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CASES

ON THE

LAW OF TORTS

SELECTED AND ANNOTATED

By
FRANCIS H. BOHLEN
Professor of Law, University of Pennsylvania

IN TWO VOLUMES
VOLUME I

INDIANAPOLIS
THE BOBBS-MERRILL COMPANY
PUBLISHERS

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232431

PREFACE.

The preparation of a collection of cases on the law of Torts has certain difficulties peculiar to itself. In perhaps no other important branch of the law is there so little agreement as to what should be included or how this should be classified and arranged.

The law of Torts is so vast, it touches so many fields of human activity, it shades insensibly into so many other branches of the law that it is extremely difficult to decide what should be included and what should be left out.

There is one boundary always fixed; a case book must primarily be a book to be used in an actual course in an actual school. And in no law school is more than three hours a week for one year devoted to the subject. Much must therefore be omitted. In fact, the problem is to select from a number of subjects, all of which in reality ought to be treated, those which can be omitted with the least harm.

Many subjects, which should perhaps be taught in a course on Torts, are customarily taught in all or the majority of law schools in the courses on the law of Property or Persons or other subjects. There is no universal agreement as to the proper place for such subjects as Conversion or Nuisance, either in its narrower or broader meaning. In at least one, and that a very recent, valuable, and suggestive collection of cases, the whole subject of Fraud and Deceit is omitted. The editor of the present collection, while perhaps somewhat influenced by the arrangement of courses in his own school, that of the University of Pennsylvania, has in his selection of subjects within this debatable territory sought to include primarily those, which in the great majority of schools are usually taught only in the course on Torts, and has not included those, though appearing to him to properly fall within that course, if they are generally covered in other courses, unless they contain so valuable an exposition of the principles of tort law that their exclusion would seriously injure the development of the subject.

Coming now to the classification and arrangement of the matter included:

The method used by the older text writers was to adopt a purely procedural classification. The whole subject was divided in accordance with the form of action appropriate for the redress of particular wrongs. Principles, which determined the liability in a particular form of tort action and the defenses thereto, were stated as though distinct from those applicable to any other form of tort action.

There was little or no effort to ascertain the fundamental principles underlying the law of Torts as a whole. Even if certain prin-

ciples appeared as determinative of liability, if certain defenses were seen to be available, in two or more actions, this was taken to be a mere accidental coincidence rather than a proof of the existence of some principle generally applicable to at least that field of the Tort law.

This method, still used by many able text writers, is entirely opposed to the trend and spirit of the modern study of law. But among even modern students of the law of Tort there is little or no unanimity as to the proper way of arranging the subject so as to best present to the student its general principles and philosophy. There is no accepted standard. Each writer must adopt his own arrangement. He must not expect that it will entirely satisfy every one, or indeed, any one. Perhaps he can hardly expect to satisfy even himself.

But while classification solely in accordance with the forms of action is undoubtedly unscientific and unsatisfactory, it is still that which to the mind of the legal profession has surrounding it the halo of tradition, and to no profession is tradition more sacred.

After all is said and done, case books are intended to educate practicing lawyers. To teach students a conception of a great branch of the law which runs counter to the prejudices, even if they be prejudices, of the bar of which they will be young and unimportant members and of the court before which they are to practice, would be to expose them to the sincere, even if erroneous, criticism of their elders as being fanciful theorists and so would seriously handicap them in their profession. In addition the student, when he first comes to the bar, is himself apt to be governed by the criticism of its older members who, to his mind, have demonstrated their ability through success in acquiring lucrative practice. There is a danger, therefore, that he would be led himself to condemn his teacher and to reject all that he had been taught.

To the editor it has always seemed that the law teacher must be very sure of his ground before he commits himself to teaching the student any revolutionary view of his subject or adopts any personal arrangement of it entirely contrary to that accepted by the profession. The proper place for him to set forth such views is in his essays and text books, by which he will, if his views be sound, convince at least that part of the practicing profession whose minds have not become entirely calloused to new impressions.

Therefore the present collection of cases is not framed along revolutionary lines. It contains no very novel classification. The old division into actions is retained whenever helpful to explain the historical development of general principles, or whenever the subject-matter is so distinct that the application of those principles thereto can best be studied in this way.

One of the most serious disadvantages of the immense range of the subject is that it practically precludes the possibility of the adopting to the full the historical method of presenting its development. In more restricted subjects it is possible to give cases in which the development of the underlying principles are traced from their first rudimentary appearance to their most recent exhibition

in their most highly developed form. In so large a subject as the law of Torts it is impossible to show the precise case in which some misconception of an early judge has led to a perversion of a doctrine originally sound, or to show the point where some wise and far-seeing jurist has boldly refused to allow the present and the future to be bound by the swaddling bands of the thought of a dead and gone past.

It is, however, often absolutely essential to devote space, which "the practical lawyer" may think better applied to an exposition of the rules now in force, to a study of the historical development of some particular subject. Such a study often clears up and explains some apparent inconsistency or anomaly which must remain a perplexing and insoluble mystery to one who knows only the latest cases and regards the modern law as springing ready wigged and gowned from the head of Themis as Athene is said to have sprung from the head of Zeus. In such case the history of the law is not merely interesting to the scholar, but vital and essential to even the most practical minded student.

For example, the modern lawyer and even the lawyer in embryo—the law student—has become so habituated to the modern conception of an actionable tort as containing two essential elements, wrongdoing, moral or social, and damage or harm resulting therefrom, that he must needs seek an explanation for the fact, that many misdeeds are actionable though causing no actual or tangible harm, in the idea that there are rights so absolute that from their mere invasion the law presumes or imports damage, though none in fact exists.[1] So he accounts for the fact that conduct is often treated as tortious which lacks any element of actual wrongdoing, either moral or social, by an altogether arbitrary conception of legal as distinguished from actual wrong. Nor does he perceive that by so doing he denies to the wrongful character of the defendant's conduct any value as an element determining his responsibility for its consequences.

A comparatively brief historical study shows that the right of private action was originally regarded not as a right to compensation for the harm done the claimant, but rather as a right to the satisfaction of the grievance felt by one against whom an offense had been committed, and that this primitive conception had by no means spent its force when the introduction of the writ of trespass furnished the starting point for our present law of Torts. On the contrary it is found constantly reflected, expressly or by implication, in the various actions brought under that writ. So too the primitive law naturally conformed itself to the mental attitude of those, whose grievances, to preserve the peace of the group, it undertook to satisfy. And thus the earlier cases under the writ of tres-

[1] The true nature and function of such so-called presumptions has been so clearly pointed out by so many able writers, by none more clearly or forcibly than by that great scholar and honest-minded thinker, the late Professor James Bradley Thayer, that no sincere student can to-day rest satisfied with such an explanation.

pass continue to reflect the mental attitude of primitive mankind, which resented an offense as such, quite irrespective of the moral or social fault of the offender, and even sought satisfaction from an inanimate or merely animal cause of offense.

These primitive conceptions have survived with peculiar persistency in actions of trespass to real and personal property, and those actions on the case, which are cognate thereto. This is due, as Sir Frederick Pollock points out in the first chapter of his work on the law of Torts, to the fact that the trespass, because of its procedural advantages, was early used for the assertion and vindication of title to and possession of real property, in lieu of the common law writ of right and the various original forms of possessory real action. Similarly the action of trespass to personal property and its derivative, the action on the case for trover, were used to try the title to personal property and to secure to the possessor of such property at least a money equivalent, when deprived of it by the unauthorized act of another, no matter how innocent. While the writ of trespass so used ceases to be a tort action except in form and becomes in substance a property action, trespass to property has held its place in the law of torts, not only because of the tendency to procedural rather than substantive classification, but also because many trespasses of this sort do actual harm and are morally and socially culpable.

The first part of Book I is devoted to a rather elaborate scrutiny of the various formed actions of Trespass, and particularly to the cases which concern the place therein of injury to the plaintiff, the defendant's volition or will to do the act complained of and the moral or social culpability of his conduct. The latter part of Book I deals with the writ of Disseisin and with the action of Trover, closely akin in scope and content to trespass to real and personal property.

Thus the way is cleared for the cases contained in Book II, exhibiting the development in the action of Trespass on the case of the more modern conception of tort liability, which requires a concurrence of fault, moral or social, on the part of the defendant, actual tangible harm suffered by the plaintiff and a relation of cause and effect between the two, sufficient to require the wrongdoer to answer for the harm he brings about.

The principal topics therein discussed are the liability for misfeasance and nonfeasance, the elements which determine the wrongfulness of positive action and the conditions or relations which create an obligation to act for the protection of others, the character of the harm sufficient to entitle the sufferer to redress, and the causal connection which must exist between the defendant's act or omission and the plaintiff's harm in order that the defendant may be required to make compensation therefor. There are also included cases which show a survival of the primitive idea that one doing harm must make it good, though free from personal fault. And a persistence of the equally primitive idea that no actual harm is required if the plaintiff's principal interests are directly and inten-

tionally offended is shown in a few more or less scattered cases, where new interests not within the scope of the writ of trespass are given protection by an action on the case. And finally it includes that most interesting exhibition of the legal enforcement of accepted ethical ideas, the action of Deceit, in which is judicially expressed the growth of the modern sense of decency and honor in commercial transactions and so much of Slander and Libel as deals with the prima facie liability of the publisher of defamatory statements.

Book III deals with those circumstances which repel a prima facie liability, or to express it somewhat differently, which for various reasons relieve from liability one guilty of what would in general be actionable wrongdoing. In the first two parts are collected cases showing, in the one the earliest, in the other the most modern and living, justification of otherwise prohibited conduct. In the third are given cases in which, while the defendant's conduct is not justified or excused, the plaintiff, whose own fault concurs with that of the defendant in bringing about his harm, is refused redress from his fellow delinquent.

It may be objected that there is no difference in principle or effect between the immunity given to the intentional use of force in self-defense, or to the personal assertion of rights without recourse to the aid of legal process, and that granted to many acts otherwise wrongful, because, though injurious to the individual, the interest of society requires that it shall not be discouraged by fear of liability. There does, however, seem to be a real difference even in theory, between permitting an act though wrongful to be done under certain circumstances without responsibility and regarding an act as, if not meritorious, at least not wrongful, because, though it injure some private interest, it conduces to the good of society and the different manner in which the two were pleaded shows that this difference was recognized by that most technical of early lawyers, the special pleader. But apart from this, the differences between the two are many and striking.

The right of self-defense is one of the first limitations upon the absolute liability of an offender, the tolerance of harmful acts because of their social convenience, while appearing in a rudimentary form in a few earlier cases, is, as a general principle, modern. The one is individualistic, dealing only with the interest of those directly concerned. The other is collectivist, regarding the group or society as a party to be considered even in determining the relations of one individual to another. The one, like the offenses redressed in the writ of trespass, was early crystallized into a rigid body of settled rules, having a limited field of operation, which have undergone little or no change. The other reflects a change in philosophic thought, a revolt from that extreme individualism which culminated at about the middle of the nineteenth century, and, itself still developing and expanding as its underlying philosophic concept is more and more fully accepted by public opinion, is applied to solve the new problems constantly presented by the changing conditions of an expanding civilization. Important as it is now, it seems safe to predict that its force has not yet been fully felt. Yet even now it is, and more and

more it will become, the most living and dominant factor in the judicial regulation of the relations of mankind *inter se*.

It touches nearly every field of human effort, it limits on the one hand individual freedom, on the other it preserves it; it sets a boundary between the fields of permissible endeavor to attain mutually conflicting ends; it determines the quantity of use permitted to individuals drawing from a common fund of natural resources; it sets rules to the battle between contending classes, each striving for its own economic advantage at the cost of the other.

It is concerned with the most vital, the most important, and at the same time the most fluid and unsettled problems of human life. Not only does every new development of commerce, of manufacture, every new invention, every new habit and method of living, raise new questions, but the answer given is and must be itself varying and changing with every settled change of public opinion. No final answer can ever be found satisfactory for all time or in every place. It is not a matter which can be settled by hard and fast unchanging rules of law. The problem is essentially sociological, economic and political. It is here that the study of law touches and blends with a knowledge of development of other lines of human thought and affairs. At most the law can only aim to express the consensus of public opinion, and this opinion must vary with changed external conditions and even more with that mental change which accompanies the acquisition of political power, and so of social importance, by large classes of mankind, whose needs and desires have heretofore gone unexpressed or, if expressed, unregarded.

The subject is so absorbingly interesting that the necessity of brevity seems here a very real misfortune. Yet it is so vast that any effort to cover it fully would spread the collection to an altogether unteachable bulk.

As it is manifestly impossible even to attempt to cover the entire field, all that has been done is to give cases showing the manner in which the problem has been dealt with in some of the more usual and important situations.

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The editor desires to express his obligation to Miss Miriam McConnell of the Philadelphia Bar, who assisted him in the collection of the cases in a large part of Book II, and to the staff of the Biddle Law Library of the University of Pennsylvania, in which the present collection of cases was compiled.

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On page xxiii will be found a list of essays containing valuable discussions of the subjects included in the present collection of cases.

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CASES ON TORTS

BOOK I.

DIRECT INVASIONS OF THE INVIOLABILITY OF THE PERSON AND PROPERTY.

Part 1

Trespass Vi et Armis.

The development of the English law is largely procedural. As the parent tort action was that of trespass, it is necessary for the student to know something of the origin and purpose of the writ of trespass. To do this it is necessary to consider briefly the state of the law anterior to it. For this purpose a number of extracts from Pollock & Maitland's History of English Law, Vol. II, chapter 8, are given, which should be read as a whole. The larger part of the chapter must, for the sake of brevity, be omitted, but certain conclusions therein reached may be briefly stated as follows:

The earliest consequences legally attached to offences were: (1) outlawry; which put the offender at war with the community, it becoming the right and duty of every member thereof to pursue and harry him, his family and goods, as though he and they were wild beasts, from which is derived the term for an outlaw *capus lupus*, a wolf's head.

(2) The blood feud; in which the person offended, his family, sept or clan, was allowed to satisfy their vengeance upon the offender, his family, sept or clan.

(3) In exceptional cases where the offence was peculiarly against the community as a whole, as treason, cowardice, or those violations of religious duties and prohibitions, which in primitive times were regarded as bringing on the community the wrath of the offended deity, there seems to have been a punishment inflicted directly by the community as a whole.

Except for this last class the early law knew no distinction between wrongs against the community, state or king, and wrongs against an individual citizen or subject.

Even in the earliest records and codes of the Teutonic peoples

the blood feud and outlawry were to a large extent replaced by elaborate tariffs and schedules of money compositions payable to the various persons aggrieved. The sum payable to the individual injured was by the Anglo-Saxons called a *bót;* the sum paid to the community and in later times to the king for the injury to his or its peace was called the *wíte.* In addition other persons might be offended, so the lord of a man slain obtained a sum called the *manbót.* If the victim was within the peace of any individual, that is, under his especial protection, as where a man was slain in the house of another, such person received what was termed a *griobrice* for satisfaction to the injury to his dignity or peace.

As civilization progressed certain of the more serious offences became unemendable, that is, incapable of expiation by a money composition. Certain offences also came to be peculiarly within the jurisdiction of the crown, whence the term "Pleas of the Crown." Among the latter were *forsteal,* or murder by ambush upon the king's highway; *hámsócn,* an attack on a man's house; the harboring of an outlaw; and breaches of military service.

Gradually the crown acquired jurisdiction over all the unemendable offences, which put the person and property of the offender at the king's mercy, together with some others. Even in such cases, however, the punishment of the offender was left to the initiative of the individuals aggrieved, an appeal for felony was the regular and usual method of reaching the felon. This appeal was prosecuted by the parties aggrieved and the method of determining the guilt of the accused was by trial by battle.

Even after offenders might be punished by presentment in the king's court or in the local courts, or by indictment, the punishment of offences primarily against the individual was still left to the individual initiative of the persons aggrieved. The appeal of felony persisted for some time; and for years the redress and punishment of minor offenses was left to actions of trespass brought by the victims thereof.

Pollock and Maitland History of English Law, Vol. II, Chap. 8, p. 456: "The writer of the Leges Henrici represents the criminal law of his time as being in the main the old law, and we have no reason to doubt the truth of what he tells us. Some crimes are emendable, some are not. Unemendable are housebreach, arson, open theft, that form of aggravated homicide which is known as open *moros,* treason against one's lord, breach of the church's or the king's hand-given peace when aggravated by homicide. These are emendable with 100 shillings; breach of the king's special peace, obstruction of the king's highway, *forsteal, hámsócn,* receipt of outlaws. In some other cases the criminal must pay his *wer;* in some it is doubtful whether any emendation need be accepted. About homicide we have elaborate tidings. Clearly a mere wilful homicide, when there has been no treachery, no sorcery, no concealment of the corpse, no sacrilege, no breach of a royal safe-conduct, is not unemendable. It still, if not duly paid for, exposes the slayer to the vengeance of the slain man's kin. But it can be paid for. The tariff

however is now very cumbrous. In the simplest case there is the *wer* of the slain, varying with his rank, to be paid to his kin; there is the *manbót* to be paid to his lord, and this varies with the lord's rank; there is the *wite* to be paid to the king or some lord who has regalia. But in all probability the offender will have run up a yet heavier bill by breaking some *grio;* the owner of the house will claim a *griobrice,* the owner of the soken will claim a *fyhtwite* or *blodwite;* happy will it be for our manslayer if he have committed neither *hámsócn* nor *forsteal.*

Now in England this elaborate system disappears with marvellous suddenness.[1] For it is substituted a scheme which certainly does not err on the side of elaboration. In brief it is this: (1) There are a few crimes with wide definitions which place life and limb in the king's mercy. (2) The other crimes are punished chiefly by discretionary money penalties which have taken the place of the old preappointed *wites,* while the old preappointed *bot* has given way to 'damages' assessed by a tribunal. (3) Outlawry is no longer a punishment; it is mere 'process' compelling the attendance of the accused.

Pollock & Maitland History of English Law, Vol. II, p. 510: "When the felonies are put on one side, we find hardly anything that can be called either a classification of punishable acts, or a general doctrine about them. In later days, as is well known, the following scheme is fashioned:—

Offences are punishable { Upon indictment { Treasons, Felonies, Misdemeanors. / Upon summary conviction.

Then with the punishable offences we contrast the *tort* which gives rise to a civil action, though the tort may also be, and very

[1] When we first begin to get judicial records the change is already complete. We have the utmost difficulty in finding a vestige of those preappointed "emendations" which, if we believe the writers of the Norman age, were still being exacted in their day. We can only remember one of the old fixed fines that lived on. This is the fine of sixty shillings exacted from the man who is vanquished in the judicial battle; it is the "king's ban" of the ancient Frankish laws. To this we may add that the London citizens of the thirteenth century claimed as a chartered right that none of them could be compelled to pay a higher fine than his *wer* of a hundred shillings, and the Kentish gavelkinders still spoke of a man being obliged to pay his *wer* in an almost impossible case. The change is not due to a substitution of Norman for English law; we may see the preappointed *bót* in Normandy when we can no longer find it in England. The most marvellous revolution however is that which occurs in the law of homicide, for not only does wilful homicide become a capital crime—this we might have expected to happen sooner or later—but the kinsfolk of the slain lose their right to a *wer* and to compensation of any sort or kind. A modern statute was required to give the *parentes occisi* a claim for damages in an English court. Yet in many parts of western Europe at a comparatively recent time men have sued for a *wer;* nor only so, they have lawfully prosecuted the blood-feud.

often is, a punishable offence. Torts again fall into two classes, and only those which involve some violence—the violence may be exceedingly small—are known as trespasses."

"In the thirteenth century we see but the germs of this scheme. *Trespass* (*transgressio*) is the most general term that there is; it will cover all or almost all wrongful acts and defaults. Every felony, says Bracton, is a trespass, though every trespass is not a felony. In a narrower sense therefore *trespass* is used as a contrast to *felony*. The word *misdemeanor* belongs as a term of art to a much later age. In the past even the gravely punishable offences have been contemplated from the point of view of the person who has been wronged. Thus

Trespasses or wrongful acts are
- Felonies to be prosecuted by appeal.
- Mere trespasses giving rise to actions in which no words of felony are used.

Only by slow degrees is the procedure which begins, not with the complaint of 'the party grieved,' but with a communal accusation (indictment or presentment), becoming a prominent part of the law's machinery. Henry II. had it set going only against 'murderers, robbers and thieves and the receivers of such.' In a later ordinance he spoke of arson and forgery. It was not, as we have already seen, even every felony that could be punished as a felony if there was only an indictment. However, long before the beginning of Edward I.'s reign, numerous offences that are no felonies are being punished upon indictment or presentment, while many others are being punished in the course of civil actions. We shall perhaps breathe the spirit of the age if we say that—

Offences less than felony are punished
- (a) In civil actions.
- (b) Upon presentment before local courts.
- (c) Upon presentment before the king's justices."

To this table we shall return, but meanwhile a few words must first be said of the punishments that are inflicted. These are in the main two, namely, (I) amercement, (II) indefinite imprisonment redeemable by fine."

"Thousands of amercements are being inflicted by courts of all kinds. The process is this:—So soon as the offender's guilt is proved the court declares that he is in mercy (*in misericordia*). If it be a royal court, he is in the king's, if it be a county court, he is in the sheriff's, if it be a seignorial court, he is in the lord's mercy. Thereupon, at least in the local courts, the offender 'waged' an amercement, that is to say, he found gage or pledge for the payment of whatever sum might be set upon him when he should have been amerced. For as yet he had not been amerced (*amerciatus*). At the end of the session some good and lawful men, the peers of

the offender (two seem to be enough) were sworn to 'affeer' the amercements. They set upon each offender some fixed sum of money that he was to pay; this sum is his amercement (*amerciamentum*)."

Ibid., p. 512: "The amercement marks an advance in the theory and practice of punishment. A basis for arbitrary or 'unliquidated' wites had thus been found, and in course of time men began to see that arbitrary wites—if they be not oppressively used—are far more equitable than the old fixed penalties. Account can now be taken of the offender's wealth or poverty, of the provocation that has been given him, of all of those 'circumstances of the particular case' that the rigid rules of ancient law had ignored. So the *misericordia*, when the central power is strong, begins to devour the old wites."[1]

Ibid., p. 517: "We can now speak briefly of the offences that were punished by amercement or by imprisonment, remembering that as a general rule imprisonment really means fine. We have said that there were three main modes of procedure."

"1. *Offences punished in the course of civil actions.* Every tort, nay, every cause of civil action, was a punishable offence. Every vanquished defendant, even though the action was 'real' or was contractual, had earned punishment. At the least he had been guilty of an unjust detention (*pro iniusta detentione*). In the lower courts he could only be—but he would be—amerced. But every defeated plaintiff could be amerced 'for a false claim.' Incidentally too any falsehood (*falsitas*), that is, any fraudulent misuse of the machinery of the law, would be punished by imprisonment. Then again every default in appearance brought an amercement on the defaulter and his pledges. Every mistake in pleading, every *miskenning* or *stultiloquium*, brought an amercement on the pleader if a mistake was to be retrieved. A litigant who hoped to get to the end of his suit without an amercement must have been a sanguine man; for he was playing a game of forfeits."

"2. *Offences punished upon presentment in the local courts.* The process of presentment in the local courts, was introduced by Henry II. for the purpose, it seems, of collecting accusations of grave offences. But the sheriff in his 'turns,' the lord of the franchise in his 'leets' came to demand information about any matter that concerned the king's right or his peace. Also they ask for charges of minor offences which are dealt with on the spot by a summary proceeding leading to amercements. "There are minor acts of vio-

[1] "We hear of attempts to establish some fixed maximum for the amercement. Becket alleged that there was such a maximum in every county, and that the law of Kent knew no amercement higher than forty shillings. In both the England and the Normandy of Glanvill's day the rule had grown up that the amercement was to be 'affeered' by the oath of lawful men. The oldest Norman customal is very instructive, for it still regards this punishment as being in strictness a forfeiture of all chattels. The function of the sworn affeerers is to declare what goods the offender has. In the case of a knight the duke is to have all, except his arms, destrier, palfrey and rouncey, his ploughs and beasts of the plough, his seed-corn and victuals enough for a year. So too the roturier's victuals, team and arms are spared. But there

lence, brawls, affrays, bloodshed. In the seignorial courts the presentment was used indiscriminately[3] as a means of punishing all the small breaches of peace and order, even abusive words and all breaches of manorial custom; it gave the lord a tight grip on his villien tenants."

"3. *Offences punishable upon presentment before the king's justices.* The justices in eyre (on their circuits) carry with them a constantly growing list of interrogatories addressed to the local jury"—as to the felonies committed, as to the king's proprietary rights (where information alone is wanted), as to assumption or abuses of franchises, upon which writs of *quo warranto* may afterwards issue and as to the misdoings of royal offices, sheriffs, coroners and bailiffs. "Only by slow degrees and in a hap-hazard way do any inquiries about ordinary and non-official crimes that are less than felonies steal their way into the articles."

"Useful though this laborious scheme of presentments may have been,—useful because it revealed abuses, because it served as a check upon sheriffs and lords, because it reminded every man of his always neglected police duties—the law did not place much reliance upon it as an engine of punishment. We are now in the act of passing from the sphere of criminal to that of civil justice, and therefore let us notice that under Edward I. a favorable device of our legislators is that of giving double or treble damages to 'the party grieved.' They have little faith in 'communal accusation' or in any procedure that expects either royal officials or people in general to be active in bringing malefactors to justice. More was to be hoped from the man who had suffered. He would move if they made it worth his while. And so in a characteristically English fashion punishment was to be inflicted in the course of civil actions; it took the form of manyfold reparation, of penal and exemplary damages."

"But we have gone too fast. An 'action for damages' was a novelty. By an action for damages we mean one in which the plaintiff seeks to obtain, not a fixed *bót* appointed by law, but a sum of money which the tribunal, having regard to the facts of the particular case, will assess as a proper compensation for the wrong that he has suffered. We repeat that this was a novelty. We may

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also seem to be maximum amercements varying with the wrong-doer's rank; the baron will not have to pay more than one hundred pounds, nor the roturier more than five shillings. Parallel to this lies the famous passage in Glanvill which saves for the amerced his 'honourable contenement.' Then the Great Charter decreed that all amercements were to be set or 'affeered' by good men of the neighborhood; that earls and barons were to be amerced by their peers; that amercements should vary with the gravity of the offence; that the knight's contenement, the merchant's merchandise, the villein's wainage should escape. The amercement became the most flexible and therefore it could be the smallest of all punishments. Three-penny amercements were common in the local courts."

[3] See Pollock & Maitland, "History of the English Law," vol. 1, p. 577, as to the jurisdiction of such courts over complaints of individuals aggrieved, see p. 574-5.

doubt whether Glanvill ever presided at the hearing of such an action."

"This may for a moment seem strange. In later days we learn to look upon the action for damages as the common law's panacea, and we are told that the inability of the old courts to give 'specific relief' was a chief cause for the evolution of an 'equitable jurisdiction' in the chancery. But when we look back to the first age of royal justice we see it doing little else than punishing crime and giving 'specific relief.' The plaintiff who goes to the king's court and does not want vengeance, usually goes to ask for some thing of which he is being 'deforced.' This thing may be land, or services, or an advowson, or a chattel, or a certain sum of money; but in any case it is a thing unjustly detained from him. Or, may be, he demands that a 'final concord' or a covenant may be observed and performed, or that an account may be rendered, or that a nuisance may be abated, or that (for sometimes our king's court will do curiously modern things) a forester may be appointed to prevent a doweress from committing waste. Even the feoffer who fails in his duty of warranting his feoffee's title is not condemned to pay damages in money; he has to give equivalent land. No one of the oldest group of actions is an action for damages."[4]

"But there is one all-important action that is stealing to the front, the action of trespass (*de transgressione*) against those who to a plaintiff's damage have broken the king's peace with force and arms. Though early precedents may be found for it, this fertile mother of actions was only beginning her reign in the last years of Henry III. Her progeny throve and multiplied, until a time came when, the older forms have been neglected, an action for damages,

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[4] "But further the practice of giving damages, even as a supplement for specific relief is one that we may see in the first stage of its growth. It makes its appearance in an influential quarter, in the popular assize of novel disseisin. Glanvill's text shows us the embryo. The writ which begins the action commands the sheriff 'to cause the tenement to be reseised of the chattels taken in it' by the disseisor, and 'to cause the tenement with the chattels to be in peace' until the hearing of the cause. So the disseisee is to recover the chattels as well as the land of which he has been dispossessed; but even this is specific relief. We further learn, however, that the disseisee can obtain the 'fruits' of the tenement from the disseisor, and we are left to imagine that, if he can not get the corn or hay itself, he may be able to get money instead. In a few years all had changed; Bracton has noticed the change. The sheriff was no longer expected to 'reseise the tenement' of the abstracted chattels; the recognitors in the assize were being told to estimate in money the *dampna* which the disseisee had suffered. Along with the land he now 'recovered' a sum of money assessed as a compensation for the wrong done him. Long the novel disseisin remained the only action in which both land and damages could be obtained; slowly in the course of the thirteenth century our legislators multiplied the cases in which this double remedy was to be had.

"When the sacred 'freehold' was not concerned the hands of the justices were freer. They could award damages as a subsidiary remedy in actions of detinue, debt and the like. The assize of novel disseisin suggested to them a method of assessing pecuniary compensation—the verdict of a jury. To find the exact place at which they first crossed the narrow line which divides an action for mere damages from an action in which damages may be given

an action which traced descent from the *breve de transgressione,* seemed to be almost the only remedy offered by the common law."

"What did men do before they had this action? What did men do in Glanvill's day? For one thing, we suspect that they uttered 'words of felony' upon slight provocation. For another thing, the old action of theft could be used for the recovery of goods from an honest hand, and a two-fold *bót* could sometimes be obtained. As to blows and bruises, we take it that they sued for some preappointed *bót* in the local courts. The king was not to be troubled with such trifles. The early disappearance from English law of the preappointed *bót* is very remarkable. The sister-law of Normandy after Bracton's death still knew a tariff for the minor acts of violence—five shillings for a slap, eighteen for a knock-down blow, thirty-six for a wound; but this tariff, simple when compared with those of older days, apparently obtained only among the roturiers, and the compensation due to a knight was a suit of armour. Unfortunately the records of our local courts do not begin until the influence of Westminster is supreme and its action for damages is well known throughout the country, still we should not be surprised to find that the doomsmen of the hall-moots when they assigned damages for a blow or a 'villein word' were guided by traditional and half-forgotten tariffs and thought but little of the circumstances of the particular case."

"The writs of trespass are closely connected with the appeals for felony. The action of trespass is, we may say, an attenuated appeal. The charge of *felonia* is omitted; no battle is offered; but the basis of an action is the wrong done to the plaintiff in his body, his goods or his land 'by force and arms and against the king's peace.' In the course of time these sonorous words will become little better than a hollow sound; there will be a trespass with force and arms if a man's body, goods or land have been unlawfully touched. From this we may gather that the court had never taken very seriously the 'arms' of the writ or fixed a minimum for the 'force' that would beget an action. Still the action was aimed at serious breaches of the king's peace, and, so far as we can see, the court in Henry III.'s reign was seldom, if ever, troubled with 'technical trespasses' or claims for 'nominal damages.' If we take the plaintiffs at their word, there have been force enough and arms enough. There has been a marauding foray; a few years earlier it would have given rise to a batch of appeals for wounds and robbery. Even when we have made allowance for the froth of 'common form,' we see that there are often some twenty defendants, and this tells a tale of

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as complimentary to the recovery of a specific thing or specific debt would be a toilsome task. Here it must suffice that one by one there came into existence actions in which the plaintiff could obtain nothing but a money compensation assessed by justices or jurors. In this contest we may mention the action for *vee de naam* (*de vetito namii*) brought against a distrainor, who, though he has now given back the beasts, has been guilty of detaining them 'against gage and pledge'; also those frequent actions brought against men who have persisted in going to the ecclesiastical tribunals after receipt of a royal prohibition."

deliberate violence, of rapine and pillage. Edward I. when he introduced this action into Wales set forth in strong words its punitive and exemplary character."

"In the days when the writ of trespass was taking a foremost place in the scheme of actions, the king's court had its hands full if it was to redress and punish the wrongs done by gentlemen who at the head of armed bands of retainers ravaged the manors of their neighbors. We must not therefore expect to find cases which indicate the limits of trespass. We may guess that some self-defence was permissible, while all self-help, unless it took the form of the timely ejectment of a disseisor, was strictly prohibited. Also we may guess that this somewhat terrible action could not have been used against those who were not to be charged with any assault on a person, entry on land or asportation of goods, but were guilty of some misfeasance while engaged in a lawful operation. In later days, slowly and with difficulty, the court gave an action against the clumsy smith who lames the horse that he is shoeing, against the stupid surgeon who poisons the wound that he should cure. Such persons could not be charged with breaking the king's peace by force and arms. We may well doubt whether Bracton or any contemporary lawyer would have told them that they had committed no tort, we may perhaps doubt whether they could not have been successfully sued in some of the local courts; but the king's justices were not as yet busied with these questions, and such records of the lowlier tribunals as are in print do not hold out much encouragement to the investigator who is in search of a medieval law of negligence, though he might find some rules, probably severe rules, about damage done by straying cattle, goring oxen, biting dogs and fire. Hardly a germ is to be found of any idea which will answer to the Roman *culpa* or become our modern negligence."

SWAYNE *v.* ROGERS.

Court of King's Bench, 2 Car. 1. 3 *Cro. Rep.* 32.

TRESPASS FOR BATTERY in the King's Bench, and judgment for the plaintiff. Error in the exchequer chamber was assigned, for that the judgment was *capiatur*, whereas the battery was before the general pardon, so as the fine is pardoned, and the judgment ought not to have been a *capiatur;* for the Court is to take notice of the pardon and give judgment for the party, but not any fine.—*Sed non allocatur:* for the Court need not take the conusance thereof without demand of the party; and it doth not appear whether the party is any of the persons excepted, or one who is to have benefit of the pardon.

CHAPTER I

SECTION 1.

Assault.

I DE S *et ux. v.* W DE S.

At the Assizes, 1348. *Y. B. Lib Assessonum, folio* 99, 60 *placitum.*

I de S and M, his wife, complain of W de S concerning this that the said W, in the year etc., with force and arms (*vi et armis*) did make an assault upon the said M at S and beat her. And W pleaded not guilty. And it was found by the verdict of the Inquest that the said W came at night to the house of the said I and sought to buy of his wine, but the door of the Tavern was shut and he beat upon the door with a hatchet which he had in his hand, and the wife of the plaintiff put her head out of a window and commanded him to stop, and he saw and he struck (at her) with the hatchet but he did not hit the woman. Whereupon the Inquest said that it seemed to them that there was no trespass since no harm (was) done. (Thorpe, C. J.) There is harm done and a trespass for which he shall recover damages since he made an assault upon the woman, as has been found, although he did no other harm. Wherefore tax the damages &c., and they taxed the damages at half a mark. Thorpe awarded that they should recover their damages etc. and that the other should be taken. And so note that for an assault made a man shall recover damages etc.[1]

[1] So it was held in many early cases that the plaintiff might receive substantial damages for an assault without any battery or other damage, 40 Edw. III, 40 pl. 19 (1366); 42 Edw. III, 7 pl. 25 (1368); 45 Edw. III, 24 pl. 35 (1371). In the first case *Belknap* for the defendant contends that an assault without battery is not actionable, since it is not "a thing against the peace," while in the last case, when the inquest had found that there had been no battery but an assault, and taxed the damages at twenty pounds, he, then representing the plaintiff, says: "Because of an assault a man receives damages, since he is disturbed in his affairs (*car il est disturbe de ses affair*), so by this (the verdict) it is understood that he was damaged (*en dam*) therefore it is reasonable that he should receive the damages taxed by the inquest."

In *Anon.,* 1 Vent. 256, it was held an assault, though no battery, to wave a sword in a menacing manner, and in *Tombs* v. *Painter,* 13 East 1 (1810), "the clenching of his fist was," said Lord Ellenborough, C. J., "an assault and an act of personal offence."

In a case in *Lib. Ass.,* 134 pl. 11 (1853), a tax collector of a town, suing for himself and the King, recovered one hundred shillings against defendants who had reviled (*rebuquerent*) him with evil words, so that he did not dare to remain in the town, because it was found that they had reviled him and made an assault upon him, though they had committed no battery.

STATE *v.* DAVIS.

Supreme Court of North Carolina, 1840. 1 *Iredell* 125.

The defendant was indicted at Yancy, on the last Fall Circuit, before his Honor Judge Pearson, for an assault and battery upon one William Roberts.

In support of the prosecution, a witness was called, who testified that he, Roberts and the defendant were crossing the Coney mountain, on their return from a muster; that witness and the defendant were walking together, leading their horses down the mountain, and that Roberts was ten or fifteen feet ahead, on foot, with a rifle in his hand; that a quarrel commenced between the defendant and Roberts, when, upon Roberts using some insulting language to him, the defendant said to witness "hold my horse—I'll whip the rascal," and instantly dropped his bridle, and advanced towards Roberts, with his hands extended, as if to catch hold of him; but before he did so Roberts stepped on one side, struck him with his rifle, and knocked him down. The witness stated further, that the words "I'll whip the rascal," were spoken loud enough for Roberts to hear them; but he was unable to state how near the defendant was to Roberts when the latter struck him—he thought defendant was in about four feet; but he would not say he was in striking distance of Roberts, or could have reached him with his arm. The defendant's counsel insisted, and moved the court so to charge the jury, that "if defendant was not in striking distance, when he made the blow, he was not guilty of an assault." His Honor instructed the jury that an "assault was an offer or attempt to strike, under such circumstances as would induce a man of ordinary firmness to believe that he was instantly to receive a blow, and would justify his striking to prevent it. That if this were not so, the peace might be broken, and neither party be guilty—the one, because he struck in self defense; and the other, because his act did not amount to an assault. That, being in striking distance was a good general rule, but did not include all cases of assault; that an offer to strike, at such a distance that any body could see the blow would not take effect, was not an assault; but if the distance were such as would induce a man of ordinary firmness, connecting it with the other circumstances, to believe that he would instantly receive a blow, unless he struck in self defence, the offer to strike would amount to an assault, although it should be proved that the assailant was not near enough to reach. That in this case, if the jury believed the witness, and were satisfied that the defendant had rushed upon Roberts and got so near that, under the circumstances, a man of ordinary firmness, would have believed that he was instantly to receive a blow, they would find the defendant guilty of the assault, although they were not satisfied that he had got quite near enough to reach him." The defendant was found guilty and appealed.

GASTON, Judge. Upon the whole, we are of opinion, that there is no error in the Judge's charge.

An assault is an intentional attempt, by violence, to do an injury to the person of another. It must be ***intentional***—for, if it can be collected, notwithstanding appearances to the contrary, that there is not a ***present*** purpose to do an injury, there is no assault. Thus, where a man laid his hand on his sword and said "if it were not assize time, I would not take such language from you," the Court agreed that it was not an assault; for the declaration was that he would not assault him, the Judges being in town, and the intention as well as the act makes an assault. *Tuberville* v. *Savage,* 1 Mod. Rep. 3.[1] And it must also amount to an ***attempt***—for a purpose to commit violence, however fully indicated, if not accompanied by an effort to carry it into immediate execution, falls short of an actual assault.[2] Therefore it is, that notwithstanding many ancient opinions to the contrary, it is now settled, that no words can, of themselves, amount to an assault. 1 Hawk. C. 62 S. 1, page 110. And therefore, also it is said not to be an assault, if a man strike at another at such a distance that he can not reach him, or put him in fear. 2 Comyn's Bat. C. The distance is here explanatory of the ***apparent attempt*** to strike and shews that in truth, it is not an ***attempt***—but only a ***menace***—to do hurt to his person. It is difficult in practice, to draw the precise line which separates violence menaced from violence begun to be executed—for until the execution of it is begun, there can be no assault. We think, however, that where an unequivocal purpose of violence is accompanied by any ***act,*** which, if not stopped—or diverted—will be followed by personal injury—the execution of the purpose is then begun—the battery is ***attempted.***[3] Thus, riding after a person so as to compel him to run into a garden for shelter to avoid being beaten, has been adjudged to be an assault. *Morton* v. *Shopple,* 3 Car. & Payne, 373 (14 Eng.

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[1] *Accord: State* v. *Crow,* 1 Iredell 375 (1841); *Commonwealth* v. *Eyre,* 1 S. & R. 347 (Pa. 1815), the defendant raised his hand and said, "If it were not for your gray hairs I would tear your heart out." This is held not to be an assault because "the action of raising the hand and accompanied by words shewed that the defendant was determined not to strike," Tilghman, C. J., p. 350.

So, while the jury can not infer an absence of intention to strike from the fact "that no blow was given, when not proven by any physical impediment or inability to inflict one," "if there are any declarations or circumstances tending to indicate a want of such intention, then the jury are bound to take the declarations or circumstances into consideration, in deciding upon the intention," Le Grand, C. J., in *Handy & Tull* v. *Johnson,* 5 Md. 450 (1854), p. 465.

[2] *Accord: Haupt* v. *Swenson,* 125 Iowa 694 (1904). So in *State* v. *Daniel,* 136 N. Car. 571 (1904), it was held that mere cursing and general abuse is not an assault though the prosecutor is put in fear thereby and submits his will to that of the defendant.

[3] Mere preparation is not enough. "Neither a purpose to make an assault nor any amount of preparation for so doing will constitute an assault unless followed by some hostile demonstration against the person toward whom the purpose is entertained. If the defendant had gone and procured the gun for the express purpose of taking the life of Andrews, but after coming up with Andrews had made no demonstration toward the accomplishment of that purpose, he would not be guilty," Henry, J., *State* v. *Painter,* 67 Mo. 84 (1871), p. 89.

Com. Law Rep. 355).[4] So, in a late case, before a very eminent English judge, it was held, that where the defendant was advancing in a threatening attitude, *with intent* to strike the plaintiff, so that his blow would, in a second or two, have reached the plaintiff, if he had no been stopped, although when stopped he was not near enough to strike, an assault was committed. *Stephen* v. *Myers,* 4 Car. & Payne, 349 (19 Eng. Com. Law Rep. 414).[5] In the case under consideration, the intent of the defendant to seize the prosecutor's person was not in question. The instruction prayed for, and the instruction given *necessarily* presupposes it. The instruction prayed for is, "that if defendant was not in *striking* distance, *when he made the blow,* he was not guilty of an assault," and the instruction given is, that an *offer "to strike,* at such a distance that any one could see *the blow* would not take effect, was not an assault"—but that *"the offer* to strike would be an assault, although the assailant was not near enough to reach, if the distance were such as to induce a man of ordinary firmness, under the accompanying circumstances, to believe that he would instantly receive a blow, unless he struck in self defence." "Rushing," with that intent, upon the prosecutor, and approaching, in execution of that intent, so near as to render it necessary for the prosecutor's safety to strike him down, amounts in law to an assault in the defendant.

PER CURIAM. Judgment to be affirmed.[6]

STATE *v.* MORGAN.

Supreme Court of North Carolina, 1842. 3 *Iredell* 186.

This was an indictment against the defendant for an assault and battery on Elias Cantrell, to which he pleaded "not guilty." The jury impannelled to try the issue returned the following special

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[4] *Accord: People* v. *Jesus Yslas,* 27 Cal. 630 (1865), and *Thomas* v. *The State,* 99 Ga. 38 (1896), where the pursuing defendant never came closer to the prosecutor than twenty-five feet. The flight proves the existence of the fear, *State* v. *Shipman,* 81 N. Car. 513 (1879); see also, *State* v. *Rawles,* 65 N. Car. 334 (1871), where the prosecutor avoided the threatened violence by leaving a place where he had a legal right to be.

[5] *Accord: State* v. *Vannoy,* 65 N. Car. 532 (1871); *State v. Yawn,* 37 Tex. Crim. R. 205 (1897); *Gann* v. *State,* 40 S. W. 725 (Tex. 1897).

[6] So it is an assault though the defendant shall relinquish his purpose and refrain from striking the blow, intended, *Handy & Tull* v. *Johnson,* 5 Md. 450, *supra,* or where the person against whom the violence is directed prevents it by an act of self-defense, as by seizing the bridle of the horse which the defendant is attempting to ride over her, *Townsdin* v. *Nutt,* 19 Kans. 282 (1877), or by striking the defendant, as in the principal case, or by a counter-threat which deters the defendant from his purpose, *Brister* v. *The State,* 40 Tex. Crim. App. 505 (1899), where the defendant, rushing upon the prosecutor with an open knife in his hand was stopped by the prosecutor pointing a pistol at him.

But see *People* v. *Lilley,* 43 Mich. 521 (1880), where it is held that if the defendant abandon his purpose before he arrive within actual striking distance, there is no assault, rejecting the test, that the "person assaulted" was put in fear.

verdict: Elias Cantrell, on the day set out in the indictment, being a constable, and having a *fieri facias* against the goods of the defendant Morgan, went to the house of Morgan, in the county of Henderson, and, in the presence of Morgan's wife, she forbidding him to do so, took into his hands a gun, the property of Morgan. She then proposed that Cantrell should not take the gun off until Morgan was sent for. Cantrell assented, and held the gun in his hands, in the presence of the wife, in the yard, having stepped out of the house into the yard with the gun in his hands, until Morgan came, which was about ten minutes. Morgan came up with an axe in his hand, and required Cantrell to give up the gun. Cantrell refused; whereupon Morgan stepped up within reach of him, held the axe up in a position to strike, and said "give up the gun or I'll split you down." Cantrell did not at the time give up the gun, but proposed some arrangement, upon which Morgan let the axe down. The matter was arranged, and then Cantrell gave up the gun. Morgan was, at the time, liable to muster, and the gun was his arms for muster. The jury further find, that Morgan, at the time he went up to Cantrell and raised the axe within reach of him, intended to strike, unless Cantrell gave up the gun; but did not intend to strike, if Cantrell gave up the gun—that Morgan used no more force than was necessary to compel Cantrell to give up the gun. Whether, upon these facts, the defendant, in law, committed an assault, and, if so, whether the assault was justified as being in the defense of his property, the jury are ignorant, and pray the opinion of the court. If the court, upon these facts, is of opinion that the defendant is guilty, then the jury so find; and if the court is of opinion that the defendant is not guilty, then the jury so find.

The court was of opinion, that raising the axe, with an intention to strike unless the gun was given up, did amount to an assault; for if a man draws a weapon, intending to strike if the other does not pull off his hat, or surrender his money, or do some act which he has no right to require, the offer and intention amount to an assault, although it be his intention only to strike, provided his unlawful terms are not complied with.

GASTON, J.[1] Two questions are presented for our consideration on this special verdict, and for the purpose of perspicuity it is necessary that they should be examined separately. The first is, whether the defendant committed an assault; and the second, if he did, whether that assault was justified as having been committed in the rightful defence of his property.

Upon the first question, this court entertains the same opinion, which was expressed in the Superior Court. There are several ancient cases in which it was held, that an assault might be committed by threats of future violence; but it has long been settled, that words alone can not constitute an assault. They may endanger the public peace, but do not break it. There is no assault, unless

[1] Only so much of the verdict and opinion is given as relates to the question as to whether the defendant's conduct constituted an assault.

there be some *act* amounting to an attempt or offer to commit personal violence. The instances usually given of such attempts or offers to do wrong to the person of another, are "by the striking at him with or without a weapon, or presenting a gun at him within a distance which the gun will carry, or pointing a pitch-fork at him standing within reach of it, or by holding up one's fist at him in an angry threatening manner." 1 Hawk. chap. 15. The law regards these acts as breaches of the peace, because they *directly* invade that personal security, which the law guaranties to every citizen.—They do not excite an apprehension that his person may be attacked on a future occasion, and thus authorize a resort to cautionary remedies against it; but they are the beginnings of an attack, excite terror of immediate personal harm or disgrace, and justify a resort to actual violence to repel the impending injury and insult. But even acts, which *prima facie* and unexplained are undoubtedly assaults, like other acts which are not unequivocal in their character, may be shown to be in truth different from what they purport to be; that they are not attempts or offers to do harm, but merely angry gestures without any accompanying purpose of mischief. The attending circumstances may plainly show this, and, among other circumstances, the declarations of the party at the time, inasmuch as such declarations are ordinarily indicative of the party's purpose, are very proper to be considered and weighed. The ordinary illustration of the doctrine, that a seeming assault may be explained away by the declarations of the supposed assailant, is the very familiar case where a man laid his hand on his sword and said to the person, with whom he was quarreling, "if it were not assize time, I would not take such language from you." There is also an illustration of it in the case of the *State* v. *Crowe,* 1 Ired. (N. Car.) 375, where the defendant, when he raised the whip, used the words, "if you were not an old man, I would knock you down." In both it was held to be a fair subject of enquiry, whether, at the time these acts were done, there was a present purpose of doing harm, and that, if there was not, the acts did not amount to an assault. But these, and all the cases within our recollection where this doctrine has been held, were cases, in which there was a declared intent not to do harm at the time. The present case is one of a very different character. The act was not only apparently a most dangerous assault, but accompanied with a present purpose to do great bodily harm; and the only declaration, by which its character is attempted to be changed, is, that the assailant was not determined to execute his savage purpose unconditionally and without a moment's delay. He had commenced the attack and raised the deadly weapon and was in the attitude to strike, but suspended the blow, to afford the object of his vengeance an opportunity to buy his safety, by compliance with the defendant's terms. To hold that such an act, under such circumstances, was not an offer of violence—not an attempt to commit violence, would be, we think, to outrage principle and manifest an utter want of that solicitude for the preservation of peace, which characterizes our law, and which should animate its administrators. To every purpose—

both in fact and in law—the attack on the prosecutor was begun—and in the pause, which intervened before its consummation, most happily for both parties an arrangement was made, which prevented the probably fatal result. But this pause—though intentional, and announced when the attack began—does not prevent that attack from being an offer or attempt to strike. If a ruffian were to level his rifle at a traveller, and announce to him that he might have fifteen minutes to make his peace with God—and the unfortunate man should save his life by prayers, by remonstrance, by money, or by any other means before the expiration of that time, could it be pretended that there had been no attempt nor offer to hurt him, because the intent was not to kill instantaneously, and therefore did not accompany the act? Will it be doubted, if a bully should present his pistol at a citizen and order him, under pain of death, not to walk on the same side of the street with him, whether there was an offer of violence, because the purpose to kill was not absolute but conditional merely? Wherever the act is done *in part execution* of a purpose of violence—whether that purpose be absolute or provisional—makes no difference as respects the question, whether the act be an assault. In both cases the assailant equally violates the public peace. In both he breaks down the barrier which the law has erected for the security of the citizen. In the former he sets up none in its place. In the latter, he substitutes for it the protection of his grace and favor.

Ordered accordingly.[2]

STATE *v.* CHURCH

Supreme Court of North Carolina, 1868. 63 N. Car. 15.

ASSAULT, tried before Mitchell, J., at Spring Term 1868, of the Superior Court of Wilkes.

The following is the special verdict found upon the trial: On a certain Sabbath, at a Church, where people had assembled for

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[2] *Accord: United States* v. *Myer*, 1 Cranch. C. C. (U. S.) 310 (1806), where the defendant, with upraised fist, said, "If you say that again I will knock you down"; *United States* v. *Richardson*, 5 Cranch. (U. S.) 348 (1837), threat of violence if the prosecutor spoke; *Bishop* v. *Ranney*, 59 Vt. 316 (1887), the question was whether the plaintiff had been guilty of assault upon the defendant, which justified the latter leaving his employment; it was held that while an assault without battery would not in every case justify the defendant leaving the employment, the master's conduct in standing over his servant with fist upraised and threatening to strike him if he repeated an accusation, which the employer regarded as tantamount to calling him a liar was an assault, though circumstances showed great provocation; *French* v. *Ware*, 65 Vt. 338 (1892), the words used were, "Get out of my way or I will shoot you"; *State* v. *Cherry*, 11 Iredell 475 (N. Car. 1850), the defendant, with a loaded shotgun in his hands, said to the prosecutor, "If you don't turn the negro loose I will shoot you"; *Herron* v. *State*, 12 Mont. 230 (1892), the defendant, holding his rifle with one hand on the trigger, said to the prosecutor, "turn around quick, or I will blow your head off," the defendant turned his horses, this was held to be an assault; *State* v. *Dooley*, 121 Mo. 591 (1894), similar facts; *State* v. *Keefe*, 19 Ark. 190 (1857), the defendant pointed a pis-

religious exercises, the defendant, with several others, was sitting outside of the building, about six or seven steps from it, and the prosecutor was approaching the Church, when the defendant, addressing him, said: "We have no use for you in this company; you shall not come here; go back." The prosecutor declined to do so. The defendant then rose to his feet and said to the prosecutor, I have a pistol, and placed his hand on a pistol that was belted around him. The prosecutor then commenced retiring, but tardily. The defendant followed him a few steps, being not more than ten steps from him, and urged him to go off or he would shoot him, and while he was walking, drew the pistol from its scabbard, but did not cock it, or present it towards the prosecutor.

Upon these facts, his Honor was of opinion that the defendant was not guilty, and the Solicitor prayed an appeal.

READE, J. A mere threat unaccompanied by an offer or attempt to strike, is not an assault.

So an offer to strike, qualified by some declaration which shows that there is no purpose to execute violence, is not an assault, unless the offer is with a deadly weapon, and then words are not allowed to qualify the act. So an offer of violence is an assault, even if it be accompanied with a declaration that violence will be forborne upon a condition which the actor had no right to impose: as if one offering to strike says, I will strike you if you do not pull off your hat. This will be an assault, because he has no right to require the hat to be pulled off.[1]

So, in the case before us, if the defendant had not drawn a deadly weapon, but had simply raised his fist in striking distance, and said, if you do not leave I will strike you that would have been an assault, because he had no right to require him to leave. But the case is stronger than that. The prosecutor was where he had a

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tol at the prosecutor and forced him to pay a bill for board, justly due by the latter. But see *Blake* v. *Barnard*, 9 C. & P. 626 (1840), the captain of a vessel presented a pistol to the head of the prosecutor, a member of the crew, confined to his berth for misconduct, and told him if he were not quiet he would blow his brains out; Lord Abinger charged that "if the defendant, at the time he presented the pistol, added words that it was not his intention to shoot the plaintiff, it would be no assault." "The qualifying declaration must be unequivocal, so as to leave the person attacked no good reason to suppose that violence will not be executed," *State* v. *Hampton*, 63 N. Car. 13 (1868), a statement by a man, who clenched his fist but did not draw it back to strike, and said that "I have a good mind to strike you" held not to deprive his actions of their character of an assault.

[1] Compare the language used in *United States* v. *Richardson*, 5 Cranch. (U. S.) 348, and *State* v. *Rawles*, 65 N. Car. 334, note to *State* v. *Morgan*, 3 Iredell 186 (N. Car. 1842). In both cases, however, the defendants' actions threatened immediate violence, which could only be avoided by compliance with his unlawful demand. In *Bishop* v. *Ranney*, 59 Vt. 316; *Keefe* v. *State*, 19 Ark. 190, notes to *State* v. *Morgan*, and in *State* v. *Morgan*, the defendants' demand was that the plaintiff or prosecutor should refrain from something which he had no right to do, repeat an accusation tantamount to calling him a liar, or that he should do something which he legally or morally ought to do but which the defendant had no right to compel by force; in *Hairston* v. *State*, 54 Miss. 689 (1877), the defendant admittedly had the right to forbid the prosecutor from touching his horses and he had the right to protect his

right to be, and was in no wrong; the defendant drew his pistol from his scabbard, advanced towards the prosecutor who was retiring, threatened to shoot him if he did not leave, was in ten steps of him, and drove him from the place. This was certainly an "offer" of violence, and constituted an assault.

The fact that the pistol was not cocked and pointed makes no difference. This would have been but the work of a moment, and was not needed to put the prosecutor in fear, and to interfere with his personal liberty: *State* v. *Hampton, ante,* 13; *State* v. *Myerfield,* Phil. 108; *State* v. *Mooney, Ibid.* 434.[2]

Let it be certified to the Court below, that there is error; to the end that judgment may pass upon the special verdict as upon a verdict of guilty.

BEACH *v.* HANCOCK.

Superior Court of Judicature of New Hampshire, 1853. *27 N. H. 223.*

TRESPASS, for an assault.

Upon the general issue it appeared that the plaintiff and defendant, being engaged in an angry altercation, the defendant stepped into his office, which was at hand, and brought out a gun, which he aimed at the plaintiff in an excited and threatening manner, the plaintiff being three or four rods distant. The evidence tended

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property by appropriate force or threat of great force, but his act was held to be an assault since it was an apparent attempt to use excessive force with a dangerous weapon, i. e., a pistol; but see Pearson, C. J., in *State* v. *Myerfield,* 61 Phillips 108 (N. Car. 1867), p. 110, and *State* v. *Jeffereys,* 117 N. Car. 743 (1895), in which the defendant, who had not pursued the prosecutrix so closely as to give her reasonable ground to fear an attack, and in fact never approached nearer than fifteen feet of her, but who stood between her and her home and by his threatening attitude forced her to go in the opposite direction, was held guilty of a simple assault.

[2] *Accord: Osborn* v. *Veitch,* 1 F. & F. 317 (1858), defendants half-raised their guns which were at half cock; *State* v. *Hampton,* 63 N. Car. 13 (1868), fist clinched but not drawn back to strike; *Read* v. *Coker,* 13 C. B. 850 (1853), defendant's shopmen, by his orders, congregated around the plaintiff, tucking up their sleeves and aprons and threatening to break the plaintiff's neck if he did not leave the shop—the trial judge, Talfourd, J., left it to the jury to say "whether there was an intention to assault the plaintiff and whether the plaintiff was apprehensive of personal violence if he did not retire," (but see *People* v. *Lilley,* 43 Mich. 521 (1880), *State* v. *Rawles,* 65 N. Car. 334 (1871), the defendants' guns were carried on their shoulders; so in *Herron* v. *State,* 12 Mont. 230 (1892), the defendant was holding his rifle with one hand on the trigger and the other on the barrel. On the other hand, it was held that the mere act of picking up a "rock," though coupled with threatening and abusive language, without any motion made to throw them, did not constitute an assault, *Penny* v. *State,* 114 Ga. 77 (1901). While in *Hairston* v. *State,* 54 Miss. 689 (1877), the plaintiff was seeking to prevent the defendant from removing his horses; his right to protect his property by appropriate force was conceded, but his pointing a pistol at the plaintiff and threatening to shoot if he did not let go of his horses was held to be an assault, because the force which he threatened to use was excessive, he having no right to use dangerous weapons even for the protection of his property.

to show that the defendant snapped the gun twice at the plaintiff, and that the plaintiff did not know whether the gun was loaded or not, and that, in fact, the gun was not loaded.

The court ruled that the pointing of a gun, in an angry and threatening manner, at a person three or four rods distant, who was ignorant whether the gun was loaded or not, was an assault, though it should appear that the gun was not loaded, and that it made no difference whether the gun was snapped or not.

The court, among other things, instructed the jury that, in assessing the damages, it was their right and duty to consider the effect which the finding of light or trivial damages in actions for breaches of peace would have to encourage a disregard of the laws and disturbances of the public peace.

The defendant excepted to these rulings and instructions.

The jury, having found a verdict for the plaintiff, the defendant moved for a new trial by reason of said exceptions.

GILCHRIST, C. J. Several cases have been cited by the counsel of the defendant, to show that the ruling of the court was incorrect. Among them is the case of *Regina* v. *Baker,* 1 Carr. & Kirw. 254. In that case, the prisoner was indicted under the statute of 7 Will. IV and 1 Vic. chap. 85, for attempting to discharge a loaded pistol. ROLFE, B., told the jury that they must consider whether the pistol was in such a state of loading that, under ordinary circumstances, it would have gone off, and that the statute under which the prisoner was indicted would then apply. He says, also, "if presenting a pistol at a person, and pulling the trigger of it, be an assault at all, certainly in the case where the pistol is loaded, it must be taken to be an attempt to discharge the pistol with intent to do some bodily injury."

From the manner in which this statement is made, the opinion of the court must be inferred to be, that presenting an unloaded pistol is an assault. There is nothing in the case favorable to the defendant. The statute referred to relates to *loaded* arms.

The case of *Regina* v. *James,* 1 Carr. & Kirw. 529, was an indictment for attempting to discharge a loaded rifle. It was shown that the priming was so damp that it would not go off. TINDAL, C. J., said: "I am of opinion that this was not a loaded arm within the statute of 1 Vic. chap. 85, and that the prisoner can neither be convicted of the felony nor of the assault. It is only an assault to point a loaded pistol at any one, and this rifle is proved not to be so loaded as to be able to be discharged."

The reason why the prisoner could not be convicted of the assault, is given in the case of *Regina* v. *St. George,* 9 C. & P. 483, where it was held that on an indictment for a felony, which includes an assault, the prisoner ought not to be convicted of an assault, which is quite distinct from the felony charged, and on such an indictment the prisoner ought only to be convicted of an assault, which is involved in the felony itself.

In this case, PARKE, B., said "if a person presents a pistol which

has the appearance of being loaded, and puts the party into fear and alarm, that is what it is the object of the law to prevent."[1]

So if a person presents a pistol purporting to be a loaded pistol at another, and so near as to have been dangerous to life if the pistol had gone off; *semble* that this is an assault, even though the pistol were, in fact, not loaded. *Ibid.*

In the case of *Blake* v. *Barnard,* 9 C. & P. 626, which was trespass for an assault and false imprisonment, the declaration alleged that the pistol was loaded with gun-powder, ball and shot, and it was held that it was incumbent on the plaintiff to make that out. Lord ABINGER then says, "If the pistol was not loaded, it would be no assault," and the prisoner would be entitled to an acquittal, which was undoubtedly correct, under the declaration, for the variance. *Regina* v. *Oxford,* 9 C. & P. 525.

One of the most important objects to be attained by the enactment of laws and the institutions of civilized society is, that each of us shall feel secure against unlawful assaults. Without such security society loses most of its value. Peace and order and domestic happiness, inexpressibly more precious than mere forms of government, can not be enjoyed without the sense of perfect security. We have a right to live in society without being put in fear of personal harm.[2] But it must be a reasonable fear of which we complain. And it surely is not unreasonable for a person to entertain a fear of personal injury, when a pistol is pointed at him in a threatening manner, when, for aught he knows, it may be loaded, and may occasion his immediate death. The business of the world could not be carried on with comfort, if such things could be done with impunity.

We think the defendant guilty of an assault, and we perceive no reason for taking any exception to the remarks of the court. Finding trivial damages for breaches of the peace, damages incommensurate with the injury sustained, would certainly lead the ill-disposed to consider an assault as a thing that might be committed with impunity. But, at all events, it was proper for the jury to consider whether such a result would or would not be produced. *Flanders* v. *Colby, post.* *Judgment on the verdict.*[3]

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[1] The statement of Baron Parke in the case of *Regina* v. *St. George* was as follows: "My idea is that it is an assault to present a pistol at all, whether loaded or not. If you threw the powder out of the pan or took the percussion cap off, and said to the party this is an empty pistol, then that would be no assault, for the party must see that it was not possible he should be injured; but if a person presents a pistol which has the appearance of being loaded, and puts the party into fear and alarm, that is what it is the object of the law to prevent."

[2] Compare the statement of *Belknap,* in Y. B. 40 Edw. III, 24 pl. 35, cited in the note to *I. de S.* v. *W de S.*

[3] *Accord: Kline* v. *Kline,* 158 Ind. 602 (1901). So in *Morgan* v. *O'Daniel,* 21 Ky. L. 1044 (1899), it was held that it was error to charge the jury that they must find for the defendant if they believed that the defendant did not intend to strike the plaintiff. In *Plonty* v. *Murphy,* 82 Min. 268 (1901), a verdict for the plaintiff was sustained since "the jury were justified (by the evidence) in finding that the defendant's behavior was intentionally oppressive, reasonably calculated to create apprehension of present violence and a fear that he might go further, and commit a battery upon the plaintiff's per-

NELSON *v.* CRAWFORD.

Supreme Court of Michigan, 1899. 122 *Mich.* 466.

Plaintiff and her husband reside on a farm about 40 rods from the residence of defendant. One evening defendant dressed in woman's clothes, navy-blue bicycle skirt, light waist, sailor hat with flowers on it, and a thin, black face veil, took a parasol, and went to her house. He had been a frequent visitor there, and was accustomed to play with her children. Although for many years he had been adjudged insane or incompetent, his malady was of a harmless character, and it had never been considered necessary to restrain him. There is no testimony to show that he acted from malicious motives, or with any intent to do injury to plaintiff or any one. He said to others, shortly afterward, "I did it to have a little fun; to see if they had any nerve." As he approached the back of the house, plaintiff stepped to the back door, and saw defendant standing three or four rods away. She spoke to him, but he made no reply,—only "mumbled." She testified that she was frightened, and ran into the house, and into her bedroom, where her husband was in bed; that she called to her husband to get up,

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son, and that he displayed force sufficient, under the circumstances, to cause the plaintiff to reasonably expect and fear an injury." On the other hand an assault is so defined in *Geiler* v. *Hendle,* 50 Atl. 632 (Del. 1895), as to require "present ability" to do the injury attempted.

There is a conflict of authority as to whether an actual intention to do the plaintiff physical harm is essential in a criminal prosecution for assault. In *People* v. *Lilley,* 43 Mich. 521 (1880), it is said that the test, that the person assaulted was put in fear can not be relied upon, and that "an assault is an inchoate violence to the person of another with the present means to carry the intent into effect," (but see *Johnson* v. *Mack,* 141 Mich. 99 (1905)), though the point actually involved was whether the defendant, who had taken some steps preparatory to attacking the prosecutor, had abandoned his purpose before his acts amounted to an attempt to inflict violence as distinguished from mere preparation. In *State* v. *Chapman,* 78 Ala. 463 (1885), it was held that, since "to constitute an assault, there must be the commencement of an act which, if not prevented, would produce a battery," it was no assault to point a gun at another which the defendant knew to be unloaded, with the intention of producing fright, *accord: People* v. *Sylva,* 143 Cal. 62 (1904); *McKay* v. *State,* 44 Tex. 43 (1875), a decision which led to a change in the criminal code of that state making such conduct a simple assault, *Pearce* v. *State,* 37 Tex. Crim. 643 (1897); in *State* v. *Brown,* 5 Pennew. 339 (Del. 1905), an assault is defined to be "an attempt with force and violence to do injury to another, with the present ability to carry it into effect," on the other hand it is held that neither intention nor ability to commit a battery is necessary, *Commonwealth* v. *White,* 110 Mass. 407 (1872), "it is not the secret intent of the assaulting party nor the undisclosed fact of his ability or inability to commit a battery, that is material; but what his conduct and the attending circumstances denote at the time to the party assaulted, *State* v. *Shepard,* 10 Iowa 126 (1859); *State* v. *Archer,* 8 Kans. App. 737 (1898); *State* v. *Llewellyn,* 93 Mo. App. 469 (1902); *State* v. *Smith,* 2 Humph. (Tenn. 1842) 457, all cases where the defendant pointed a gun or pistol at another, which was either alleged or proved to be unloaded or was not alleged or proved to be loaded; and see *State* v. *Daniel,* 136 N. Car. 571 (1904), p. 575, *semble.* It is said in *People* v. *Lilley,* 43 Mich. 521, that "an assault (criminal) may be made upon a person even though he had no knowledge of the fact at the time."

telling him that "there is something here,—I don't know what it is;" that the defendant followed her into the house, and to the bedroom door; that her husband took up a stick of wood, raised it, and told defendant to get out of the house; that defendant then gave his name; that she was made ill by fright; and that on October 22d, 42 days after the fright, she had a miscarriage, which she attributes to the fright. The only demonstration he made was by tapping the end of his parasol on the ground or floor. This suit is brought to recover damages resulting from the fright. The court directed a verdict for the defendant, on the ground (*inter alia*) that there was no assault or attempt to do her any bodily or physical injury.

GRANT, C. J. (After stating the facts.) We think the court properly held that no violence was offered or threatened, and therefore there was no assault.

We think the clear weight of authority supports the instruction given by the court below. In this case there is no evidence that defendant intended any wrong or contemplated, or can be held to have contemplated, the consequences alleged to have followed his acts. It was not dark. The time was between "daylight and dark." Plaintiff saw him when he was four rods from the house. Defendant was approaching plaintiff's house along the customary way. Under these circumstances and the authorities above cited, we think the instruction of the court was correct.

Judgment affirmed.

The other Justices concurred.[1]

SECTION 2.

Battery.

COLE *v.* TURNER.

Nisi Prius, 1704. 6 *Modern Rep.*, 149.

HOLT, C. J., upon the evidence in trespass for assault and battery, declared,—

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[1] In *Degenhardt* v. *Heller*, 93 Wis. 662 (1896), it was held that to discharge a revolver, not aimed or pointed at the plaintiff, though intending to frighten him, is not an assault; but see *Johnson* v. *Mack*, 141 Mich. 99 (1905), in which, however, the plaintiff was shot by a revolver fired merely to frighten him.

That there is no right to immunity from fear of even personal injury caused by the negligent acts of the defendant or by his wrongful act, other than one hostilely directed against the plaintiff's person or intended to cause him fear of hostile violence, see cases collected in the notes to *Bucknam* v. *Great Northern R. Co.*, *post*, and *Mitchell* v. *Rochester Street Railway*, *post*, and *Victorian R. Commissioners* v. *Coultas*, L. R. 13 A. C. 222 (1888).

If no direct violence is threatened to the person of the plaintiff, acts intended to cause discomfort or annoyance do not constitute an assault, *Stearns* v. *Sampson*, 59 Maine 568 (1871), the defendant in order to evict a tenant

First, That the least touching of another in anger is battery.[1]

Secondly, If two or more meet in a narrow passage, and, without any violence or design of harm, the one touches the other gently, it will be no battery.

Thirdly, If any of them use violence against the other, to force his way in a rude, inordinate manner, it will be a battery; or any struggle about the passage to that degree as may do hurt will be a battery.[2]

THE UNITED STATES *v.* ORTEGA.

Circuit Court of the United States, Third Circuit, 1825. 4 *Wash. C. C.* 531.

The defendant was indicted for an assault upon the person of Mr. Salmon, the Spanish charge d'affaires, and for infracting the law of nations by committing violence upon his person. These charges were contained in two separate indictments, both of which were tried at the same time.

The facts of the case, as proved by Mr. Salmon, (who presented himself to the court as a voluntary witness), were as follows. On the night of the 17th of September last, whilst the witness was returning from the circus, he heard steps of some person walking gently behind him. The defendant came up to him, and seizing the breast of his coat, said, angrily: Mr. Salmon, I am Ortega, you have insulted me, and I seek satisfaction. The answer was, I have not insulted you, but you now insult me—let me go. No, replied the defendant, I have got you now, and I will not let you go, unless you promise to give me satisfaction, for you have published many falsehoods against me. Mr. Salmon replied, that he had published nothing against him but in answer to a very insulting manifesto of his against all kings, and especially against his government. He further added; it is so long after your arrival that you seek satisfaction for an old offence; and is this the way you demand it? Have you no friend to send on such an errand? You know who I

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who refused to leave after the term expired, removed the doors and windows and turned a blood-hound loose in the house; but see *Wood* v. *Young,* 20 Ky. L. R. 1931 (1899), *contra.*

[1] It is not necessary that the touching should be in anger—any intentional interference with another's person, not consented to by him and unwarranted by the usages of decent society and offensive to a reasonable sense of personal dignity, is a battery; *Spence* v. *Duffy,* 1 Rogers' City Hall Recorder 39 (N. Y. 1816), a shop man took hold of a customer's arm to lead her back to the shop to take and pay for goods cut from a piece at her request; *Richmond* v. *Fisk,* 160 Mass. 34 (1893), a milk-man intruded into the plaintiff's bedroom against his express command and shook him to awaken him so that he might present his bill.

[2] So one engaging on a public highway in concert with others in a students' "rush," conduct reasonably calculated to injure a person thereon, is guilty of a battery upon one thrown down and injured by him, *Markley* v. *Whitman,* 95 Mich. 236 (1893); see also *Reynolds* v. *Pierson,* 29 Ind. App. 273 (1902), 64 N. E. 484, note to *Clark* v. *Downing,* 55 Vt. 259 (1882), 45 Am. Rep. 612.

am and where I live. The defendant, still retaining his hold, Salmon again desired him to let him go, threatening to strike him if he did not. The defendant answered, You need not strike me, for I shall fight you in another place; and then inquired if he had any arms with him? Mr. Salmon replied that he had not, for he professed to be a peaceable man. The defendant observed, that he had none either, but that he could easily procure them, if Mr. Salmon would fight.[1]

Charge, WASHINGTON, J. There are two questions for your consideration. 1. Is the charge, that an assault was committed by the defendant upon the person of Mr. Salmon, sufficiently proved? If it be, then, 2. Was Mr. Salmon a public minister at the time the assault was made?

1. (After summing up the evidence as before stated, the judge proceeds.) It was argued by the counsel for the defendant, that, to constitute an assault, it must be accompanied by some act of violence. The mere taking hold of the coat, or laying the hand gently upon the person of another, it is said, does not amount to this offence; and that nothing more is proved in this case, even by Mr. Salmon. It is very true that these acts may be done, very innocently, without offending the law. If done in friendship, for a benevolent purpose, and the like, the act would certainly not amount to an assault.[2] But these acts, if done in anger, or a rude and insolent manner, or with a view to hostility, amount, not only to an assault, but to a battery. It is then for you to say whether, from the evidence which has been given in the cause, Mr. Salmon was

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[1] So much of the facts and the charge of the jury as relate to the infractions of the law of nations by committing assault upon Mr. Salmon as Spanish chargé d'affaires, are omitted.

[2] *Accord:* Buller's Nisi Prius, p. 16, citing *Short* v. *Lovejoy, coram Lee, C. J.,* Guildhall 1752, "If a man wantonly do an act by which another man is hurt, as by wantonly pushing a drunken man, he will be answerable in an action of Assault and Battery, but if he intend doing a right act, as to assist such drunken man, or to prevent him from going along the street without help, and in so doing, harm do ensue, he will not be answerable;" *Hoffman* v. *Eppers,* 41 Wis. 251 (1876), where the defendant had aroused the plaintiff from a drunken slumber and assisted in taking him into the street and started for a justice's court where the plaintiff had been summoned to appear as a witness in a suit there pending, on the way the plaintiff became obstreperous and was arrested as drunk and disorderly, taken before a magistrate and fined. It was said by Lyon, J., that "It was certainly lawful for the defendant to arouse the plaintiff from his drunken slumber and assist him to the court where his presence was required as a witness, and if the defendant did this as a friendly act, in a gentle and friendly manner and with an honest purpose to do the plaintiff no injury but only to aid him to reach the court, he is not liable to respond in damages for such acts;" citing Greenleaf on Evidence, § 85. Where, however, the interference with the plaintiff's person is unwarranted, the defendant is liable though he acted without anger, in perfect good nature and from the best motives, *Johnson* v. *McConnel,* 15 Hern. 293 (N. Y. 1878), defendant broke the plaintiff's leg trying to stop a scuffle in which the latter, while drunk, was engaged with a third person.

See also *Coward* v. *Baddley,* 1 Car. & Kerwan 257 (1844), where it was held that the mere touching of another not hostilely but merely to attract his attention "whether the subject of a civil action or not" was not a criminal assault and battery justifying giving the person doing so into custody.

seized, or laid hold of, by the defendant, in kindness and for a justifiable cause, or in anger and with hostile intentions? If the latter, it is an unquestionable case of assault and battery.

The jury returned with a verdict finding the defendant guilty.

CLARK *v.* DOWNING.

Supreme Court of Vermont, 1882. 55 *Vt.* 259.

Trespass for assault and battery. Verdict for the defendant.

The plaintiff's testimony, which the defendant contradicted as to the alleged assault, was that after the defendant had ordered the plaintiff to leave his premises, the plaintiff replied, he would as soon as he could, and immediately started for his horse and unhitched it and he and his daughter got into the wagon and were going away, when the defendant caught hold of the horse, kicked it, and struck it over the back several times with a board.

The defendant's evidence tended to contradict the plaintiff's testimony and the plaintiff asked the court to charge that the defendant had struck the horse, as the plaintiff's testimony tended to show, this would be an assault upon the plaintiff, for which he would be entitled to recover. The court did charge that beating the horse was an aggravation of the assault upon the plaintiff, if he was assaulted; but as an independent act was not a personal assault for which alone recovery could be had; that under the declaration recovery could be had for beating the horse only in case the jury found the plaintiff was personally assaulted.[1]

ROYCE, Ch. J. The only other exception taken was to the refusal of the court to charge as requested. The evidence referred to in the exceptions, and upon which the request was predicated, and the question of what in law constitutes an assault, have to be considered in deciding whether the request should have been complied with or not. It appears that the evidence as to what transpired at the time and upon the occasion when it was claimed that the assault was committed was conflicting, and the request was based upon the supposition that the jury might find the facts as the plaintiff's evidence tended to show.

Admitting that the jury might so find, did the striking of the plaintiff's horse constitute an assault upon the plaintiff? It is not necessary to constitute an assault that any actual violence be done to the person. If the party threatening the assault have the ability, means, and apparent intention, to carry his threat into execution, it may in law constitute an assault. The disposition, accompanied with a present ability to use violence, has been held to amount to an assault. Where violence is used it is not indispensably necessary that it should be to the person. It was decided in *Hopper* v. *Reeve,*

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[1] Only so much of the facts and the charge of the Court is given as relates to the question as to whether or not the striking of the horse constituted a personal assault upon the plaintiff.

7 Taunt. 698, that the upsetting of a chair or carriage in which a person was sitting was an assault; in *Morton* v. *Shoppee,* 3 C. & P. 373, that riding after a person at a quick pace and compelling him to run into his garden to avoid being beaten was an assault; that the striking of the horse upon which the wife of the plaintiff was riding was an assault upon the wife. 1 Stephens N. P. 210.

An assault is defined in *Hays* v. *The People,* 1 Hill (N. Y.) 351, to be an attempt with force or violence to do a corporal injury to another. The striking of the plaintiff's horse in the manner that his evidence tended to show would probably result in a corporal injury to him; hence, the request should have been complied with.

The case should have been submitted to the jury for them to find whether the striking was as the plaintiff claimed it to have been, or in the manner and for the reasons indicated in the defendant's plea.

Judgment reversed, and cause remanded.

Accord: Dowdell v. *Burford,* 1 Mod. 24 (1650), where the defendant struck, apparently intentionally, the horse on which the plaintiff's wife was riding, causing it to run away and throw her off and injure her; *Dubuc de Marentille* v. *Oliver,* 1 Pennington 275 (N. J. 1808), plaintiff struck with a stick a horse attached to carriage in which the plaintiff was seated and caused him damage to the amount of fifteen dollars; *Bull* v. *Colton,* 22 Barb. 94 (N. Y. 1856). See also *Reynolds* v. *Pierson,* 29 Ind. App. 273, 64 N. E. 484 (1902), where the plaintiff, an old man, who was holding on to the arm of a friend, was thrown down and injured by the boisterous manner in which the defendant seized hold of the friend as a sort of a friendly greeting, a form of "horse play," which, while the court condemned it, was customary between them, the court holding that "there was such a reckless disregard of consequences as to imply an intention to assault the plaintiff." But see *Kirkland* v. *State,* 43 Ind. 146 (1873), where an instruction, that the defendant was guilty of an assault, if he struck the prosecutor's horses while he was driving them, was held error, but there was no evidence that the prosecutor was in the wagon or holding the lines, so that, as the court said, he might have been driving them "by words of command." In the following cases trespass *ri et armis,* not assault and battery, was held to lie where there were unintentional collisions between carriages producing injury to the occupants, *Hopper* v. *Reeve,* 7 Taunton, 698 (1817); *Spear* v. *Chapman,* 8 Ir. L. R. 461 (1846); *Burdick* v. *Worrall,* 4 Barb. 596 (N. Y. 1848).

GERATY *v.* STERN.

Supreme Court of New York, 1883. 30 *Hun* 426 (*N. Y.*)

DYKMAN, J. The defendants are in the city of New York, and this action is brought against them to recover damages for ill treatment amounting to an assault, alleged to have been received by the plaintiff at the hands of the employés of the defendants.

The jury was justified in finding from the testimony that the plaintiff went to the defendants' store in New York city to purchase an ulster for herself, that after she had examined one and had it on her person preparatory to its purchase, a person in the employ of the defendants in the store, who is called a floor-walker, approached the plaintiff and told her that she did not want to purchase the garment,

and used language to indicate that she was a spy from a rival house, and directed the saleswoman to take the cloak from off the plaintiff, which was done.

This was an indignity and a wrong to the plaintiff for which legal liability attaches to some one. It amounted to an assault, which is well defined as an unlawful setting upon one's person.[1] Are the defendants responsible in the law for this misconduct of their employés? The liability of masters is not measured entirely by their instructions to their servants. If the act of the servant be within the scope of his authority, and committed in his master's business, the latter is responsible. (*Higgins* v. *Watervliet Turnpike Co.*, 46 N. Y. 23, 7 Am. Rep. 293.)[2]

SECTION 3.

False Imprisonment.

COMER *v.* KNOWLES.

Supreme Court of Kansas, 1877. 17 *Kans. Rep.* 436.

VALENTINE, J.: False imprisonment is necessarily a wrongful interference with the personal liberty of an individual. The wrong may be committed by words alone, or by acts alone, or by both, and by merely operating on the will of the individual, or by personal violence, or by both. It is not necessary that the individual be confined within a prison, or within walls; or that he be assaulted, or even touched. It is not necessary that there should be any injury done to the individual's person, or to his character, or reputation. Nor is it necessary that the wrongful act be committed with malice, or ill-will, or even with the slightest wrongful intention. Nor is it necessary that the act be under color of any legal or judicial proceeding. All that is necessary is, that the individual be restrained of his liberty without any sufficient legal cause therefor, and by words or acts which he fears to disregard. It will therefore be seen that the wrong constituting false imprisonment differs essen-

[1] *Accord: Respublica* v. *DeLongchamps*, 1 Dallas 111 (Pa. 1784), 1 L. ed. 59, the striking of the prosecutor's cane in an insulting manner during an altercation was held to be a criminal assault, McKean, C. J., saying, as to the assault, "this is, perhaps, one of the kind in which the insult is more to be considered than the actual damage; for, though no great bodily pain is suffered by a blow on the palm of the hand, or the skirt of the coat, yet these are clearly within the legal definition of assault and battery, and among gentlemen too often induce duelling, and terminate in murder;" *United States* v. *Ortega*, 4 Wash. C. C. 531 (1825); *State* v. *Davis*, 1 Hill 46 (S. Car. 1832), rope attaching negro to prosecutor's waist cut in taking negro from his possession; *Regina* v. *Day*, 1 Cox. C. C. 207 (1845), prosecutor's coat cut in attack upon him.

[2] Remainder of the opinion holding that the defendants were answerable for the act of their floor-walker is omitted.

tially from the wrongs constituting malicious prosecution, malicious arrest, assault, and assault-and-battery, though all of these wrongs may sometimes be united in one comprehensive and aggregated wrong. It also differs from libel and slander, and indeed from every other wrong for which an action is given.

HOMER *v.* BATTYN.

Court of King's Bench, 1738. *Buller N. P.* 62.

On a motion for an attachment against three persons for a rescous of a person taken in execution, it was objected that there had not been a legal arrest, as the bailiff had never touched the defendant—*per curiam,* this is a good arrest; and if the bailiff who has a process against one, says to him when he is on horseback, or in a coach, "you are my prisoner, I have a writ against you," upon which he submits, turns back or goes with him, though the bailiff never touched him, yet it is an arrest, because he submitted to the process:[1] but if instead of going with the bailiff, he had gone or fled from him, it could be no arrest unless the bailiff had laid hold of him.[2]

MARTIN *v.* HOUCK.

Supreme Court of North Carolina, 1906. 141 *N. Car.* 317.

This action was brought to recover damages for an unlawful arrest and false imprisonment. The defendant, Calvin Houck, was a policeman of Granite Falls, when he was informed that the plaintiff had stolen a pair of shoes from a store while it was on fire. He and his co-defendants, J. O. Deal and George Lefevers, who acted as deputies, went to the plaintiff's house, which was two miles from the town in the night and after the plaintiff and his wife had retired, and arrested him, after searching the house at plaintiff's request, as the State's evidence tended to show. The plaintiff's wife was compelled to dress in the presence of these strangers. The plaintiff, when accused of stealing the shoes, denied his guilt, but voluntarily agreed to go with the defendants to town and answer the charge. The defendants then told him that he need not go that night if he would come to town the next morning, which he promised to do.

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[1] The submission may be shown by words, *Jones* v. *Jones,* 13 Iredell 448 (N. Car. 1852), or by acts—as by procuring bail when told to do so or to go to jail, *Browning* v. *Rittenhouse,* 40 N. J. L. 230 (1878), or by paying taxes which plaintiff refused to pay until arrested, *Pike* v. *Hanson,* 9 N. H. 491 (1838), or by giving up property, the defendant giving the plaintiff, who was ill in bed, the choice of giving it up, finding bail or being taken on a *capias,* or a sheriff's officer left in his room to guard him, *Grainger* v. *Hill,* 4 B. N. C. 212 (1838); *Bonesteel* v. *Bonesteel,* 28 Wis. 245 (1871), 30 Wis. 511 (1872).

[2] *Genner* v. *Sparks,* 1 Salk. 79 (1704); *Russen* v. *Lucas,* 1 C. & P. 153 (1824).

He went to Granite Falls the next morning, but no warrant was ever issued, and no accusation made against him for stealing the shoes. The defendants had no warrant for the plaintiff when they went to his home for the purpose of arresting him, nor does it appear that any formal charge was ever made against him, before or after the arrest. There was evidence on the part of defendants to show that, while they had entered his house that night, they had not arrested him.

The jury found, under issues properly submitted, that the defendants did unlawfully arrest the plaintiff and assessed his damages at $200. Judgment was entered upon the verdict and the defendants appealed.

WALKER, J. There was abundant evidence to show that the plaintiff had been unduly restrained of his liberty by Houck and the other defendants who were present and participated. In ordinary practice, words are sufficient to constitute an imprisonment, if they impose a restraint upon the person, and the party is accordingly restrained; for he is not obliged to incur the risk of personal violence and insult by resisting until actual violence be used.[1] This principle is reasonable in itself, and is fully sustained by the authorities. Nor does there seem that there should be any very formal declaration of arrest. If the officer goes for the purpose of executing his warrant, has the party in his presence and power, if the party so understands it, and in consequence thereof submits, and the officer, in the execution of the warrant, takes the party before a magistrate or receives money or property in discharge of his person, it is in law an arrest, although he did not touch any part of the body.[2] It is not necessary to constitute false imprisonment that the person restrained of his liberty should be touched or actually arrested. If he is ordered to do or not to do a thing, to move or not to move against his own free will, if it is not left to his option to go or stay where he pleases, and force is offered or there is reasonable ground to apprehend that coercive measures will be used if he does not yield,[3] the offense is complete upon his submission. A false imprisonment may be committed by words alone, or by acts alone, or by both, and by merely operating on the will of the individual, or by personal violence, or both. It is not necessary

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[1] This is a quotation from 3 Starkie Ev. 1113.

[2] This is taken from the opinion of Wilcox, J., in *Pike* v. *Hanson*, 9 N. H. 491 (1838), where, after the plaintiff had refused to pay certain taxes until arrested, the defendant's tax collector told her he arrested her but did not touch her, whereupon she paid the taxes; see also *Grainger* v. *Hill*, 4 B. N. C. 212. "Bare words," says Wilcox, J., "will not constitute an arrest (so far quoting from *Genner* v. *Sparks*, 1704, Buller N. P. 62, 1 Salk. 79 (1704)); there must be an actual touching of the body; or what is tantamount, a power of taking immediate possession of the body; and the party's submission thereto."

[3] This is part of the charge of Baldwin, J., in *Johnson* v. *Tompkins*, Bald. C. C. 571, 590 (1838), the residue bearing on this point being as follows: "A person so threatened need not wait for its actual application. The submission to the threatened and reasonably to be apprehended force, is no consent

that the individual be confined within a prison or within walls, or that he be assaulted. It may be committed by threats. Voorhees on Arrest, Sections 274, 275 and 276. The evidence shows that the defendant Houck said to the plaintiff, "Consider yourself under arrest. You must go back to Granite Falls with us." There was still other evidence showing that he submitted to the control they attempted to exercise over his person and that he was made to act contrary to his own will. It is clear, we think, that there was no error in the charge with respect to the question whether or not there was an arrest.

We can find no error in the rulings and charge of the court.

No Error.[4]

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to the arrest, detention, or restraint of the freedom of his motions—he is as much imprisoned as if his person were touched or force actually used; the imprisonment continues till he is left at his own will to go where he pleases and must be considered as involuntary till all efforts at coercion cease and the means of effecting it are removed."

In *Whitman* v. *Atchison etc. R. Co.*, 85 Kans. 150 (1911), it was held that it was enough that the plaintiff was led by the defendant's false statements to believe that it was the defendant's legal right to detain him till he had given information as to the cause and extent of his injuries, there being no evidence tending to indicate that force would be used to compel compliance. In *Payson* v. *Macomber*, 3 Allen 69 (Mass. 1861), it was held that it did not constitute false imprisonment to induce the plaintiff by false representations, threats of prosecution and the payment of her expenses to go to and remain in Salem, Chapman, J., saying, p. 73, that this "did not tend to show that the defendants used force or threats of force, and without this the plaintiff has no cause of action. It is at most a case where she yielded to the defendant's misrepresentations and threats of prosecution against her and voluntarily absented herself from court and her home for a time."

[4] *Accord: Goodell* v. *Tower et al.*, 77 Vt. 61 (1904), defendant, after showing the plaintiff the warrant, permitted him to go on an errand before going with the defendant before a justice, but becoming impatient, the defendant went to meet him and then followed him to the place of trial; *Tracy* v. *Seamans*, 26 N. Y. Weekly Dig. 117 (1887), defendant served a warrant on plaintiff who, after the defendant had left, went with her husband before a justice as the defendant had requested; *Searls* v. *Viets*, 2 Thomps. & Cook, 224 (N. Y. Sup. Ct. 1873); *Courtoy* v. *Dozier*, 20 Ga. 369 (1856), where the constable while not guarding the plaintiff came with him and stopped at his house, where the constable gave the plaintiff permission to go home and take tea before accompanying him to the defendant, the justice who issued the warrant.

When, however, the warrant is not served personally, but a message is sent and the plaintiff in response appears and gives bail, it was held that there was no arrest, *Berry* v. *Adamson*, 6 B. & C. 528 (1827); see also, *Arrowsmith* v. *Le Mesurier*, 2 B. & P. N. R. 211 (1806).

But the mere exhibition of a warrant with the suggestion that the party to be arrested had better come with him and fix the matter up without taking any steps toward serving the warrant, is not an arrest, especially when the plaintiff refused to go, *Lawrence* v. *Buxton*, 102 N. Car. 129 (1889); *Hill* v. *Taylor*, 50 Mich. 549 (1883).

It is not necessary that the defendant have a warrant or other *prima facie* authority to detain the plaintiff; it is enough if the defendant leads the plaintiff to so believe and the plaintiff in consequence submits to the defendant's supposed authority, *Wood* v. *Lane*, 6 C. & P. 774 (1834); *Whitman* v. *A. T. & D. F. R. Co.*, 85 Kans. 150 (1911).

It is not enough that the plaintiff fears that force will be applied by the

BRUSHABER *v.* STEGEMANN.

Supreme Court of Michigan, 1871. *22 Mich. 266.*

CAMPBELL, Ch. J. Stegemann sued the Brushabers for assault and false imprisonment without reasonable or probable cause. The false imprisonment complained of was that they had compelled him to go with them to the police office, under pretense of charging him with a felonious assault on his wife, who was their sister.

An exception is taken to the charge of the court defining what might amount to an imprisonment. The portion of the charge complained of is so vaguely pointed out, that it is questionable whether the exception is sufficient in form. But as the objection seems to be pointed at so much of the charge, as held that an imprisonment might exist without actual manual arrest of the person, we shall refer to that point. The clause in question was this: "Now, a man may be imprisoned without being taken hold of by persons that imprison him. Suppose, for instance, an officer comes to one of you with a warrant, and says, 'I want you to come along with me,' and you go along without his taking hold of you,—that would be an arrest. It is not necessary that he should lay his hands upon you. So, if a man comes to you and says, 'If you don't go with me I shall shoot you!' and if you go with him through fear, although he does not touch you, it would be an imprisonment. And if a man comes to you in any other way and uses words, or accompanies them with such an appearance that would lead you to be in fear of him, or make you comply with his demand, that would be an imprisonment. So, in this case, if the defendants came to this place and told him they wanted to take him to the station house, and he complied, seeing the two together with clubs in their hands, and went with them through fear, that would be imprisonment."[1] The court then went on to instruct them very clearly that if they believed the defendant's version of the transaction, which was, in substance, that they did not

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defendant if he or she moves, he must be put in such fear by some word or act of the defendant giving him reasonable cause for fear, *Powell* v. *Fiber Co.,* 150 N. Car. 12 (1908), Clark, C. J., dissenting as to whether on the facts the plaintiff had reason to fear force.

[1] *Accord: Hildebrand* v. *McCrum,* 101 Ind. 61 (1884), plaintiff locked in a room and by threats of violence forced to confess to a breach of promise of marriage and to agree to pay a sum of money therefor; *Garnier* v. *Squires,* 62 Kans. 321 (1900), defendant suspecting that plaintiff had stolen a sum of money from him, went to his office and by threatening him with a revolver detained him there for half an hour and forced him to open his safe; *Herring* v. *State,* 3 Tex. App. 108 (1877), plaintiff detained at his gate by a show of weapons till he retracted certain derogatory statements which the defendant alleged he had made.

A mere refusal to give up the possession of property claimed by the plaintiff, though in consequence he remains at the place where the goods are the better to assert his title, is not a false imprisonment, *McClure* v. *State,* 26 Tex. App. 102 (1888), there must be at least a threat of injury to the plaintiff's goods, unless he remained, made for the purpose of detaining him; but compare *State* v. *Smith,* 7 Humph. 43 (Tenn. 1846).

intend to arrest plaintiff themselves, but were only waiting for a policeman, and he voluntarily accompanied them, rather than wait for a policeman, there was no arrest.

BIRD *v.* JONES.

Queen's Bench, 1845. *7 Adolphus & Ellis (N. S.)* 741.

COLERIDGE, J. This point is, whether certain facts, which may be taken as clear upon the evidence, amount to an imprisonment. These facts, stated shortly, and as I understand them, are in effect as follows.

A part of a public highway was enclosed, and appropriated for spectators of a boat race, paying a price for their seats. The plaintiff was desirous of entering this part, and was opposed by the defendant: but after a struggle, during which no momentary detention of his person took place, he succeeded in climbing over the enclosure. Two policemen were then stationed by the defendant to prevent, and they did prevent him from passing onward in the direction in which he declared his wish to go: but he was allowed to remain unmolested where he was, and was at liberty to go, and was told that he was so, in the only other direction by which he could pass. This he refused for some time, and, during that time, remained where he had thus placed himself.

These are the facts: and, setting aside those which do not properly bear on the question now at issue, there will remain these: that the plaintiff, being in a public highway and desirous of passing along it, in a particular direction, is prevented from doing so by the orders of the defendant, and that the defendant's agents for the purpose are policemen, from whom, indeed, no unnecessary violence was to be anticipated, or such as they believed unlawful, yet who might be expected to execute such commands as they deemed lawful with all necessary force, however resisted. But, although thus obstructed, the plaintiff was at liberty to move his person and go in any other direction, at his free will and pleasure: and no actual force or restraint on his person was used, unless the obstruction before-mentioned amounts to so much.

I lay out of consideration the question of right or wrong between these parties. The acts will amount to imprisonment neither more nor less from their being wrongful or capable of justification. And I am of opinion that there was no imprisonment. To call it so appears to me to confound partial obstruction and disturbance with total obstruction and detention. A prison may have its boundary large or narrow, visible and tangible, or, though real, still in the conception only; and it may itself be movable or fixed: but a boundary it must have; and that boundary the party imprisoned must be prevented from passing; he must be prevented from leaving that place, within the ambit of which the party imprisoning would confine him, except by prison-breach. Some con-

fusion seems to me to arise from confounding imprisonment of the body with mere loss of freedom: it is one part of the definition of freedom to be able to go withersoever one pleases; but imprisonment is something more than the mere loss of this power; it includes the notion of restraint within some limits defined by a will or power exterior to our own.

In Com. Dig. *Imprisonment* (G), it is said: "Every restraint of the liberty of a free man will be an imprisonment." For this the authorities cited are 2 Inst. 482, Cro. Car. 210. (a) But, when these are referred to, it will be seen that nothing was intended at all inconsistent with what I have ventured to lay down above. In both books, the object was to point out that a prison is not necessarily what is commonly so called, a place locally defined and appointed for the reception of prisoners.[1]

On a case of this sort, which, if there be difficulty in it, is at least elementary, it is not easy nor necessary to enlarge: and I am unwilling to put any extreme case hypothetically: but I wish to meet one suggestion, which has been put as avoiding one of the difficulties which cases of this sort might seem to suggest. If it be said that to hold the present case to amount to an imprisonment would turn every obstruction of the exercise of a right of way into an imprisonment, the answer is, that there must be something like personal menace or force accompanying the act of obstruction, and that, with this, it will amount to imprisonment. I apprehend that is not so. If, in the course of a night, both ends of a street were walled up, and there was no egress from the house but into the street, I should have no difficulty in saying that the inhabitants were thereby imprisoned; but, if only one end were walled up, and an armed force stationed outside to prevent any scaling of the wall of passage that way, I should feel equally clear that there was no imprisonment. If there were, the street would obviously be the prison; and yet, as obviously, none would be confined to it.[2]

WILLIAMS, J. "If the bailiff" (as the case is put in Bull. N.-P. 62) "who has a process against one, says to him, 'You are my prisoner, I have a writ against you,' upon which he submits, turns

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[1] A man may be imprisoned in his own house, *Sorenson* v. *Dundas*, 50 Wis. 335 (1880); see also *Warner* v. *Riddiford*, 4 C. B. N. S. 180 (1858), where the plaintiff was refused permission to leave the room or go up-stairs in his own house, except under guard of a constable.

So it is said by Thorpe, C. J., Y. B. Lib. Assessonum folio, 104, pl. 85, that: "There is said to be an imprisonment where one is arrested by force and against his will, although it be on the high street and not in a house." In *Fotheringham* v. *Adams Express Co.*, 36 Fed. 252 (1888), where the plaintiff, having, as it appears, been taken into custody without a warrant, was after his release put under guard of detectives who had control of his movements, constantly urged him to confess and gave him to understand that force would be used if he attempted to assert his liberty, it was held that his imprisonment continued during the time he was so guarded.

[2] *Wright* v. *Wilson*, 1 Lord Raymond 739 (1699), "A. has a chamber adjoining the chamber of B. and has a door that opens into it, by which there is a passage to get out; and A. has another door which C. stops, so that A. can not get out by that. This is no imprisonment of A. by C., because A. may

back or goes with him, though the bailiff never touched him, yet it is an arrest, because he submitted to the process." So, if a person should direct a constable to take another into custody, and that person should be told by the constable to go with him, and the orders are obeyed, and they walk together in the direction pointed out by the constable, that is, constructively, an imprisonment, though no actual violence be used. In such cases, however, though little may be said, much is meant and perfectly understood. The party addressed in the manner above supposed feels that he has no option, no more power of going in any but the one *direction* prescribed to him than if the constable or bailiff had actually hold of him: no return or deviation from the course prescribed is open to him. And it is that *entire* restraint upon the will which, I apprehend constitutes the imprisonment.

PATTESON, J. I have no doubt that, in general, if one man compels another to stay in any given place against his will, he imprisons that other just as much as if he locked him up in a room: and I agree that it is not necessary, in order to constitute an imprisonment, that a man's person should be touched. I agree, also, that the compelling a man to go in a given direction against his will may amount to imprisonment. But I can not bring my mind to the conclusion that, if one man merely obstructs the passage of another in a particular direction, whether by threat of personal

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go out by the door in the chamber of B., though he be a trespasser by doing it. But A. may have a special action upon his case against C."; per Holt, C. J., at Nisi Prius, at Lincoln—the plaintiff being nonsuit; *Crossett* v. *Campbell,* 122 La. 659 (1909), the plaintiff was told he must leave an enclosure where some school boys were playing ball unless he paid an admission fee, and one of the defendants took steps toward ejecting him, this was held not to be an imprisonment since "free egress was always open to him." But if the defendant prevents the plaintiff from leaving by the only exit known to the latter, the defendant being aware of his ignorance of any other means of egress, the defendant is guilty of false imprisonment if he does not inform the plaintiff how to get out, and if the plaintiff be an invitee upon the defendant's premises, this is so though the defendant lawfully prevented him from using the only exit known to him, *Talcott* v. *National Exhibition Co.,* 144 N. Y. App. Div. 337 (1911), a person coming to a base ball park to buy tickets for a game was not allowed to leave by the usual gates because of the great crowd flocking in, no one showed him any other way out and it was an hour or more before he found his way out.

The Texas Criminal Code, Paschall's Digest, § 2169, provides that "it is sufficient imprisonment to stop a man from going in any direction he may see proper; and it is not necessary that he be detained in any particular spot, so he is prevented from moving from place to place, or in the direction he wishes to go." So in *Woods* v. *State,* 3 Tex. Crim. App. 204 (1877), it was held a false imprisonment to forbid the prosecutor to plow in a field claimed by both defendant and himself.

In many cases there are *dicta* which seem to adopt the opinion of Denman, C. J., as that in *Comer* v. *Knowles,* 17 Kans. 436 (1877), "false imprisonment is necessarily a wrongful interference with the liberty of an individual" and a charge of the trial court was approved in *Hawk* v. *Ridgway,* 33 Ill. 473 (1864), that it is sufficient to show that the defendant "prevented (the plaintiff) from going where he wished or preventing him from doing what he desired," but in every such case there was that "entire restraint" upon the plaintiff's will spoken of by Williams, J., in the principal case.

violence or otherwise, leaving him at liberty to stay where he is or to go in any other direction if he pleases, he can be said thereby to imprison him. He does him wrong, undoubtedly, if there was a right to pass in that direction, and would be liable to an action on the case for obstructing the passage, or of assault, if, on the party persisting in going in that direction, he touched his person, or so threatened him as to amount to an assault. But imprisonment is, as I apprehend, a total restraint of the liberty of the person, for however short a time, and not a partial obstruction of his will, whatever inconvenience it may bring on him. The quality of the act can not, however, depend on the right of the opposite party. If it be an imprisonment to prevent a man passing along the public highway, it must be equally so to prevent him passing further along a field into which he has broken by a clear act of trespass.

A case was said to have been tried before Lord Chief Justice Tindal involving this question: (a) but it appears that the plaintiff in that case was compelled to *stay* and hear a letter read to him against his will, which was doubtless a total restraint of his liberty whilst the letter was read.

DENMAN, C. J. I had no idea that any person in these times supposed any particular boundary to be necessary to constitute imprisonment, or that the restraint of a man's person from doing what he desires ceases to be an imprisonment because he may find some means of escape.

It is said that the party here was at liberty to go in another direction. I am not sure that in fact he was, because the same unlawful power which prevented him from taking one course might in case of acquiescence have refused him any other. But this liberty to do something else does not appear to me to affect the question of imprisonment. As long as I am prevented from doing what I have a right to do, of what importance is it that I am permitted to do something else? How does the imposition of an unlawful condition show that I am not restrained ? If I am locked in a room, am I not imprisoned because I might effect my escape through a window, or because I might find an exit dangerous or inconvenient to myself, as by wading through water or by taking a route so circuitous that my necessary affairs would suffer by delay?[3]

It appears to me that this is a total deprivation of liberty with reference to the purpose for which he lawfully wished to employ his liberty: and, being effected by force, it is not the mere obstruction of a way, but a restraint of the person. The case cited as occurring before Lord Chief Justice Tindal, as I understand it, is much in point. He held it an imprisonment where the defendant stopped the plaintiff on his road till he had read a libel on him. Yet he did not prevent his escaping in another direction.

It is said that, if any damage arises from such obstruction, a special action on the case may be brought. Must I then sue out a new writ stating that the defendant employed direct force to prevent my going where my business called me, whereby I sustained loss? And, if I do, is it certain that I shall not be told that I

have misconceived my remedy, for all flows from the false imprisonment, and that should have been the subject of an action of trespass and assault? For the jury properly found that the whole of the defendant's conduct was continuous: it commenced in illegality; and the plaintiff did right to resist it as an outrageous violation of the liberty of the subject from the very first.

Rule absolute.

SECTION 4.

Trespass to Real Property.

PFEIFFER *v.* GROSSMAN.

Supreme Court of Illinois, 1853. 15 *Ill. Rep.* 53.

TREAT, C. J. This was an action of trespass *quare clausum fregit,* brought in 1853, by Pfeiffer against Grossman. The plea was, not guilty. It appeared in evidence, that the plaintiff had title to a certain tract of land; that according to a survey made in 1854, a fence claimed by the defendant was on this tract; the fence enclosed about half an acre of the tract, part of which was in timber, and the rest in cultivation; the fence was built by McGuire, who was in possession previous to the defendant; prior to the survey, there was some difficulty between the plaintiff and defendant as to the boundary line, the latter claiming to the fence; the defendant was dissatisfied with the survey, and continued in possession of the ground up to the fence, although notified by the plaintiff to remove the fence; after suit was brought, the defendant caused another survey to be made, which agreed with that made in 1851. It was stated by the plaintiff's counsel, that the suit was brought for the purpose of establishing the boundary line between the parties. The court refused to give these instructions: "That the putting a fence or letting it stay on the land of another is a trespass in the eye of the law, for which the aggrieved person is entitled to at least nominal damages; that the plowing up of another man's land and cultivating it, although the land may thereby be improved, is still a trespass in law, for which the person aggrieved is entitled to at least nominal damages." The jury found the issue for the defendant, and the court rendered judgment on the verdict.

The instructions not only asserted correct legal principles, but they were strictly applicable to the case. If a party puts a fence on another's land, or ploughs up the soil, he is liable as a trespasser. Such acts are a violation of the owner's right of possession, to redress which the law gives him an action. And the action is maintainable, although the owner is not substantially injured. He is entitled to nominal damages for the intrusion upon his possession.

The defendant can not defeat the action, by showing that the plaintiff is not materially prejudiced, or even that he is actually benefited. A right is invaded, and a wrong committed, and that is a sufficient basis for an action. Every unauthorized entry on the land of another is a trespass, for which an action will lie. The law implies damage to the owner, and in the absence of proof as to the extent of the injury, he is entitled to recover nominal damages. Especially is this the case, where the suit is brought for the purpose of settling a question of right. *Dixon* v. *Clow,* 24 Wend. (N .Y.) 188; *Pastorious* v. *Fisher,* 1 Rawle (Pa.) 27; *Bagby* v. *Harris,* 9 Ala. 173; *Plumleigh* v. *Dawson,* 1 Gil. (Minn.) 544; *Bolivar Manuf. Co.* v. *Neponset Mfg. Co.,* 16 *Pick.* (Mass.) 241; *Whipple* v. *The Cumberland Mfg. Co., 2* Story's R. 561.

The judgment is reversed, and the cause remanded.

Judgment reversed.[1]

ROWELL, J., in *Bragg* v. *Laraway,* 65 Vt. 673 (1893), p. 683:

"As to liability for marking the line through plaintiff's sugar-place, defendant says *de minimis.* But this maxim is not of universal application, but is often limited and rendered inapplicable by other maxims, and especially by the maxim that there is no wrong without a remedy, under which, when it is material to the establishment or the preservation of the right itself that its invasion should not pass with impunity, an action lies, although no actual damage has been sustained. The test seems to be whether the act complained of would, if repeated, operate in derogation of the right. Hence trespass *qua. clau.* is maintainable for an entry upon the land of another, although there is no real damage, because repeated acts of the kind might be used as evidence of title, and thereby the right of the plaintiff might be injured. Broom's Legal Max. (*203); Taunton, J., in *Marzetti* v. *Williams,* 1 B. & Ad. 415; *Cole* v. *Drew,* 44 Vt. 49; *Fullam* v. *Stearns,* 30 Vt. 443. So a commoner can maintain an action for injury to the common by taking away manure dropped thereon by the cattle, though his proportion of the damage be only a farthing, for by repeated acts of that kind a mere wrong-doer might, in course of time, establish evidence of a right of common. *Pindar* v. *Wadsworth,* 2 East. 154. In

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[1] *Accord: Dixon* v. *Clow,* 24 Wend. 188 (N. Y. 1840), where it was "evident that the action was brought for the purpose of trying the extent of the defendant's right." Every unauthorized entry upon the land of another is a trespass, and whether the owner suffer much or little he is entitled to a verdict for some damages, *Dougherty* v. *Stepp,* 1 Dev. & Battle 371 (N. Car. 1835), defendant entered the plaintiff's unenclosed land with a surveyor and surveyed part of it, claiming it as his own; *Brown* v. *Manter,* 22 N. H. 468 (1851), defendant dragged trees across plaintiff's land. "The gist of the action of trespass is the disturbance of possession;" *Attwood* v. *Fricot,* 17 Cal. 37 (1860), entry upon mining claim, defendant denies plaintiff's title and avers title in himself. *Baltimore & Ohio R. Co.* v. *Boyd,* 67 Md. 32 (1887), p. 40, defendant R. R. Co. laid tracks on plaintiff's land.

This is equally so when the action is on the case brought by a reversioner out of possession, who could therefore not bring trespass q. c. f., against one erecting a dam on adjacent land so as to back up the water into a mill race on the land which the plaintiff had the reversion, *Ripka* v. *Sergeant,* 7 W. & S. 9 (Pa. 1844).

Harrop v. *Hirst,* L. R. 4 Exch. 43, the inhabitant householders of a district were entitled by custom to a flow of water to a spout on a highway, and to the use of the water in their houses for domestic purposes. A riparian proprietor through whose land the water flowed on its way to the spout, on various occasions, diverted the water so as sensibly and materially to diminish its flow, and various inhabitants of the district were thereby inconvenienced by failing to obtain water at the spout when they wanted it. The plaintiffs, being occupiers of a house in the district, brought suit against such riparian proprietor for an infringment of their right, but the jury found that they had not personally sustained any actual inconvenience from the want of water. It was held, nevertheless, that the action was maintainable, inasmuch as the acts of the defendant, if continued, would be evidence of a right in derogation of the right of the plaintiffs as inhabitants of the district."

HANNABALSON *v.* SESSIONS.

Supreme Court of Iowa, 1902. 116 *Iowa* 458.

Action at law to recover damages for an alleged assault and battery. There was a verdict and judgment for defendant, and plaintiff appeals.—*Affirmed.*

WEAVER, J. Plaintiff and defendant live upon adjoining lots. There is frequent war between the families. The *casus belli* in the present instance is to be found in the following circumstances: Upon the boundary line between the lots is a tight board fence, a part of which was built by plaintiff's husband; but, unfortunately, this barrier, while all sufficient to prevent the passage of the dove of peace, is neither high enough nor tight enough to prevent the interchange of brick bats or the bandying of opprobrious epithets. On May 30, 1898, the defendant, while at work in his garden, claimed to have narrowly escaped a brick hurled in his direction by one of the plaintiff's children, and in his indignation at the unprovoked bombardment threatened the lad with arrest. Plaintiff and her husband, being at work near by, heard the threat and took up the quarrel. About this time plaintiff's husband discovered that a ladder belonging to the defendant was hanging upon a peg or block attached to the partition fence, and, conceiving this to be a cloud upon his title, he forthwith attempted to remove it, while defendant, seeing the peril in which his property was placed, rushed to its defense. Whether plaintiff himself laid violent hands on the ladder is a matter of grave dispute. She denies it, and says that the height and depth of her offending consisted in her leaning up against the fence with one arm quietly hanging over the top thereof, and in stimulating her husband's zeal by audible remarks about the "crazy fool" who was bearing down upon them from the other side. She further avers that while occupying this position of strict neutrality, the defendant assaulted her *vi et armis,* and with his clenched fist struck the arm which protruded over the fence top into his domain. Defendant denies the striking, and says

that plaintiff, instead of being a peaceable and impartial observer of the skirmish, was herself a principal actor, and that in aid of her husband she climbed upon some convenient pedestal, and, hanging herself across the fence, reached down, and with malice aforethought seized the ladder and wrenched it from its resting place. Thereupon, actuated by a natural and lawful desire to protect his property from such ravishment, and being goaded on by statements from the other side of the fence reflecting upon his mother and casting doubt upon his proper rank in the animal kingdom, he gently, and without unreasonable force, laid his open hand upon plaintiff's arm, and mildly but firmly suggested the propriety of her "keeping on her own side of the fence."

It is said that the court erred in instructing the jury that, if plaintiff leaned over the partition fence and attempted to interfere with the ladder, defendant had the right to use such force upon her as was reasonably necessary to cause her to desist, and to expel her from his premises. It is claimed this instruction is wrong, not only as a matter of legal principle, but because no such defense was pleaded. As to the matter of pleading, we have to say, without attempting to decide whether this defense is not available under the general denial, that the defendant did, before verdict, amend his answer and plead specifically that he was acting in justifiable defense of his property. There was no error in permitting the amendment. The general doctrine announced in the instruction is, in our judgment, correct. The mere fact that the plaintiff did not step across the boundary line does not make her any less a trespasser if she reached her arm across the line as she admits she did. It is one of the oldest rules of property known to the law that the title of the owner of the soil extends, not only downward to the center of the earth, but upward *usque ad coelum,* although it is, perhaps, doubtful whether owners as quarrelsome as the parties in this case will ever enjoy the usufruct of their property in the latter direction. The maxim, *"Ubi pars est ibi est totum,"*—that where the greater part is, there is the whole,—does not apply to the person of a trespasser, and the court and jury could therefore not be expected to enter into any inquiry as to the side of the boundary line upon which plaintiff preponderated, as she reached over the fence top. It was enough that she thrust her hand or arm across the boundary to technically authorize the defendant to demand that she cease the intrusion, and to justify him in using reasonable and necessary force required for the expulsion of so much of her person as he found upon his side of the line, being careful to keep within the limits of the rule, *"Molliter manus imposuit,"* so far as was consistent with his own safety. Under the instructions of the court, the jury must have found that the defendant kept within the scope of his legal rights in this respect, and that the alleged assault was not established by the evidence.

The judgment of the district court is affirmed.[1]

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[1] *Accord: Ellis* v. *Loftus Iron Co.,* L. R. 10 C. P. 10 (1874), where the defendant's horse kicked and bit the plaintiff's mare through the fence, the

SECTION 5.

Trespass to Personal Property.

GRAVES *v.* SEVERENS.

Supreme Court of Vermont, 1868. 40 *Vt.* 636.

Action on the case. Plea, general issue, and trial by jury at the September Term, 1867, Barrett, J., presiding.

The plaintiff's declaration contained two counts; the first count alleges the bailment of the mare in question, and a colt, for the purpose of being kept through the winter, and that the defendant drove and rode said mare, and so carelessly and immoderately used her, that said mare miscarried her foal, and became of little value to the plaintiff.

The second count alleges that the defendant rode and drove, and otherwise used said mare, without permission or consent of the

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mare being within the plaintiff's premises. In *Pickering* v. *Rudd,* 1 Starkie 56 (1815), Lord Ellenborough expressed a doubt as to whether an intrusion upon the column of air above the plaintiff's land whether by a projecting board or a balloon would be a trespass, though holding that if inconvenience was caused thereby, an action could be maintained. It is, however, held in *Smith* v. *Smith,* 110 Mass. 302 (1872), that if the eaves of the defendant's barn projected over the plaintiff's close he was guilty of trespass—for "it is a wrongful act on the part of the defendant which, if continued for twenty years, might give him a title to the land by adverse possession.

It is a trespass to string wires on the close of another though at a considerable height above the ground, Fry, L. J., *in Wandsworth Board of Works* v. *United Telephone Co.,* L. R. 13, Q. B. D. 904 (1884), p. 927 *(semble); Butler* v. *Frontier Telephone Co.,* 186 N. Y. 486 (1906).

In *Lamprey* v. *Danz,* 86 Minn. 317 (1902), the defendant was enjoined from shooting over the plaintiff's "duck pass"—a sheet of water over which ducks flew from lake to lake—but here it was shown that the defendant's act frightened away the ducks and diminished the value of the plaintiff's property as a shooting place.

No case has ever determined whether the passage of a balloon or air ship over the land of another is or is not a trespass. In *Kenyon* v. *Hart,* 6 B. & S. 249 (1865), Blackburn, J., says, p. 252, that he understood "the good sense" of the doubt of Lord Ellenborough on the subject but "not the legal reason for it." In an able paper on "The Beginnings of an Aerial Law," 4 Am. Journal of International Law, 109 (1910), A. K. Kuhn, Esq., approves of the statement of Sir Frederick Pollock in his Law of Torts, 8th ed., p. 348, that "the most reasonable rule" would be that "the scope of possible trespass is limited to that of effective possession," and cites—"The Code of the Canton of Grisons" (in effect 1862, § 165), providing that: "Property in land extends to the airspace (above) and the earth beneath as far as these may be of productive value to the owner." The German Civil Code (in effect 1912) also recognizes the extension of property upwards and downwards (§ 667—1900), but in a clause for which air navigation is largely responsible, it is declared: "But the owner cannot prohibit such interferences undertaken at such a height or depth that he has no interest in their prevention."

plaintiff, and that said mare was greatly injured and miscarried her foal by reason of said riding, using and driving.

The plaintiff requested the court to charge the jury that if they found the contract did not authorize the defendant to use said mare as the evidence tended to show he did use her, that the plaintiff was entitled to recover by reason and on account of such use, even though such use did not injure said mare or cause the loss of her foal. But the court refused so to charge, but held that if the jury should find that the contract did not authorize the defendant to use said mare as the evidence tended to show he did use her, still the plaintiff would not be entitled to recover, unless the jury should find that such use injured the mare or caused her to lose her foal. The plaintiff thereupon consented that a verdict in said cause be taken for the defendant, with leave to the plaintiff to except. Verdict for the defendant. Exceptions by the plaintiff.

WILSON, J. The plaintiff's claim for nominal damages rests on the allegation that the mare was injured by use, and that allegation is fully disproved by the evidence and verdict of the jury. It is true that for an unlawful entry upon real property, or disturbance of incorporeal rights, when the unlawful act might have an effect upon the rights of the party and be evidence in favor of the wrongdoer, if his right ever came in question, an action may be supported, though there be no actual damage done. But it would seem to be settled that an action for trespass to personal property will not lie, when no unlawful intent, or disturbance of a right of possession, is shown, and when no actual damage has been done, but all damage is expressly disproved, unless there be some *right* in question, which it is important to the plaintiff to establish. *Paul* v. *Slason,* 22 Vt. 231; *Fairbanks* v. *Kittredge,* 24 Vt. 8; Sedgwick on Dam. 62. In this case, the evidence tended to show that the defendant used the mare under claim of right, and there is no evidence of any wanton act on the part of the defendant in respect to the property. There is no right in question in respect to the title to the property. No actual damage was done, and we think the plaintiff is not entitled to nominal damages under the circumstances of the case.

The judgment of the county court is affirmed.[1]

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[1] *Accord: Dubuc de Marentille* v. *Oliver,* 1 Pennington 379 (N. J. 1808). So in *Slater* v. *Swan,* 2 Strange 872, Raymond, C. J., said that an action on the case for beating a horse differed "from trespass for assaulting a man, when the assault is the cause of the action; but here the assault on the horse is no cause of action, unless accompanied with special damage," and compare the charge of Tappan, J. to the jury in *Keller* v. *Mosser,* Tapp. 75 (Ohio Cir. Ct. 1816), an action of trespass *quare clausum fregit.*

Where, however, personal property is carried away or destroyed, it is immaterial how small its value is: *Fullam* v. *Stearns,* 30 Vt. 443 (1857), pp. 456-7; see *Seneca Road Co.* v. *Auburn & R. Co.,* 5 Hill 170 (N. Y. 1843), p. 176.

Notwithstanding the statement in *Marlow* v. *Weekes,* Barnes, Notes, 452, that a writ of trespass *vi et armis* for assaulting and beating a beast appears in the Register, Professor James Barr Ames says in a note to that case in

his Selection of Cases on the Law of Torts, Vol. 1, p. 49, that "There seems to be no such writ in the Register. Trespass for the asportation or the destruction of a chattel are the only writs for trespass affecting personal property."

WINTRINGHAM *v.* LAFOY.

Supreme Court of New York, 1827. *7 Cow. (N. Y.)* 735.

On error from the C. P. of the city and county of New York. The action in the court below was trespass *de bonis asportatis* by Lafoy against Wintringham. It appeared on the trial, that Wintringham was a constable, who held a *fi.fa.* issued by the marine court of the city, against the goods and chattels of one Gallis; and that, on the 19th of January, 1826, he levied on the articles in question, consisting of jewelry in the store occupied by Gallis, who was present at the levy. That Gallis informed the defendant below that the goods had been assigned by him (Gallis) and the defendant below said he was indemnified. That Gallis placed the articles on the glass case, so that the defendant below might look at them, to ascertain their value. That the defendant below made an inventory, and said he would remove the goods unless security was given that they should be forthcoming, to answer the execution. The security was, therefore, given, and the articles were left in the store.

On this evidence, the defendant below moved for a nonsuit, which being denied, he excepted. Verdict for the plaintiff below of $105.94.

Curia, per SAVAGE, CH. J. Was there any evidence of a trespass? If a sheriff takes the goods of a stranger, he is liable in this action. It is contended, however, that admitting the goods to belong to the plaintiff, the defendant did no tortious act. Every unlawful interference by one person with the property or person of another, is a trespass. The defendant in the court below undertook to control the property levied on. He took it into his possession, though there was no manual seizing of it. He was about to take it away, and would have done so, but for the security given him that it should be forthcoming upon the execution. He exercised a dominion over it. This was enough to constitute him a trespasser, he having no authority. Trover lies against a defendant who undertakes to control property in defiance, or exclusion of the owner. (5 *Cow.* (N. Y.) 325, 6, *and the cases there cited.*) The same doctrine is applicable in trespass, as in trover where the conversion is the tortious intermeddling with the goods of another.

The judgment must be affirmed.

Judgment Affirmed.

Accord: Miller v. *Baker,* 1 Metc. (Mass.) 27 (1840); *Morse* v. *Hurd,* 17 N. H. 246 (1845). So it was held "a seizure might be constructive as well as actual" and that a refusal to allow goods to be removed until rent was paid amounted to a distress, *Cramer* v. *Mott,* L. R. 5 Q. B. 357 (1870); and see *Carey* v. *Bright,* 58 Pa. 70 (1868), compare *Martin* v. *Houck,* 141 N. Car. 317 (1906).

CHAPTER II

The Essential Elements of Trespass.

SECTION 1.

Injury to the Plaintiff.

(a) Assault.

LEWIS *v.* HOOVER.

Supreme Court of Indiana, 1834. 3 *Blackf. (Ind.)* 407.

ERROR to the Allen Circuit Court.

STEVENS, J. Trespass, assault and battery. Plea, not guilty. Jury trial, verdict and judgment for the defendant. It appears of record in this case, by a bill of exceptions, that during the trial of the cause, after the parties had closed their evidence and arguments to the jury, and before the jury had retired, the plaintiff asked the court to charge the jury that if they thought, from the evidence, the defendant struck at the plaintiff with a stick, in a violent and angry manner, within striking distance of him, they ought to find for the plaintiff: which charge the court gave, but added as an additional charge, that if no damage was proved to have resulted from the said assault, they ought to find for the defendant. To this additional and latter charge the plaintiff excepted, and prosecuted this writ of error.

The only question to be determined is, whether that latter and additional charge of the court was correct?

An assault is an attempt or offer with violence to do a corporal hurt to another, as if one lift up his cane or fist at another in a threatening manner, or strike at him with a stick, his fist, or any weapon, within striking distance, but miss him. This is called an unlawful setting upon one's person, and is inchoate violence for which the party assaulted may have redress by an action of *trespass vi et armis,* and shall recover damages as a compensation, although no actual suffering or injury is proved. The damages are not asserted for the mere corporal injury or pecuniary loss, but for the malicious and insulting conduct of the defendant. 3 Bl. Comm. 120; 1 Bac. Abr. 242; 1 Saund. on Pl. & Ev. 103, 104. From this it appears that the above additional and latter charge of the Circuit Court to the jury is incorrect, and should not have been given.[1]

[1] So in *Hurst* v. *Carlisle,* 3 P. & W. 176 (Pa. 1831), where it was held that an action of assault lies without proof of contact or immediate injury, an assault was said to be "an attempt to commit" battery wounding or mayhem;

(b) Battery.

UNITED STATES v. ORTEGA, 2 *ante* page 23.

(c) False imprisonment.

VALENTINE, J., in COMER v. KNOWLES, 1 *ante* page 27.

(d) Trespass to real property.

NORVELL *v.* THOMPSON.

Court of Appeals of South Carolina, 1834. 2 *Hill* 470.

The presiding judge made the following report:

Trespass quare clausam fregit. The trespass was committed on the woodlands of the plaintiffs, and consisted in cutting a few saplings and bushes along an old path, in order to open it sufficiently for the passage of wagons, carts, etc. The defendant supposed the land belonged to another person, to whom he applied for permission and obtained it, both being under a misapprehension as to the plaintiffs' line. None of the witnesses could venture to assess the value of the timber cut, or estimate the damage. I instructed the jury if there were actually no damage done, or if it were so inconsiderable that it could not be estimated, as the defendant set up no claim to the land, and supposed he had permission of the real owner, they might find a verdict for the defendant; and they did so.

The plaintiffs gave notice of an appeal in this case, and that they would move the Court of Appeals for a new trial, on the following grounds:

1. Because a trespass having been proven, the verdict could not legally be for defendant.

2. Because his honor was mistaken in law, in charging the jury that where the trespass was very small they might find for defendant.

HARPER, J. This is a very unimportant case, but in strictness of law I suppose the plaintiffs are entitled to their motion. If a trespass be proved, the plaintiffs are entitled to some damages, though they be merely nominal. Some damage was certainly proved, though very trifling. In some cases, where the jury has been rightly instructed on the point of law, but in cases of very trifling trespass,

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and see *Butler* v. *Stockdale,* 19 Pa. Super. Ct. 98 (1902); and *Handy & Tull* v. *Johnson,* 5 Md. 450 (1854), a case where the defendant forced himself into the plaintiff's bedroom and shook his fist in his face in the course of an angry altercation, in which it was also held that "the jury can not infer a want of intention to do violence or injury merely from the failure to strike, in the absence of any declaration or circumstances indicating an absence of such intention, other than the fact that no blow was given," p. 465.

has thought proper to find for the defendant, this Court being satisfied that substantial justice was done, has refused to interfere. But this is the privilege of the jury. The Court is bound to afford relief against an erroneous instruction by the Court on a point of law. There is something in the reasoning of the plaintiffs' counsel. No trespass can be conceived more trifling than the mere passing over the unclosed land of another, and it would be impossible to estimate the damage resulting from a particular act of this sort. Yet, if no recovery could be had in a case of this sort, the trespasser, by repetition of the act and the lapse of time, might acquire the right of way, in spite of anything that could be done to prevent it.

The motion is granted.[1]

(e) Trespass to personal property.

GRAVES v. SEVERENS, ante page 40.

SECTION 2.

Volition and Intention.

(a) Trespass to the person.

GIBBONS *v.* PEPPER.

King's Bench, 1695. 1 *Lord Raymond,* 38.

TRESPASS, assault, and battery. The defendant pleads that he rode upon a horse in the king's highway, and that his horse, being affrighted, ran away with him, so that he could not stop the horse; that there were several persons standing in the way, among whom the plaintiff stood; and that he called to them to take care, but that, notwithstanding, the plaintiff did not go out of the way, but continued there; so that the defendant's horse ran over the plaintiff against the will of the defendant; *quoe est eadem transgressio, etc.* The plaintiff demurred. And Sarjeant *Darnall,* for the defendant, argued that if the defendant in his justification shows that the accident was inevitable, and that the negligence of the defendant did not cause it, judgment shall be given for him. To prove which he cited *Weaver* v. *Ward,* Hobart 134.

Northey, for the plaintiff, said, that in all these cases the defendant confessed a battery, which he afterward justified; but in this case he justified a battery which is no battery. Of which opinion was the whole court; for if I ride upon a horse, and J. S. whips the horse so that he runs away with me and runs over any other

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[1] *Accord: Sefton* v. *Prentice,* 103 Cal. 670 (1894); *Smethurst* v. *Journey,* 1 Houst. 196 (Del. 1855); but see *Mahle* v. *Grierson,* 2 Willson Tex. Civil App., § 764 (1885).

person, he who whipped the horse is guilty of the battery, and not I. But if I by spurring was the cause of such accident, then I am guilty. In the same manner, if A takes the hand of B, and with it strikes C, A is the trespasser, and not B. And, *per curiam,* the defendant might have given this justification in evidence, upon the general issue pleaded. And therefore judgment was given for the plaintiff.

Accord: Goodman v. *Taylor,* 5 C. & P. 410 (1832); *Steudle* v. *Rentchler,* 64 Ill. 161 (1872). See also, *Davis* v. *Saunders,* 2 Chitty 639 (1770).

WEAVER *v.* WARD.

King's Bench, 1616. *Hobart,* 134.

Weaver brought an action of trespass of assault and battery against Ward. The defendant pleaded that he was, amongst others, by the commandment of the lords of the council, a trained soldier in London, of the band of one Andrews, captain, and so was the plaintiff: and that they were skirmishing with their muskets charged with powder for their exercise *in re militari* against another captain and his band; and as they were so skirmishing, the defendant, *casualiter et per infortunium et contra voluntatem suam,* in discharging his piece, did hurt and wound the plaintiff; which is the same, etc., *absque hoc,* that he was guilty *aliter sive alio modo.* And, upon demurrer by the plaintiff, judgment was given for him; for, though it were agreed that if men tilt or turney in the presence of the king, or if two masters of defence playing their prizes kill one another, that this shall be no felony, or if a lunatic kill a man, or the like; because felony must be done *animo felonico;* yet, in trespass, which tends only to give damages according to hurt or loss, it is not so; and, therefore, no man shall be excused of a trespass (for this is the nature of an excuse, and not of a justification, *prout ei bene licuit*), except it may be judged utterly without his fault; as if a man by force take my hand and strike you, or if here the defendant had said that the plaintiff ran across his piece when it was discharging, or had set forth the case with the circumstances so as it had appeared to the court that it had been inevitable, and that the defendant had committed no negligence to give occasion to the hurt.

VOSBURG *v.* PUTNEY.

Supreme Court of Wisconsin, 1891. 80 *Wis.* 253.

Appeal by defendant from a judgment of the Circuit Court for Waukesha County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from a kick received from plaintiff. *Reversed.*

The plaintiff was about fourteen years of age and the defend-

ant about eleven years of age. They were sitting opposite to each other across an aisle in school. The defendant reached across the aisle with his foot and hit with his toe the skin of the plaintiff's right leg. The touch was slight. The plaintiff did not feel it either on account of its being so slight or of loss of sensation produced by the shock. In a few moments he felt a violent pain in that place which caused him to call out loudly. Owing to a previous injury which left the leg in a very serious condition the slight touch caused serious lameness.[1] The jury found *inter alia* that the injury to the plaintiff's leg was caused by the kick and that the defendant in touching the plaintiff did not intend to do him any harm.

The jury having found that the defendant, in touching the plaintiff with his foot, did not intend to do him any harm, counsel for defendant maintain that the plaintiff has no cause of action, and that defendant's motion for judgment on the special verdict should have been granted. In support of this proposition counsel quote from 2 Greenleaf on Evidence, § 83, the rule that "that the intention to do harm is of the essence of an assault." Such is the rule, no doubt, in actions or prosecutions for mere assaults. But this is an action to recover damages for an alleged assault and battery. In such case the rule is correctly stated, in many of the authorities cited by counsel, that plaintiff must show either that the intention was unlawful, or that the defendant is in fault. If the intended act is unlawful, the intention to commit it must necessarily be unlawful. Hence, as applied in this case, if the kicking of the plaintiff by the defendant was an unlawful act, the intention of the defendant to kick him was also unlawful. Had the parties been upon the play-grounds of the school, engaged in the usual boyish sports, the defendant being free from malice, wantonness, or negligence, and intending no harm to plaintiff in what he did, we should hesitate to hold the act of the defendant unlawful, or that he could be held liable in this action. Some consideration is due to the implied license of the play-grounds. But it appears that the injury was inflicted in the school, after it had been called to order by the teacher, and after the regular exercises of the school had commenced. Under these circumstances, no implied license to do the act complained of existed, and such act was a violation of the order and decorum of the school, and necessarily unlawful. Hence we are of the opinion that, under the evidence and verdict, the action may be sustained.

Accord: See *Weaver* v. *Ward*, ante, p. 46; *Welch* v. *Durand*, 36 Conn. 182 (1869); *Peterson* v. *Haffner*, 59 Ind. 130 (1877), the defendant, a boy of fourteen, with intent to injure and in play, threw a piece of mortar at the plaintiff's brother, who with the plaintiff was running away, the plaintiff looked back and part of the mortar struck him in the eye; *Henry* v. *Carlton*, 129 Ala. 479 (1900), where the defendant's absence of personal ill will toward and intent to injure the plaintiff was immaterial, he having thrust him out of the way in the course of an unlawful pursuit of his servant.

So the defendant is liable if, in an unlawful attempt to strike or injure

[1] The statement of facts is much condensed from those given by Orton, J. in a previous trial of same case, 78 Wis. 84.

another, he strike or otherwise directly injure the plaintiff, the lack of specific intent to injure the plaintiff can at most only be considered in assessisg the damages, *James* v. *Campbell,* 5 C. & P. 372 (1832), plaintiff struck during a scuffle between the defendant and a third person; *Corning* v. *Corning,* 6 N. Y. 97 (1851), the plaintiff was riding in a buggy with a companion, the horse starting, a blow aimed at her companion struck her; *Carmichael* v. *Dolen,* 25 Nebr. 335 (1889), the defendant, during a brawl, fired his pistol over his shoulder at his antagonists and struck a bystander.

If, however, the defendant struck or shot in lawful self-defense and without negligence strike a bystander he is not liable in trespass, *Brown* v. *Kendall,* post, p. 57, and cases cited in the note thereto. Nor will the consent of the person immediately touched by the defendant absolve him if it injure the non-assenting plaintiff, *Reynolds* v. *Pierson,* 29 Ind. App. 273 (1902), nor will provocation by the person intended to be struck mitigate the damages recoverable by a plaintiff struck by mistake, *Corning* v. *Corning,* 6 N. Y. 97. Injurious violence to another's person or an unpermitted interference therewith, derogatory of such other's personal dignity because done in good nature and with good motive, *Johnson* v. *McConnel,* note 2 to *United States* v. *Ortega,* 4 Wash. C. C. 531; or in fun, *Peterson* v. *Haffner,* 59 Ind. 130 (1877); or in horse play, *Markley* v. *Whitman,* 95 Mich. 236 (1893), and *Reynolds* v. *Pierson,* 29 Ind. App. 273. So taking of another's property as a "joke" is a trespass, *Wartman* v. *Swindell,* 54 N. J. L. 589 (1892).

It is no defense to an unwarranted, rude and violent interference with another's person that the defendant mistook him for another, *Seigel* v. *Long,* 169 Ala. 79 (1910), the defendant, a farmer, placed his hand on the head of the plaintiff, who was driving an automobile, and pushed his hat back, when discovering that he was not the driver who had previously frightened his horses, he apologized.

RAZOR *v.* KINSEY.

55 *Ill. App.* 605 (1894).

PLEASANTS, J. "Willfulness or intention on the part of the defendant to do the injury to the person of the party injured, is held to be essential to the establishment of liability of the defendant in an action of trespass for an assault and battery, and malice or wantonness besides, to an allowance for vindictive damages. There may be trespass to the person and liability for the actual damage, without intention to commit it, but not an assault and battery."

Accord: The Lord Derby, 17 Fed. 265 (1883); so in *Mercer* v. *Corbin,* 117 Ind. 450 (1888), it was said that "there must be something more than a mere negligent touching of a plaintiff's person to constitute an assault and battery." But it was further held that a specific intent to injure or interfere with the plaintiff's person was not necessary if there was recklessness or wilful indifference to consequences sufficient to create an implied or constructive intent; as to which see *Commonwealth* v. *Lister,* 15 Phila. 405 (Pa. 1882), pistol discharged in a spirit of frolic into the floor of a crowded Pullman car; and *State* v. *Stanton,* 37 Conn. 421 (1870): shot fired at one man and striking another; and *State* v. *Myers,* 19 Iowa 517 (1865), shooting into a crowd and injuring some one not intended is criminal.

In England the plaintiff establishes a *prima facie* cause of action in trespass by showing harm immediately resulting to him from the defendant's voluntary act. The declaration need not allege negligence or unlawful conduct on the defendant's part, nor need the plaintiff prove it in the first instance. If the harm resulted immediately from some outside force over which he had no control, see *Gibbons* v. *Pepper,* 1 Ld. Raym. 38 (1695), he was not guilty of

trespass unless there was some prior negligence or misconduct of his without which the harm would not have occurred and which thus was the occasion if not the cause of the harm. It is highly doubtful whether such phrases as that which occur in *Weaver* v. *Ward,* Hobart 134, and are repeated later in cases and in early textbooks, see Buller's Nisi Prius, p. 16, to the effect "that no man shall be excused of a trespass unless it be judged utterly without his fault" or "as if here the defendant had set forth the case with the circumstances so as it had appeared to the court that it had been inevitable and that the defendant had committed no negligence to give occasion to the hurt," were intended to lay down any broader principle of immunity than that exhibited in these cases, see *Holmes* v. *Mather,* L. R. 10 Exch. 261 (1875), particularly the opinion of Cleasby B., and *Wakeman* v. *Robinson,* 1 Bing. 213 (1823). This could and must be shown under the general issue and a plea confessing the trespass and excusing it by the allegation of such facts was bad, *Gibbons* v. *Pepper,* 1 Ld. Raym. 38 (1695); *Goodman* v. *Taylor,* 5 C. & P. 410 (1832). Many cases decide that where the harm was due to the defendant's voluntary act, inevitable accident, that is that the defendant neither intended the harm nor was guilty of any negligence or fault, could not be shown under the general issue, but if a defense at all, which is nowhere directly asserted, must be pleaded specially: *Knapp* v. *Salsbury,* 2 Camp. 500 (1832); *Hall* v. *Fearnley,* 3 Q. B. 919 (1842).

And while many dicta more or less clearly asserted, Dallas, C. J., in *Hall* v. *Fearnley,* 3 Q. B. 919; Bramwell, B., in *Holmes* v. *Mather,* L. R. 10 Exch. 261, or denied, Ellenborough, C. J., and Grose, J., in *Leame* v. *Bray,* 3 East 593 (1803), pp. 599-600, that the fact that the defendant was free from negligence or fault was a defense to an action of trespass, the point was not finally settled in England till 1891, when in *Stanley* v. *Powell,* L. R. 1891, 1 Q. B. 86, it was finally determined that "where an act is voluntary and the result injurious an action of trespass can not be supported against a plea pleaded and proved and which the jury find established, to the effect that there was no negligence on the part of the defendant." In that case the plaintiff, who was beating up game for a shooting party, was struck in the eye by shot fired by the defendant at a pheasant, but which striking a tree, was so deflected that it struck the plaintiff who was standing in another field, some distance from the line of fire. The absence of negligence proved by the defendant, which in the state of the case, had the same effect as though it had been specially pleaded, was held a good defense, if the declaration was taken to be in trespass; see *Chaddock* v. *Tabor,* 115 Mich. 27 (1897).

As to the rule in Admiralty similar to that laid down in *Stanley* v. *Powell,* L. R. 1891, 1 Q. B. 86, see The Virgo, 25 W. R. 397 (1877).

(b) False imprisonment.

WOOD *v.* CUMMINGS.

Supreme Judicial Court of Massachusetts, 1908. 197 *Mass.* 80.

Tort, with three counts, the second of which was for false imprisonment.

The defendant was trustee in bankruptcy of the estate of one Smith, and as such had taken possession of his shop and everything therein. The plaintiff was the holder of a mortgage upon the goods and chattels of Smith, upon which there was due $446.16 principal and interest.

On March 2, 1904, the plaintiff met the defendant by appointment. They came from the train together and went into the shop.

One Walter Smith, who was with the defendant, remained outside by the door. After looking over and checking the property the plaintiff tried to go out from the shop, but found the door fastened, and was told by the defendant that the door was locked by his orders. The defendant stated to the plaintiff that he had the door locked because he "didn't know but that the plaintiff would have a gang there." Sharp words passed between the plaintiff and the defendant concerning the locking of the door. The defendant rapped on the window in the door, which immediately was unlocked by Walter Smith, and the plaintiff passed out of the shop. The defendant then relocked the door. The plaintiff testified that he suffered no injury nor damage whatsoever from this action of the defendant. This was all the evidence as to imprisonment.[1]

KNOWLTON, C. J. The plaintiff's claim of damages for false imprisonment is not sustained by the evidence. The testimony shows that the locking of the door was not to imprison the plaintiff, but for another purpose. As soon as the plaintiff made known his desire to go out the door was unlocked, and the plaintiff suffered no injury nor damage.[2]

(c) Trespass to property.

SMITH *v.* STONE.

King's Bench, 1647. *Style* 65.

Smith brought an action of trespass against Stone, ***pedibus ambulando.*** The defendant pleads this special plea in justification, viz., that he was carried upon the land of the plaintiff by force and violence of others, and was not there voluntarily, which is the same trespass for which the plaintiff brings his action. The plaintiff demurs to this plea. In this case, ROLLE, J., said, that it is the trespass of the party that carried the defendant upon the land, and not the trespass of the defendant: as he that drives my cattle into another man's land is the trespasser against him, and not I, who am owner of the cattle.[3]

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[1] Only so much of the facts and the opinion of the court is given as relates to the count for false imprisonment.

[2] In *Woodward* v. *Washburn,* 3 Denio 369 (N. Y. 1846), the defendant, who had locked the door at the usual closing hour while the plaintiff was therein and refused to open it to let him out, was held guilty of false imprisonment, *cf. Talcott* v. *National Exhibition Co.,* 144 App. Div. (N. Y.) 337 (1911)—but see *Spoor* v. *Spooner,* 12 Metc. 281 (Mass. 1847), where a constable, with knowledge of the usual starting time of a steamer came on board to make an arrest just as it was about to start, it was held that it was not false imprisonment to start the boat before the constable had gone ashore.

[3] See *Millen* v. *Fandrye,* Popham 161 (1605), where it was held that the defendant who has set his dog on the plaintiff's trespassing sheep to drive them from his close was not liable in trespass for the dog's following the sheep on to the plaintiff's adjoining premises, he having done all he could to call

SECTION 3.

Culpability.

John Henry Wigmore, "Responsibility for Tortious Acts: Its History." "Select Essays in Anglo-American Legal History." —Volume III, Pages 475 to 482.

In endeavoring to realize the nature of the primitive canons of Responsibility, one must take into consideration the essentially superstitious and unreasoning spirit which pervaded the jural doings of primitive society; for the notion here dealt with was only one of the vehicles of his expression. One need not here to call to mind in detail the characteristics of primitive culture; only certain of the more germane may be noted. The instinct of revenge, as an aggressive reaction from inflicted pain, preceding any developed sense of justice; the prevalence of clan-organization and clan-responsibility; the idea of transgression as associated with ceremonial observances; the implicit belief in taboo and curse; the propitiation of ghosts and deities by gifts and sacrifices; the sense of pollution and contamination (as by the touching of blood or of a corpse); the inheritance of guilt; the appeal to a decision of the Deity or of chance in litigation (as by the subjection to ordeals, the swearing of exculpatory oaths, the engaging in formal combat); the arbitrary formalism of words and phrases in pleading and oaths,—these give the tone to the times. In the light of these it is easy to understand that the notion of Responsibility for Harmful Results was determined largely by crude primitive instincts of superstition,—that our ancestors were satisfied with finding a visible source for the harm and following out their ideas of justice upon it.

It must be remembered, moreover, that we are here dealing with a sentiment characteristic of primitive justice everywhere. It was, beyond question, universal. It appears not only in the strictly Germanic peoples, but in the records of all the race-stocks, however mixed, of post-Christian Europe,—the Scandinavian, the Flemish-Dutch, the Celtic, the French, the Spanish, the Italian, the Slavic, the Hungarian. It is found in earliest Greece and earliest Rome. It is equally marked in the Semitic races—Jews and Mohammedans

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back his dog; with which compare *Beckwith* v. *Shordike,* 4 Burrow 2092 (1767), where the defendant and his dog were trespassing on the plaintiff's land and the dog chased the plaintiff's deer.

In *Gilbert* v. *Stone,* Aleyn 35 (1641), a plea that twelve unknown armed men had so threatened him that they put him in fear of his life and compelled him to go to the plaintiff's house was held bad on demurrer, "for one can not justify a trespass through fear and the defendant hath remedy against those that compelled him." But see *Cunningham* v. *Pitzer,* 2 W. Va. 264 (1867), where it was held that the defendant was not guilty of trespass in threshing and carrying off the plaintiff's corn by command of a body of Confederate troops, if, but only if, "he had no other reasonable means of saving himself from death or great bodily harm or loss of personal liberty," and see *Ploof* v. *Putnam,* 81 Vt. 471 (1909), where a man out on Lake Champlain in a violent storm, who mooring his boat to the plaintiff's wharf, without the latter's permission, was held not to become a trespasser thereby, though, it is held in *Vincent* v. *Lake Erie Transportation Co.,* 109 Minn. 456 (1910), that he must pay for the damage, if any, done to the wharf.

—as well as their predecessors in Chaldea and Egypt; and in the totally unrelated Hindus and Chinese, as well as the Japanese. And in the primitive tribes still surviving everywhere—in Africa, Australia, America and Asia—it is still observable. In the two following passages, its general bearing is broadly stated:

1884, A. H. Post, Die Grundlage des Rechts und die Grundzuege seiner Entwickelungsgeschichte, §§ 39, 40, pp. 350, 354:

"All wrongs are originally violations of rights between one clan and another. Every wrong done by an individual creates an obligation for his clan towards that of the injured person. There is thus no doctrine, in civil wrongs, about intent, negligence, guilt, capacity, voluntariness, mistake, fear, or the like. The whole point of view of individual mental states which dominates our modern tort-law (a law essentially of individual rights and duties) is alien to primitive law. Each clan is liable to the other for every injury suffered, whether it be done by adult clan-members or by women, children, animals, or lifeless objects belonging to the clan, and whether the wrongdoer be blamable or be merely the involuntary tool of external forces. It is only with the dissolution of the clan-organization that the individual aspect of wrongs comes into consideration; and at the same time the wrongdoer's mental state (wholly ignored in clan-law) comes for the first time into the foreground. * * * With the disappearance of the clan-organization and the development of the state, by which the inter-tribal union grows into a community held together by a higher social power, and in which the individual is accorded a more or less personal sphere of rights, there arises gradually the notion of personal culpability as a presupposition of personal responsibility for wrongs. One of its first expressions is in the idea that harm caused by accident is not to be so stringently treated as an intentional harm. Though the intentional harm would justify a blood-feud, the accidental one can be compounded by expiation-money wherever the injured party's duty to accept expiation-money comes to be recognized, this is found first applied to accidental harms.

"A further mark of this gradual transition to personal culpability appears in the diminution of the fine for negligent harms as compared with that for intentional ones; and also in the application of the negligence-fine to harms done by the women, children, slaves, animals, and lifeless objects belonging to the clan, or by a blood-relation not himself responsible. * * * To this distinction between intentional and unintentional harms the distinction appears to be originally due between criminal and civil law. The intentional wrong becomes the crime, by which the doer is made corporally responsible. The unintentional wrong creates only an obligation to give redress; only the property of the wrongdoer is thereby made liable. It is only gradually that certain negligent misdeeds are made punishable as crimes, and that certain intentional wrongs are treated merely as calling for redress. * * *

"Moreover, a special grouping of negligent wrongs is quite alien to the early legal system. Only intentional and unintentional acts are distinguished. The unintentional includes the negligent as well as the unavoidable, but without discriminating them. * * * With the rise of the conception of culpability as the presupposition of a wrong, there develops a deep and remarkable change in legal ideas. In the primitive the social order is regarded merely from a mechanical point of view and the responsibility for harm is placed on him who caused it, regardless of whether he willed it or was only the medium

of a higher force; but now the mental side of the social union comes strongly to the front. There is thus prepared the basis for a psychological theory of compromise or settlement. The principle that without moral culpability no liability arises either to make compensation or to suffer punishment develops necessarily a body of doctrine about guilt, capacity, intent, negligence, and thus to distinctions between voluntary and involuntary acts. The mechanical aspect of the social order, originally the marked one, now begins more and more to be ignored, and the mental aspect, on the other hand, comes to be exclusively emphasized."

1888, P. F. GIRARD, Les actions noxales, in Nouvelle revue historique du droit français et étranger, XII. 38:

"There is a phenomenon which one can discern throughout all antiquity,—that is, vengeance, the physical, unreasoning emotion, which drives the victim of an injury to a violent reaction against the immediate author of the injury. He who regards himself as offended against, takes vengeance for the offence as he will and as he can, alone or with the help of others, recognizing only the brute fact that he has suffered, and dominated by a feeling of resentment measured solely by the harm he has undergone. * * * The victim of the harm knows nothing but the harm done to him. He does not concern himself with the intent of the doer. * * * He therefore revenges himself for the harm-causing act, even though it may have been unintentional. * * * Moreover, for the same reason, the victim takes his revenge even where the immediate author of the harm is not capable of intending it,—where it is not a human being, but an animal, or an inanimate object."

In this particular field, too, there are numerous manifestations, all akin. The doer of a deed was responsible whether he acted innocently or inadvertently, because he was the doer; the owner of an instrument which caused harm was responsible, because he was the owner, though the instrument had been wielded by a thief; the owner of an animal, the master of a slave, was responsible because he was associated with it as owner, as master; the master was liable to his servant's relatives for the death, even accidental, of the servant, where his business had been the occasion of the evil; the *rachimburgius,* or popular judge, was responsible for a wrong judgment, without regard to his knowledge or his good faith; the oath-helper who swore in support of the party's oath was responsible, without regard to his belief or his good faith; one who merely attempted an evil was not liable because there was no evil result to attribute to him; a mere counsellor or instigator of a wrong was not liable, because the evil was sufficiently avenged by taking the prime actor, and where several co-operated equally, a lot (frequently) was cast to select which one should be amenable; while the one who harbored or assisted the wrongdoer, even unwittingly, was guilty, because he had associated himself with one tainted by the evil result. Of these various forms of the primitive notion which determined responsibility, we are here concerned with only a few,—those that have a more or less intimate connection with later doctrines of the English law of torts, and are therefore for us more worth tracing from early times.

Common Pleas, 1466, *Y. B.* 6 *Edward IV,* 7 *pl.* 18.: A man brought a writ of trespass *quare vi et armis fregit, etc., et herbam suam pedibus conculcando consumpsit,* and supposed the trespass in five acres; and the defendant says, as to the coming, &c., and as to the trespass in the five

acres, *actio non;* for he says that he himself has an acre of land upon which a thorn-hedge is growing, adjoining the said five acres, and the defendant, at the time of the trespass alleged, came and cut the thorns, and they, *ipso invito, cecidere* on the said acres of the plaintiff, and the defendant went quickly upon the said acres, &c., and took them, which is the same trespass for which he has conceived his action, &c.; and upon this they demurred, &c., and it was well argued and adjourned. And now *Catesby* says: "Sir, it has been said that if one does an act, though lawful, whereby wrong and damage is done to another against his will, still if he in any way could have avoided it, &c., then he shall be punished therefor, &c. Sir, it seems to me the other way; and as I understand it, if one does a lawful act whereby damage comes to another against his will, he shall not be punished at all, &c. As if I drive my cattle along the highway, and you have an acre of ground adjoining, and my cattle enter upon your ground and eat your grass, and I come freshly and drive them out: in this case you shall have no action against me, because then it was lawful to drive them out, and their entry upon the land was against my will;[1] and no more here, for the cutting was lawful, and the falling upon your land was against my will, therefore the retaking was good and lawful, &c. And, sir, I put a case, that I am cutting my trees, and the boughs fall upon a man and kill him; in this case I shall not be attainted as of felony, for my cutting was lawful, and the falling upon the man was against my will, and no more here, &c. FAIRFAX. It seems to me just the other way, and I say that there is a diversity between an act resulting in a felony and one resulting in trespass, for in the case put by Catesby there was no felony, for felony is of malice prepense, and when it was against his will it was not *animo felonico,* &c., but if one is cutting trees, and the boughs fall on a man and wound him, in this case he shall have an action of trespass, &c.; and, also, sir, if one is shooting at butts, and his bow shakes in his hands, and kills a man, *ipso invito,* it is no felony, as has been said, &c., but if he wounds one by shooting, he shall have a good action of trespass against him, and yet the shooting was lawful, &c., and the wrong which the other received was against his will., &c., and so here, &c.

YONGE. I think differently; and in such a case, where one has *damnum absque injuria,* in this case he shall have no action, for he has no wrong, and there is no reason for his recovering damages; and so it was here, when he went upon the land to get the thorns which had fallen, this entry was not tortious, for when he cut them, and they fell on the close, *ipso invito,* the property in them was in him, and therefore it was lawful for him to take them out of the close; therefore, notwithstanding the damage, no wrong was suffered, &c.

PIGOT. To the same intent, and suppose I have a mill and the water which comes to my mill runs through your land and you have withies or willows growing by the water, and you cut your withies and they against your will fall into the water and stop the water so that I do not have sufficient water for my mill, in that case I shall have an action of trespass and yet the cutting was lawful and the falling was against your will.[2]

BRIAN. It seems to me the other way, and to my intent, when one does an

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[1] But see *Hartford* v. *Brady, post.*
[2] See *Lawson* v. *Price,* 45 Md. 123 (1876).

act he is bound to act in such a way as not to prejudice others, &c. As if I am building a house, and a piece of timber falls on my neighbor's house and breaks his house, he shall have a good action &c.; and yet the raising of the house was lawful, and the timber fell, *me invito,* &c. And so if one assaults me and I can not escape, and I in self-defense lift my stick to strike him, and in lifting it hit a man who is behind me, in this case he shall have an action against me, yet my act was lawful, and I hit him, *me invito,* &c.; and so here, &c.

LITTLETON, J. To the same intent, and if a man is damaged, he ought to be recompensed; and to my intent the case put by Catesby is not law, for if your cattle come on my land and eat my grass, notwithstanding you come freshly and drive them out, you ought to make amends for what your cattle have done, be it more or less. But if cattle stray upon a man's land, the lord can not distrain them for rent because when a lord distrains for rent, he is to hold the distress till his rent is paid, and so he can not in the case aforesaid, for if I will offer sufficient amends, I shall have my cattle again, &c.; and in a writ of rescous of cattle taken *damage feasant,* it is a good plea for one to say that he tendered sufficient amends, &c.; and, sir, if this should be law, that he might enter and take the thorns, for the same reason, if he cut a large tree, he might come with his wagons and horses to carry the tree off, which is not reason, for perhaps he has corn or other crops growing, &c.; and no more here, for the law is all one in great things and small, &c., and so according to the quantity of the trespass he should have amends.

CHOKE, C. J. To the same intent, for when the principle was not lawful, that which depends upon it is not lawful; for when he cut the thorns and they fell on my land, this falling was not lawful, and therefore his coming to take them out was not lawful. As to what was said about their falling *ipso invito,* that is no plea, but he ought to show that he could not act in any other way, or that he did all that was in his power to keep them out, &c., or else he shall pay damages, &c. And, sir, if the thorns on a great tree had fallen on his land by force of the wind, in this case he might have come in to get them, because the falling was not his act, but by the force of the wind, &c. 21 Hen. VII, fol. 28.*

(a) Trespass to the person.

DICKENSON *v.* WATSON.

King's Bench, 1682. *T. Jones* 205.

The plaintiff brought error on a judgment in the court of the sheriffs of the city of York, in trespass for an assault, battery, and wounding of the plaintiff's eye, by discharging of a gun charged with powder and hail-shot, by which he lost the sight of his eye. The defendant pleaded *actio non,* because he is, and at the time of

* See *Newsom* v. *Anderson,* 2 Iredell 42 (N. Car. 1841), and *Lambert & Olliot* v. *Bessey,* T. Raym. 421 (1681), where the language of the counsel and court in the principal case is quoted at length.

the trespass was, an officer appointed for collecting the duty of hearth-money; and for the better discharge of his office, and more sure custody and keeping of the money by him collected and to be collected, he provided himself with fire-arms, and having one of his pistols in his hands, and intending to discharge it ***ne aliquod damnum eveniret,*** he discharged it (***nemine in opposito visu existente***), and while he discharged it, the plaintiff ***casualiter viam illam proeterivit, et si aliquod malum ei inde accideret hoc fuit contra voluntatem,*** of the defendant. ***Quæ est eadem transgressio.*** Upon this the plaintiff demurred, and judgment was given for him; whereupon error was brought, and judgment was affirmed, nothing being urged besides the sufficiency of the plea. But the court held it to be insufficient; for in trespass the defendant shall not be excused without unavoidable necessity, which is not shown here. Besides, the defendant did not traverse ***absque hoc quod aliter seu alio modo,*** as was done in the case of *Weaver* v. *Ward,* Hobart, 134. And yet judgment there given for the plaintiff.

See *Vincent* v. *Stinehour,* 7 Vt. 62 (1835), where it is said that "Where a person is doing a voluntary act which he is under no obligation to do, he is held answerable for any injury which may happen to another either by accident or carelessness;" and *Wright* v. *Clark,* 50 Vt. 130 (1877); Denio, C. J., in *Castle* v. *Duryee,* 2 Keyes (41* N. Y.) 169 (1865), pp. 172-174, and *Jennings* v. *Fundeberg,* 4 McCord 161 (S. Car. 1827).

Certain acts may be so fraught with peril to others that the mere doing them, except under the compulsion of necessity or legal duty, may be so akin to fault that he who does them does them at his risk and may be liable no matter how carefully he does them, while if they be done under necessity or legal duty, he is only liable if they are done without that care which the dangerous nature of the thing requires. While the American courts generally deny liability for direct injury unless caused by an unlawful act or due to negligence, they require a high degree of care in the voluntary carriage, handling and discharge of firearms or other weapons. In *Tally* v. *Ayres,* 3 Sneed 677 (Tenn. 1856), it was said that "the act of taking a loaded gun into a public place—no necessity or cause being shown for doing so—was an uncalled for and reckless act;" and in *Judd* v. *Ballard,* 66 Vt. 668 (1894), it was said that irrespective of the care used in handling a loaded revolver, "it was negligence to be adjusting it with the loaded revolver so held that an accidental discharge would injure the plaintiff." See also, *Morgan* v. *Cox,* 22 Mo. 373 (1856), where the defendant having used a loaded gun to punch a cow, it went off, presumably by reason of the hammer striking his saddle as he was returning it to its original position, shooting the plaintiff's slave, but see *Sutton* v. *Bonnett,* 114 Ind. 243 (1887). So to carry a gun, while out shooting, pointing toward a comrade, was held negligence in *Winans* v. *Randolph,* 169 Pa. 606 (1895), or to "break" a gun for the purpose of extracting the cartridge while pointing it toward another, *Atchison* v. *Dullam,* 16 Ill. App. 42 (1884).

So an action of trespass will lie against one firing a gun or shooting an arrow at a mark without making sure that no one is dangerously near to it, *Chaddock* v. *Tabor,* 115 Mich. 27 (1897); *Bullock* v. *Babcock,* 3 Wend. 391 (N. Y. 1829), or who shoots at a fox while the dog which has run to cover is playing nearby, *Wright* v. *Clark,* 50 Vt. 130 (1877), or who fires at what he supposes to be a wild animal without making sure that it is such, *Rudd* v. *Byrnes,* 156 Cal. 636 (1909), where the defendant shot a friend mistaking him for a deer. So if one discharges a loaded firearm or directs its discharge at another, he is liable in trespass and it is no defence that he did not believe or that he had good reason to believe it to be unloaded, *Bahel* v. *Manning,* 112 Mich. 24 (1897), or that he has taken the utmost precautions to ascertain that only blank cartridges are used, *Castle* v. *Duryee,* 2 Keyes (*41 N. Y.) 169

(1865), a regiment fired what was meant to be a blank volley in the direction of a crowd of spectators. One of them was shot by a ball which, notwithstanding the very elaborate precautions taken, had remained in one of the muskets. It was held that the colonel who gave the order to fire was liable in trespass. "The negligence," said Denio, C. J., "consisted in firing into a crowd of people without positive knowledge that no one musket in the whole regiment contained anything more than a blank cartridge."

BROWN *v.* KENDALL.

Supreme Judicial Court of Massachusetts, 1850. *60 Mass. 292.*

This was an action of trespass for assault and battery, originally commenced against George K. Kendall, the defendant, who died pending the suit, and his executrix was summoned in.

It appeared in evidence, on the trial, which was before WELLS, C. J., in the court of common pleas, that two dogs, belonging to the plaintiff and the defendant, respectively, were fighting in the presence of their masters; that the defendant took a stick about four feet long, and commenced beating the dogs in order to separate them; that the plaintiff was looking on, at the distance of about a rod, and that he advanced a step or two toward the dogs. In their struggle, the dogs approached the place where the plaintiff was standing. The defendant retreated backward from before the dogs, striking them as he retreated; and as he approached the plaintiff, with his back toward him, in raising his stick over his shoulder, in order to strike the dogs, he accidentally hit the plaintiff in the eye, inflicting upon him a severe injury.

Whether it was necessary or proper for the defendant to interfere in the fight between the dogs; whether the interference, if called for, was in a proper manner, and what degree of care was exercised by each party on the occasion; were the subject of controversy between the parties, upon all the evidence in the case, of which the foregoing is an outline.

The jury under certain instructions which sufficiently appear in the opinion of the court, returned a verdict for the plaintiff; whereupon the defendant alleged exceptions.

SHAW, C. J. This is an action of trespass, *vi et armis,* brought by George Brown against George K. Kendall, for an assault and battery; and the original defendant having died pending the action, his executrix has been summoned in. The rule of the common law, by which this action would abate by the death of either party, is reversed in this commonwealth by statute, which provides that actions of trespass for assault and battery shall survive. Rev. Sts., chap. 93, § 7.

The facts set forth in the bill of exceptions preclude the supposition, that the blow, inflicted by the hand of the defendant upon the person of the plaintiff, was intentional. The whole case proceeds on the assumption, that the damage sustained by the plaintiff, from the stick held by the defendant, was inadvertent and unin-

tentional; and the case involves the question how far, and under what qualifications, the party by whose unconscious act the damage is done is responsible for it. We use the term "unintentional" rather than involuntary, because in some of the cases, it is stated, that the act of holding and using a weapon or instrument, the movement of which is the immediate cause of hurt to another, is a voluntary act, although its particular effect in hitting and hurting another is not within the purpose or intention of the party doing the act.

It appears to us, that some of the confusion in the cases on this subject has grown out of the long-vexed question, under the rule of the common law, whether a party's remedy, where he has one, should be sought in an action of the case, or of trespass. This is very distinguishable from the question, whether in a given case, any action will lie. The result of these cases is, that if the damage complained of is the immediate effect of the act of the defendant, trespass *vi et armis lies;* if consequential only, and not immediate, case is the proper remedy. *Leame* v. *Bray,* 3 East, 593; *Hugget* v. *Montgomery,* 2 N. R. 446, Day's Ed. and notes.

In these discussions, it is frequently stated by judges, that when one receives injury from the direct act of another, trespass will lie. But we think this is said in reference to the question, whether trespass and not case will lie, assuming that the facts are such, that some action will lie. These *dicta* are no authority, we think, for holding, that damage received by a direct act of force from another will be sufficient to maintain an action of trespass, whether the act was lawful or unlawful, and neither wilful, intentional, or careless. In the principal case cited, *Leame* v. *Bray,* the damage arose from the act of the defendant, in driving on the wrong side of the road, in a dark night, which was clearly negligent if not unlawful. In the course of the argument of that case (p. 595), LAWRENCE, J., said: "There certainly are cases in the books, where, the injury being direct and immediate, trespass has been holden to lie, though the injury was not intentional." The term "injury" implies something more than damage; but, independently of that consideration, the proposition may be true, because though the injury was unintentional, the act may have been unlawful or negligent, and the cases cited by him are perfectly consistent with that supposition. So the same learned judge in the same case says (p. 597), "No doubt trespass lies against one who drives a carriage against another, whether done wilfully or not." But he immediately adds, "Suppose one who is driving a carriage is negligently and heedlessly looking about him, without attending to the road when persons are passing, and thereby runs over a child and kills him, is it not manslaughter? and if so, it must be trespass; for every manslaughter includes trespass;" showing what he understood by a case not wilful.

We think, as the result of all the authorities, the rule is correctly stated by Mr. Greenleaf, that the plaintiff must come prepared with evidence to show either that the *intention* was unlawful, or that the defendant was *in fault;* for if the injury was unavoid-

able, and that the conduct of the defendant was free from blame, he will not be liable. 2 Greenl. Ev., §§ 85 to 92; *Wakeman* v. *Robinson,* 1 Bing. 213. If, in the prosecution of a lawful act, a casualty purely accidental arises, no action can be supported for an injury arising therefrom. *Davis* v. *Saunders,* 2 Chit. R. 639; Com. Dig. Battery, A. (Day's Ed.) and notes; *Vincent* v. *Stinehour,* 7 Vt. 69. In applying these rules to the present case, we can perceive no reason why the instructions asked for by the defendant ought not to have been given; to this effect, that if both the plaintiff and defendant at the time of the blow were using ordinary care, or if at that time the defendant was using ordinary care, and the plaintiff was not, or if at that time, both the plaintiff and defendant were not using ordinary care, then the plaintiff could not recover.

In using this term, ordinary care, it may be proper to state, that what constitutes ordinary care will vary with the circumstances of cases. In general, it means that kind and degree of care, which prudent and cautious men would use, such as is required by the exigency of the case, and such as is necessary to guard against probable danger. A man, who should have occasion to discharge a gun, on an open and extensive marsh, or in a forest, would be required to use less circumspection and care, than if he were to do the same thing in an inhabited town, village, or city. To make an accident, or casualty, or as the law sometimes states it, inevitable accident, it must be such an accident as the defendant could not have avoided by the use of the kind and degree of care necessary to the exigency, and in the circumstances in which he was placed.

We are not aware of any circumstances in this case, requiring a distinction between acts which it was lawful and proper to do, and acts of legal duty. There are cases, undoubtedly, in which officers are bound to act under process, for the legality of which they are not responsible, and perhaps some others in which this distinction would be important. We can have no doubt that the act of the defendant in attempting to part the fighting dogs, one of which was his own, and for the injurious acts of which he might be responsible, was a lawful and proper act, which he might do by proper and safe means. If, then, in doing this act, using due care and all proper precautions necessary to the exigency of the case, to avoid hurt to others, in raising his stick for that purpose, he accidentally hit the plaintiff in his eye, and wounded him, this was the result of pure accident, or was involuntary and unavoidable, and therefore the action would not lie. Or if the defendant was chargeable with some negligence, and if the plaintiff was also chargeable with negligence, we think the plaintiff can not recover without showing that the damage was caused wholly by the act of the defendant, and the plaintiff's own negligence did not contribute as an efficient cause to produce it.

The court instructed the jury, that if it was not a necessary act, and the defendant was not in duty bound to part the dogs, but might with propriety interfere or not as he chose, the defendant was responsible for the consequences of the blow, unless it appeared that

he was in the exercise of extraordinary care, so that the accident was inevitable, using the word not in a strict but a popular sense. This is to be taken in connection with the charge afterward given, that if the jury believed, that the act of interference in the fight was unnecessary (that is, as before explained, not a duty incumbent on the defendant), then the burden of proving extraordinary care on the part of the defendant, or want of ordinary care on the part of the plaintiff, was on the defendant.

The court are of opinion that these directions were not conformable to law. If the act of hitting the plaintiff was unintentional, on the part of the defendant, and done in the doing of a lawful act, then the defendant was not liable, unless it was done in the want of exercise of due care, adapted to the exigency of the case, and therefore such want of due care became part of the plaintiff's case, and the burden of proof was on the plaintiff to establish it. 2 Greenl. Ev., § 85; *Powers* v. *Russell,* 13 Pick. (Mass.) 69, 76; *Tourtellot* v. *Rosebrook,* 11 Metc. 460.

Perhaps the learned judge, by the use of the term extraordinary care, in the above charge, explained as it is by the context, may have intended nothing more than that increased degree of care and diligence, which the exigency of particular circumstances might require, and which men of ordinary care and prudence would use under like circumstances, to guard against danger. If such was the meaning of this part of the charge, then it does not differ from our views, as above explained. But we are of opinion, that the other part of the charge, that the burden of proof was on the defendant, was incorrect. Those facts which are essential to enable the plaintiff to recover, he takes the burden of proving. The evidence may be offered by the plaintiff or by the defendant; the question of due care, or want of care, may be essentially connected with the main facts, and arise from the same proof; but the effect of the rule, as to the burden of proof, is this, that when the proof is all in, and before the jury, from whatever side it comes, and whether directly proved, or inferred from circumstances, if it appears that the defendant was doing a lawful act, and unintentionally hit and hurt the plaintiff, then unless it also appears to the satisfaction of the jury, that the defendant is chargeable with some fault, negligence, carelessness, or want of prudence, the plaintiff fails to sustain the burden of proof, and is not entitled to recover.

New trial ordered.

Accord: See *Morris* v. *Platt,* 32 Conn. 75 (1864); *Paxton* v. *Boyer,* 67 Ill. 132 (1873), both cases where the defendant shooting in self-defense injured a bystander; but see also the case supposed by Brian, *arguendo* in Y. B. 6 Edw. IV 7, p. 816, *ante; Martin* v. *Miller,* 16 Mo. 509 (1852), *semble;* and see Doe, C. J., in *Brown* v. *Collins,* 53 N. H. 442 (1873); *Sullivan* v. *Murphy,* 2 Miles 298 (Pa. 1839), the defendant stumbled and fell against a stove in a bar room overturning the stove and throwing boiling water from a vessel, standing thereon, upon the plaintiff. The court charged that if the fall of the defendant was a mere accident, brought about without any default or negligence or improper conduct on his part, he would not be responsible for the plaintiff's injury; but the fall was the effect of intoxication from voluntary drinking, he was culpable and the verdict should be for the plaintiff. A rule for a new trial, moved for on the ground of misdirection, was refused.

McGEE *v.* WILLING.

Supreme Court of Pennsylvania, Nisi Prius, 1874. 31 *Legal Intelligencer,* 37.

1. A civil action for damages can be maintained against an infant himself for injuries done by him while under the age of seven years.

2. Whether a woman undertaking to perform the duties of a nurse assumes the risk of being injured by the follies of a child, not decided.

SHARSWOOD, J.—Gentlemen of the jury: This is, in some respects, a novel and interesting case. The defendant is sued by the plaintiff for an assault and battery, alleged to have been committed by him on her four years ago, at a time when he was not six years of age. Of that there is no doubt, and she claims to recover of him the damages which she has sustained in consequence thereof.

There is no doubt whatever that such an infant being in the eye of the law deficient in mental capacity and under seven years of age, is not liable, in a criminal proceeding, to be punished for his acts contrary to law, any more than would an idiot, or would a person of unsound mind; the *malus animus,* the evil intention, which is essential to constitute crime, would be wanting. Had then, the defendant been proceeded against criminally for this alleged assault, he could not have been convicted in a court of justice, and would have been entitled to his acquittal on the ground of his age alone; or had he inflicted a blow on the plaintiff, which had produced death, he could not have been convicted or punished even for the lowest degree of homicide; but the law is certainly different, I think, as to the liability of a person for the consequences of civil injuries in a civil court of justice when proceeded against in an action. The evil intention, or *malus animus,* which is essential to constitute crime, is not essential to constitute liability, though of course it enters very materially into the question of the amount of damages which are to be recovered in the case. In ordinary cases, in the instance of an adult, if the injury is not the effect of an unavoidable accident, the person by whom it was inflicted is liable to respond in damages to the sufferer, however innocent he may be in respect to intending an injury to anybody. Thus, in a very old case decided in England as far back as Henry the seventh, in the year 1505, more than three hundred and fifty years ago, where in shooting at a mark, the archer's arrow glanced and struck another, struck a person who was present, it was held that it would be a trespass for which he would be civilly responsible. In another later case, where a number of persons were lawfully exercising themselves in a military muster, one whose gun went off accidentally and wounded another, was held liable in trespass for the injury, and it was laid down in that case as clear law, that if a lunatic hurt a man he should be answerable in damages, and no man should be excused for trespass except it be adjudged entirely without his fault. The liability therefore, to answer in damages for trespass, does not depend upon the capacity of the actor, and if it were nec-

essary, very good reasons could be given for it. Where infants are the actors, that may probably be considered, however, an unavoidable accident, which would not be so considered where the actors are adults; but such a distinction, if it exists at all, does not apply to this case; for if the evidence of the plaintiff be believed, here was a blow voluntarily inflicted by the defendant, and not an accident resulting from mere negligence, which might not be imputable to so young an infant. If this had been an injury arising from negligence, I suppose the law to be very clear that no negligence could be imputed to so young an infant; but this blow, if the testimony of the plaintiff is to be believed, was voluntarily given, and was not the result of negligence, although it may have been and was the mere act of a foolish child, ignorant of the consequences.[1]

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[1] *Accord: Harvey* v. *Dunlop,* Hill & Denio, 193 (N. Y. 1843), where the defendant was a boy of six; Y. B. 35, Hen VI 11, pl. 18, where the defendant's counsel said that the defendant was no more than five years of age and so he shows clearly that he has not the discretion to commit a trespass or to entertain malice; *Huchting* v. *Engle,* 17 Wis. 230 (1863), child of six liable in *trespass quare clausum fregit.* Compare *Nagle* v. *Allegheny Valley R. Co.,* 88 Pa. 35 (1878); *Savannah F. & W. R. Co.* v. *Waller,* 97 Ga. 164 (1895); *Gunn* v. *Ohio River R. Co.,* 42 W. Va. 676 (1896); *Chicago City R. Co.* v. *Tuohy,* 196 Ill. 410 (1902), and *Nashville R. Co.* v. *Howard,* 112 Tenn. 107 (1903), as to the capacity of very young children to be guilty of contributory negligence barring recovery for injuries due to the negligence of others.

Accord also: *Vosburg* v. *Putney,* 80 Wis. 523 (1891), and *Haffner* v. *Peterson,* 59 Ind. 130, note 1 thereto; *Bullock* v. *Babcock,* 3 Wend. 391 (N. Y. 1829); *O'Brien* v. *Loomis,* 43 Mo. App. 29 (1890), in all of which the injury was the direct result of a willed act of a child of ten to twelve; *Neal* v. *Gillett,* 23 Conn. 437 (1855), where a horse was frightened by a ball thrown in play by a boy of twelve, who the court regarded as having sufficient discretion to make his act culpably negligent; *Conklin* v. *Thompson,* 29 Barb. 218 (N. Y. 1859), horse frightened by firecrackér thrown into street by boy of fourteen; *Edwards* v. *Crume,* 13 Kans. 348 (1874), boy, age not stated, set fire to prairie which spread to plaintiff's adjacent premises, *Smith* v. *Davenport,* 45 Kans. 423 (1891), boy, age not stated, riding on a pony, ran over plaintiff.

The minor's act is none the less a trespass in him because done by his father's command. *Edwards* v. *Crume,* 13 Kans. 348 (1874); *Scott* v. *Watson,* 46 Maine 362 (1859).

So a lunatic, though not punishable criminally is liable to make compensation for the harm done by his acts, *Weaver* v. *Ward,* 1 Hobart 134; *McIntyre* v. *Sholty,* 121 Ill. 660 (1887); *Jewell* v. *Colby,* 66 N. H. 399 (1890), both cases of death caused by acts of an insane person which would have been criminal had he been sane; and *Morse* v. *Crawford,* 17 Vt. 499 (1845), an insane bailee destroyed the property entrusted to him.

In *Williams* v. *Hays,* 157 N. Y. 541 (1899), it was held that an insane person was not answerable for negligent non-feasance, at least if his insanity is due to no fault of his own, and a person totally lunatic is held in *Worthington* v. *Mencer,* 96 Ala. 310 (1891), to be incapable of contributory negligence.

In *Cross* v. *Andrews,* 2 Croke 622, an insane innkeeper is held as fully liable for the loss of his guest's property as though sane and in *Cross* v. *Kent,* 32 Md. 581 (1870), it was said that a lunatic was as answerable if he burned the plaintiff's barn by accident as if he had burned it intentionally, but see *Jewell* v. *Colby,* 66 N. H. 399 (1890).

Both infants and lunatics are liable for injuries due to the negligent upkeep of their real estate, *McCabe* v. *O'Connor,* 4 N. Y. App. Div. 354 (1896), 162 N. Y. 600 (1900); *Morain* v. *Devlin,* 132 Mass. 87 (1882), "there is no reason for holding that the lunatic, having the benefits, is exempt from responsibilities of ownership of real estate," per Gray, C. J.

(b) False imprisonment.

FRAZIER *v.* TURNER.

Supreme Court of Wisconsin, 1890. 76 *Wis.* 562.

Action to recover damages for alleged false imprisonment. On the trial in the court below the plaintiff recovered, and from the judgment rendered in his favor the defendants Martha E. Turner and David Turner appeal to this court.

On the trial it was shown that the warrant was issued on a complaint signed by the defendant but in the handwriting of Mr. Duff, the district attorney. The defendant took the warrant from the magistrate, stating that she wanted Mr. Conger, the deputy-sheriff, to serve it. Conger later brought the plaintiff before the magistrate.

The defendants offered to show that they had, previous to the application for the warrant, made a statement of the facts to Mr. Duff, the district attorney, and that he drew up the complaint. This was objected to by the plaintiff, and excluded by the trial court, on the ground that, as there was no claim that the arrest was maliciously made, and no claim for punitory damages, the motive which actuated the defendants in making the complaint and procuring the arrest was immaterial.

TAYLOR, J. On this appeal it is contended by the learned counsel for the plaintiff and respondent that the complaint and warrant do not state facts sufficient to show that the plaintiff had committed any crime known to the law; that the warrant was absolutely void upon its face, and was therefore no justification to the officer serving the same for making the arrest complained of; and it is also insisted that there is sufficient evidence to show that the appellants, Martha E. and David Turner, directed the officer serving such void warrant to make such arrest, and are therefore liable in the law for such unlawful arrest. On the part of the appellants, the counsel claim that the warrant was not void on its face, and, if it was voidable, it could have been amended by the justice on the return of the warrant, on the application of the state.

We think there can be no doubt but that the complaint does not state facts showing that the plaintiff had committed any crime, and that the warrant was void on its face for the same reason. The warrant was void because it does not state that the thing alleged to have been stolen was of any value.

The warrant being void on its face, was no justification for the arrest by the deputy-sheriff; and the appellants having delivered the void warrant to the sheriff, and having directed him to make the arrest on such void warrant, are equally liable with the sheriff. This was fully discussed and decided by this court in the case of *Gelzenleuchter* v. *Niemeyer,* 64 Wis. 316. There is as much evidence of the participation of the appellants in making the arrest in

this case as in the case last above cited. The question as to whether the appellants participated in procuring the arrest of the respondent under the void warrant was properly submitted to the jury by the learned circuit judge.

There was no error in excluding the evidence offered by the appellants that they had submitted the facts in the case to the district attorney, and acted under his advice. Having participated in the arrest of the plaintiff under a void warrant, they are equally liable as the officer making such arrest.

By the Court.—The judgment of the circuit court is affirmed.[1]

(c) Trespass to property.

HAZELTON *v.* WEEK.

Supreme Court of Wisconsin, 1880. 49 *Wis.* 661.

COLE, J. In the court below this was treated as an action of trespass for unlawfully entering upon the plaintiff's land and cutting and removing therefrom a quantity of pine timber. There was no dispute on the trial that the logs were cut on the plaintiff's land, and that the defendant *Week* had them and manufactured them into lumber. Nor was there any claim that the defendant *Week* himself cut any of the logs. It is clearly established by the evidence, and the fact is conceded, that he did not, but that the defendant Hughes, with his brother, and person employed by them, actually cut the timber. The contention in the court below was, whether *Week* employed the brothers Hughes to cut the timber, agreeing to pay them for their work, or whether he simply agreed to buy the logs of them, which they cut on their own responsibility.

It seems to have been assumed by the learned circuit court, that if *Week* merely agreed to buy the logs which Hughes cut, then he would not be responsible in this action of trespass; for the court in effect charged upon this question, that if the jury found from the testimony that *Week* employed Hughes to cut the logs for him, agreeing to pay him for his work, then he would be liable for the trespass; but if the agreement simply was that *Week* would buy the logs which Hughes got out, and then *Week* took them under that arrangement, without notice or knowledge of the trespass by Hughes, then he would not be liable in an action for such trespass. This charge was excepted to by the plaintiff; and in view of the evidence there can be no doubt that it was well calculated to mislead the jury to his prejudice. It may be assumed at the outset that

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[1] See also *Campbell* v. *Sherman,* 35 Wis. 103 (1874), where it was held that a sheriff seizing a vessel was liable for seizing a ship under a process issued by a circuit court of the state under a statute, which, being unconstitutional, gave it no jurisdiction.

Week purchased the logs of the Hugheses, as he said he did, in good faith, without notice that they had been guilty of trespass in cutting them. He was sworn on his own behalf on the trial, and testified to this effect. He says that the agreement was that he was to purchase the logs which the Hugheses should cut, at three dollars per thousand, they furnishing their own timber. He admits that he went upon the plaintiff's land not knowing who owned it at the time, and examined the logs, which were banked thereon. He denies, however, that he knew these logs had been cut upon this land. But he says that he furnished a man to aid in scaling the logs, and on his cross-examination makes this admission: "I removed the timber from the land, or my men did and I paid them for it. Frank helped, and that was part of the bargain, that he should help get the logs into the creek. I paid for men to go up and get the logs and drive them down. * * * I did not know when I made the bargain with the Hugheses, in the fall of 1875, that they had previously trespassed on lands where they had no right."

Now, assuming, as we do, that this is a true version of the transaction—that *Week* had merely agreed to purchase of the Hugheses the logs which they might cut and get out—yet if the Hughes brothers entered upon the plaintiff's land without right or authority, and committed a trespass by cutting the timber standing thereon, and *Week,* with his servants, also entered upon the premises and removed the logs and converted them to his own use, he is responsible equally to the Hugheses to the owner, or plaintiff, for the value of the logs. The Hughes brothers certainly acquired no title to the timber by severing it from the soil; they were simply wrongdoers, and consequently could confer no title by the formality of a sale. As soon as the timber was cut it became the personal property of the owner of the land, and *Week* in going upon the premises and removing the logs without authority from such owner, was a trespasser, and liable in damages for the wrong. It is not essential to that responsibility that the element of a wilful or intentional trespass should enter into the transaction; it was sufficient that he was taking away property that he had no right to remove. If he did not know who owned the land, he was bound to know that the logs severed from the soil were the property of the owner, whoever he might be, and that without the consent of such owner he had no right to interfere with the property. The rule of law is well settled in this court.

In *Dexter* v. *Cole,* 6 Wis. 320, which was an action of trespass, it appeared that the defendant, who was a butcher in Milwaukee, was driving some sheep he had purchased, toward the city, upon the highway, when they became mixed with a small lot belonging to the plaintiff, which were running at large upon the highway. The defendant drove the whole flock into a yard near the road, for the purpose of parting them, and did not throw out a number which he did not claim, and pursued his way with the remainder to his slaughter-house, where they were slaughtered in his business. The

evidence tended to show, and if the jury found it did show, that some four of the plaintiff's sheep remained in the flock, and were driven to Milwaukee and slaughtered. The court sustained the action on the ground that any unlawful interference with, or acts of ownership over property, the exclusion of the owner, was sufficient to sustain the action, and that it was not necessary to show actual or forcible dispossession of the property; that the intent did not necessarily enter into the trespass; that it was sufficient if the act done was without a justifiable cause or purpose. But perhaps the case nearest in point to the one at bar is *Higginson* v. *York,* 5 Mass. 341. The head note thus states the case: "A., having entered the close of B., and having cut a quantity of cord wood, sells the same to C., who hires D., the master of a coasting vessel, to go in company with C. and transport the wood to market. D. was held liable for the value of the wood in an action of trespass *quare clausum fregit,* brought by B., although it was agreed he was ignorant of the original trespass committed by A."

In *Hobart* v. *Hagget,* 12 Maine 67, which was an action of trespass for taking an ox belonging to the plaintiff, it was proved that the defendant met the plaintiff in the street, and bought of the latter an ox, which the plaintiff directed him to go and take out of his enclosure, and the defendant, by mistake, took the wrong ox. The defendant was held liable in the action. The court says: "The taking of the plaintiff's ox was the deliberate and voluntary act of the defendant. He might not have intended to commit a trespass in so doing. Neither does the officer, when, on a precept against A., he takes, by mistake, the property of B., intend to commit a trespass; nor does he intend to become a trespasser who, believing that he is cutting timber on his own land, by mistaking the line of division, cuts on his neighbor's land; and yet in both cases the law would hold them as trespassers." Cooley on Torts, 348, lays down the same doctrine.

But it would seem to be quite unnecessary to extend our remarks upon this question. The above authorities, and others which might be cited, of the same import, abundantly show that the defendant *Week,* by entering upon the premises of the plaintiff and removing therefrom the logs in controversy, was simply a wrongdoer, and is responsible in damages for the value of the property taken. If he did not intend to commit a trespass, of course no exemplary damages could be recovered against him; but he is surely liable, upon every just principle, for the value of the property which he unlawfully removed and converted to his own use. Therefore, without noticing the other questions discussed on the briefs of counsel, we must reverse the judgment and order a new trial.

By the Court—It is so ordered.[1]

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[1] In the following cases the defendant cut timber or mined minerals upon the plaintiff's land through a mistake as to the boundaries, *Oswalt* v. *Smith,* 97 Ala. 627 (1893); *Jeffries* v. *Hargis,* 50 Ark. 65 (1887); *Mishler Lumber Co.* v. *Craig,* 112 Mo. App. 454 (1905); *Perry* v. *Jefferies,* 61 S. Car. 292 (1901); *Luttrell* v. *Hazen,* 3 Sneed 20 (Tenn. 1855); *Small* v. *Ball,* 47 Vt. 486

RUSSELL *v.* IRBY.

Supreme Court of Alabama, 1848. 13 *Ala.* 131.

COLLIER, C. J. The seventh section of the act of 1807, "to prevent trespasses in certain cases," enacts, "If any person shall cut down, carry away, or destroy, any cypress, white oak, black walnut, pecan, or cherry tree, upon any lands not his own, without first having the consent of the owner, he shall forfeit and pay the owner thereof ten dollars for every such tree, so cut, carried away, or destroyed." Clay's Dig. 581. There can be no doubt that where a statute imposes a penalty, but omits to prescribe a remedy for its recovery, that an action of debt will lie at the suit of the party entitled to it. The material question in the case before us, is, whether to subject one to liability under the statute, it is enough to show mistake, or even carelessness. We think it entirely clear, that the cutting of trees upon another's land, under the impression that the party had not gone beyond his own boundaries, was not within the contemplation of the legislature. Moral justice would forbid any extraordinary infliction in such a case, and the damages recoverable at common law, would afford an adequate reparation. Whether negligence so gross as to indicate an entire recklessness, or indifference to the rights of another, would be a substitute for actual knowledge, or authorize its application, need not be considered. The facts before us show nothing more than a mere accident or mistake, consistent with honest intention. This construction of the act rests not upon the mere fitness of the thing, and the suggestions of reason, but is supported by at least one most respectable adjudication directly in point. In *Batchelder* v. *Kelly,* 10 N. H. 436, which was an action under a similar statute to recover

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(1874); *Maye* v. *Tappan,* 23 Cal. 306 (1863); *Atlantic etc. Co.* v. *Maryland Coal Co.,* 62 Md. 135 (1884): *Herdic* v. *Young,* 55 Pa. 176 (1867).

In *Pearson* v. *Inlow,* 20 Mo. 322 (1855), and *Maye* v. *Tappan,* 23 Cal. 306 (1863), the defendant was held guilty of trespass though misled by the innocent misstatements of the plaintiff, who was himself mistaken as to the location of his boundary.

In *Cubit* v. *O'Dett,* 51 Mich. 347 (1883), the defendant acting under direction and orders of an overseer of highways, cut a ditch which threw surface water upon the plaintiff's land.

The defendant's entry upon the plaintiff's land is none the less a trespass because made in the *bona fide* assertion of a title which he thought to be good, *Shipman* v. *Baxter,* 21 Ala. 456 (1852), or in the exercise of an authority which he in good faith believed he possessed, *Coffman* v. *Burkhalter,* 98 Ill. App. 304 (1901).

In the following cases the defendant took or carried away, or destroyed, personal property, under an honest mistake as to the identity of the chattel, (*Hobart* v. *Hagget,* 12 Maine 67 (1835), cited in principal case), or as to his title thereto, (*Humbser* v. *Scott,* 5 Mo. App. 597 (1878), a trustee under a fraudulent deed of trust, liable in trespass for removing and selling goods covered thereby); or as to the title of another whom he assisted in removing goods, *Wallard* v. *Worthman,* 84 Ill. 446 (1877), defendant in good faith assisted the holder of a bill of sale in fact given as security only, to recover goods covered thereby, and see *Cate* v. *Cate,* 44 N. H. 211 (1862).

the penalty prescribed for cutting and carrying away trees on the land of another, the court said, to subject a party to the penalty: "it must appear that the act was done knowingly and wilfully, and not through mistake or accident; in which latter case the party would be entitled to recover only the value of the injury he had actually sustained. The general tenor of the statute is such, as wholly to preclude the idea that it was designed to apply to unintentional trespasses." This latter remark applies with equal justness to our statute.[1]

NEWSOM *v.* ANDERSON.

Supreme Court of North Carolina, 1841. *2 Iredell (Law)* 42.

This was an action of Trespass *vi et armis quare clausum fregit,* tried at the Fall Term, 1841, of Stokes Superior Court, before his Honor Judge Nash. The plaintiff and defendant were owners of contiguous tracts of land. In clearing near the dividing line, a tree cut on the defendant's land fell with part of the top on the land of the plaintiff. There was no evidence to show that the tree was felled by design or carelessness on the plaintiff's land; nor was there any evidence to show that when the tree fell there was any grass or vegetable growth of any kind, or that any actual injury was sustained by the land. The counsel for the plaintiff requested the Court to charge the Jury, that when a man, in clearing his land, fells a tree so that any part of it falls on his neighbor's land, it is a trespass for which an action of trespass *quare clausum fregit* can be sustained. The Court declined giving the instruction as prayed for, but charged the Jury that every voluntary entry on the land of another, without his consent, and not sanctioned by the law, was a trespass for which an action could be brought—that in this case the plaintiff could not sustain his action, unless they were satisfied from the evidence that the tree was designedly or carelessly felled by the defendant so as to fall on the plaintiff's land, or that, by falling on

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[1] *Accord: Whitecraft* v. *Vanderver,* 12 Ill. 235 (1850); *Watkins* v. *Gale,* 13 Ill. 152 (1851); *Russell* v. *Myers,* 32 Mich. 522 (1875); *Perkins* v. *Hackleman,* 26 Miss. 41 (1853), no statutory double damages can be recovered where the defendant had reason to believe he owned the land or had the authority of the owner, but see *Loewenberg* v. *Rosenthal,* 18 Ore. 178 (1889), *contra* under the peculiar wording of the statute of that state.

As to the different measure of damages where the trespass is innocent and where it is intentional, see *Herdic* v. *Young,* 55 Pa. 176 (1867); *Maye* v. *Yappen,* 23 Cal. 306 (1863); and *Winchester* v. *Craig,* 33 Mich. 205 (1876); *United States* v. *Gentry,* 119 Fed. 70, 55 C. C. A. 658 (Eighth Circuit, 1902).

If the defendant intends to commit a trespass upon public lands he is liable to the penalty if the land is in fact the private property of the plaintiff, *Givens* v. *Kendrick,* 15 Ala. 648 (1849); *Perkins* v. *Hackleman,* 26 Miss. 41 (1853); *Emerson* v. *Beavaus,* 12 Mo. 511 (1849).

But a master is not liable to such a penalty because his servant of his own motion intentionally trespasses upon the plaintiff's land and appropriates its produce for the use of the master's cattle, *Potulni* v. *Saunders,* 37 Minn. 517 (1887).

the plaintiff's land, it had fallen on his grass or vegetable growth of some kind. There was a verdict and judgment for the defendant, and the plaintiff appealed.

J. T. Morehead for the plaintiff, cited Rev. Stat., ch. 31, § 83; *Dougherty* v. *Stepp*, 1 Dev. and Bat. 371; *Gregory* v. *Piper*, 17 Eng. C. L. R. 197.

No counsel appeared for the defendant in this Court.

DANIEL, J. To sustain trespass, the injury must in general be immediate, and committed with force, either actual or implied. If the injurious act be the immediate result of the force originally applied by the defendant, and the plaintiff be injured thereby, it is the subject of an action of trespass *vi et armis*, by all the cases both ancient and modern, and it is immaterial whether the injury be *wilful or not*. *Leame* v. *Bray*, 3 East 599; 2 Leigh's N. P. 1402. We think that the charge of the Judge was incorrect, when he said "that the plaintiff could not recover, unless the tree was designedly or carelessly felled by the defendant, so as to fall on the plaintiff's land, or that, by falling on the plaintiff's land, it had fallen on his grass or vegetable growth of some kind." The ground of the action, Q. C. F. is the injury to the possession (3 Black. Com. 210; 1 Term R. 480), and that, whether the injury extends to the plaintiff's land in the mineral or vegetable kingdom. Is not the felling of trees on a person's land and encumbering it with rubbish an injury to the possession? We think it is. Where a master ordered his servant to lay down a quantity of rubbish near his neighbor's wall, but so that it might not touch the same, and the servant used ordinary care in executing the orders of his master, but some of the rubbish naturally ran from the pile against the wall, it was held that the master was liable in trespass. *Gregory* v. *Piper*, 17 Eng. C. L. 454.

We are of the opinion that there must be a new trial.

PER CURIAM. New trial awarded.

Compare Y. B. 6 Edw. IV, 7 pl. 18, *ante*.

So one casting upon the land of another rocks and debris by blasting is guilty of trespass *quare clausum fregit*, *Hay* v. *Cohoes Co.*, 2 N. Y. 159 (1849); *Scott* v. *Bay*, 3 Md. 431 (1853); *Bessemer &c. Co.* v. *Doak*, 152 Ala. 166 (1907); *G. B. & L. Ry. Co.* v. *Eagles*, 9 Colo. 544 (1886), "in general," says Helm, J., in the last named case, "if a voluntary act, lawful in itself, may naturally result in the injury of another or the violation of his legal rights, the actor must at his peril see to it that such injury or such violation does not follow or he must expect to respond in damages therefor; and this is true regardless of the motive or the degree of care with which the act is done. Perhaps, on the ground of public policy, an injunction to restrain the excavating of the defendant company's road-bed would not have issued at the suit of plaintiff, even though blasting were necessary; but public policy could not exonerate the company from liability for private damage directly resulting from its acts." See also, note 2 to *Fitzsimons & Connell* v. *Braun & Fitts*, *post*, and cases cited therein, and see *Lawson* v. *Price*, 45 Md. 123 (1876), where the defendant in cutting timber along a stream within his own land allowed branches, etc., to fall therein, thereby obstructing the plaintiff's mill-race, "The question," said Alvey, J., "is not whether the defendant acted with due care, but whether his acts have occasioned the damage complained of."

To constitute trespass *quare clausum fregit* it is not necessary to person-

ally invade the plaintiff's close, and it is enough if one deliberately throws stones against his house or door, *Prewitt* v. *Clayton*, 5 T. B. Monr. 4 (Ky. 1827), or casts a dead animal from the road into his well, *Emory* v. *Collings*, 1 Harrington 325 (Del. 1832), or shoots over the plaintiff's land so that the shot or the game killed falls upon it, Lord Ellenborough in *Pickering* v. *Rudd*, 1 Starkie 46 (1815); *Whittaker* v. *Stangvick*, 100 Minn. 386 (1907); and see *Forbell* v. *City of New York*, 164 N. Y. 522 (1900), where the defendant by the use of powerful pumps, some distance from the plaintiff's land, deliberately sucked all the water from the plaintiff's soil.

THE NITRO-GLYCERINE CASE.

(Parrot *v.* Wells, Fargo & Co.)

Supreme Court of the United States, 1872. 15 *Wallace* 524.

In 1866 the defendants, who were expressmen engaged in carrying packages between New York and California, by way of the Isthmus of Panama, received at New York a box containing nitro-glycerine to be carried to California. There was nothing in the appearance of the box tending to excite any suspicion of the character of its contents. It was received and carried in the usual course of business, no information being asked or given as to its contents. On arriving at San Francisco, California, its contents were leaking and resembled sweet oil. The box was then taken for examination, as was the custom with the defendants when any box carried by them appeared to be damaged, to the premises occupied by them, which were leased from the plaintiff. Whilst a servant of the defendants, by their direction, was attempting to open the box the nitro-glycerine exploded, injuring the premises occupied by them and other premises leased by the plaintiff to, and occupied by, other parties. The defendants had no knowledge of, and no reason to suspect, the dangerous character of the contents. They repaired the injuries to the premises occupied by them.[1]

MR. JUSTICE FIELD, after stating the facts of the case, delivered the opinion of the court, as follows:

The question presented to us is, whether upon this state of facts the plaintiff is entitled to recover for the injuries caused by the explosion to his buildings, outside of that portion occupied by the defendants under their lease.

The defendants, being perfectly ignorant of the contents of the case, received in the regular course of their business, were not guilty of negligence in introducing it into their place of business and handling it in the same manner as other packages of similar outward appearance were usually handled. "Negligence" has been defined to be "the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent

[1] The statement of facts is taken from the head note and only a part of the opinion is given.

and reasonable man would not do." (*Blyth* v. *Birmington Water Works,* 11 Exchequer, 784.) It must be determined in all cases by reference to the situation and knowledge of the parties and all the attendant circumstances. What would be extreme care under one condition of knowledge, and one state of circumstances, would be gross negligence with different knowledge and in changed circumstances. The law is reasonable in its judgments in this respect. It does not charge culpable negligence upon any one who takes the usual precautions against accident, which careful and prudent men are accustomed to take under similar circumstances.

This action was not brought upon the covenants of the lease; it is in trespass for injuries to the buildings of the plaintiff, and the gist of the action is the negligence of the defendants: unless that be established, they are not liable. The mere fact that the injury has been caused is not sufficient to hold them. No one is responsible for injuries resulting from unavoidable accident, whilst engaged in a lawful business. A party charging negligence as a ground of action must prove it. He must show that the defendant, by his act or by his omission, has violated some duty incumbent upon him, which has caused the injury complained of.

The cases between passengers and carriers for injuries stand upon a different footing. The contract of the carrier being to carry safely, the proof of the injury usually establishes a *prima facie* case, which the carrier must overcome. His contract is shown, *prima facie* at least, to have been violated by the injury. Outside of these cases, in which a positive obligation is cast upon the carrier to perform safely a special service, the presumption is that the party has exercised such care as men of ordinary prudence and caution would exercise under similar circumstances, and if he has not, the plaintiff must prove it.

Here no such proof was made, and the case stands as one of unavoidable accident, for the consequences of which the defendants are not responsible. The consequences of all such accidents must be borne by the sufferer as his misfortune.

The principle is recognized and affirmed in a great variety of cases—in cases where fire originating in one man's building has extended to and destroyed the property of others; in cases where injuries have been caused by fire ignited by sparks from steamboats or locomotives, or caused by horses running away, or by blasting rocks, and in numerous other cases which will readily occur to every one. The rule deducible from them is, that the measure of care against accident, which one must take to avoid responsibility, is that which a person of ordinary prudence and caution would use if his own interests were to be affected, and the whole risk were his own.

And the principle is not changed whether the injury complained of follows directly or remotely from the act or conduct of the party. The direct or remote consequences of the act or conduct may determine the form of the action, whether it shall be case or trespass,

where the forms of the common law are in use, but can not alter the principle upon which liability is enforced or avoided.

JUDGMENT AFFIRMED.[2]

SECTION 4.

Plaintiff's Consent.

(a) Trespass to the person.

PILLOW AND WIFE *v.* BUSHNELL.

Supreme Court of New York, 1849. 5 *Barb.* 156.

This was an action brought by husband and wife, for an assault and battery on the wife, tried at the Columbia circuit before Justice CADY, in October, 1848. The plaintiffs, some time after their marriage, had joined the society of Shakers, at New Lebanon. The husband abandoned the society, and afterward, in August, 1847, went back to New Lebanon for the purpose of taking away his wife. She was unwilling to leave, and the assault and battery charged was that the defendant had rescued the wife from her husband when he had her by the arm taking her out of the house. The defense was that in what the defendants did they acted by the consent and at the request of the wife.

The judge, among other things, charged the jury, that if they were satisfied that no assault had been committed upon her, or that what was done by the defendants was with her consent and concurrence and by her desire, they must find a verdict for the defendants; for if she, being the party assaulted, consented to the assault,

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[2] See *Losee* v. *Buchanan*, 51 N. Y. 476 (1875). See also, *Brown* v. *Collins*, 53 N. H. 442 (1873), where the defendant's horse ran away and ran into and injured a post on the plaintiff's property; Doe, J., said, p. 450, "There are many cases where a man is held liable for taking, converting—*Cheshire R. Co.* v. *Foster*, 51 N. H. 490—or destroying property, or doing something else, or causing it to be done, intentionally, under a claim of right, and without any actual fault. 'Probably one-half the cases, in which trespass *de bonis asportatis* is maintained, arise from a mere misapprehension of legal rights.' Metcalf, J., in *Stanley* v. *Gaylord*, 1 Cush. 536 (Mass. 1848). When a defendant erroneously supposed, without any fault of either party, that he had a right to do what he did, and his act, done in the assertion of his supposed right, turns out to have been an interference with the plaintiff's property, he is generally held to have assumed the risk of maintaining the right which he asserted, and the responsibility of the natural consequences of his voluntary act. But when there was no fault on his part, and the damage was not caused by his voluntary and intended act; or by an act of which he knew, or ought to have known, that damage would be a necessary, probable, or natural consequence; or by an act which he knew, or ought to have known, to be unlawful, —we understand the general rule to be, that he is not liable."

if one was proved to have been committed, the action would not lie. The plaintiff's counsel excepted to that part of the charge which held that her consent constituted a defense. And the jury found a verdict for the defendants.

PARKER, J. As to the other charge presented, I am equally well satisfied that the charge was correct. If the act complained of as an assault and battery was committed by the consent and request of the wife, it formed an entire defense. But the ruling at the circuit (that the wife was a competent witness against her husband) having been erroneous on the first point, there must be a new trial. Costs to abide the event.[1]

MOHR *v.* WILLIAMS.

Supreme Court of Minnesota, 1905. 95 *Minn.* 261.

BROWN, J. Defendant is a physician and surgeon of standing and character, making disorders of the ear a specialty, and having extensive practice in the city of St. Paul. He was consulted by plaintiff, who complained to him of trouble with her right ear, and, at her request, made an examination of that organ for the purpose of ascertaining its condition. He also at the same time examined her left ear, but, owing to foreign substances therein, was unable to make a full and complete diagnosis at that time. The examination of her right ear disclosed a large perforation in the lower part of the drum membrane, and a large polyp in the middle ear, which indicated that some of the small bones of the middle ear (ossicles) were probably diseased. He informed plaintiff of the result of his examination, and advised an operation for the purpose of removing the polyp and diseased ossicles. After consultation with her family physician, and one or two further consultations with defendant, plaintiff decided to submit to the proposed operation. She was not informed that her left ear was in any way diseased, and understood that the necessity for an operation applied to her right ear only. She repaired to the hospital, and was placed under the influence of anæsthetics; and, after being made unconscious, defendant made a thorough examination of her left ear, and found it in a more serious condition than her right one. A small perforation was discovered high up in the drum membrane, hooded, and with granulated edges, and the bone of the inner wall of the middle ear was diseased and dead. He called this discovery to the attention of Dr. Davis—the plaintiff's family physician, who attended the opera-

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[1] In *Christopherson* v. *Bare,* 11 Q. B. 473 (1848), a plea of consent to a count of assault was held bad. Denman, C. J., saying (p. 477): "It is a manifest contradiction in terms to say that the defendant assaulted the plaintiff by his permission"; Pattison, J., saying: "An assault must be an act done against the will of the party assaulted; and therefore it cannot be said that a party has been assaulted by his permission;" and Coleridge, J., saying that "If the plea had been not guilty, the defendant might have shown that the act was done in the course of sport between the parties, and by the plaintiff's leave."

tion at her request—who also examined the ear and confirmed defendant in his diagnosis. Defendant also further examined the right ear, and found its condition less serious than expected, and finally concluded that the left, instead of the right, should be operated upon; devoting to the right ear other treatment. He then performed the operation of ossiculectomy on plaintiff's left ear; removing a portion of the drum membrane, and scraping away the diseased portion of the inner wall of the ear. The operation was in every way successful and skilfully performed. It is claimed by plaintiff that the operation greatly impaired her hearing, seriously injured her person, and, not having been consented to by her, was wrongful and unlawful, constituting an assault and battery; and she brought this action to recover damages therefor.

The last contention of defendant is that the act complained of did not amount to an assault and battery. This is based upon the theory that, as plaintiff's left ear was in fact diseased, in a condition dangerous and threatening to her health, the operation was necessary, and having been skilfully performed at a time when plaintiff had requested a like operation on the other ear, the charge of assault and battery can not be sustained; that, in view of these conditions, and the claim that there was no negligence on the part of defendant, and an entire absence of any evidence tending to show an evil intent, the court should say, as a matter of law, that no assault and battery was committed, even though she did not consent to the operation. In other words, that the absence of a showing that defendant was actuated by a wrongful intent, or guilty of negligence, relieves the act of defendant from the charge of an unlawful assault and battery.

We are unable to reach that conclusion, though the contention is not without merit. It would seem to follow from what has been said on the other features of the case that the act of defendant amounted at least to a technical assault and battery. If the operation was performed without plaintiff's consent, and the circumstances were not such as to justify its performance without, it was wrongful; and, if it was wrongful, it was unlawful. As remarked in 1 Jaggard, Torts, 437, every person has a right to complete immunity of his person from physical interference of others, except in so far as contact may be necessary under the general doctrine of privilege; and any unlawful or unauthorized touching of the person of another, except it be in the spirit of pleasantry, constitutes an assault and battery. In the case at bar, as we have already seen, the question whether defendant's act in performing the operation upon plaintiff was authorized was a question for the jury to determine. If it was unauthorized, then it was within what we have said, unlawful. It was a violent assault, not a mere pleasantry; and, even though no negligence is shown, it was wrongful and unlawful. The case is unlike a criminal prosecution for assault and battery, for there an unlawful intent must be shown. But that rule does not apply to a civil action, to maintain which it is sufficient to show that the assault complained of was wrongful and unlawful or the result

of negligence. 1 Addison, Torts, 689; *Lander* v. *Seaver,* 32 Vt. 114; *Vosburg* v. *Putney,* 80 Wis. 523, 50 N. W. 403.

The amount of plaintiff's recovery, if she is entitled to recover at all, must depend upon the character and extent of the injury inflicted upon her, in determining which the nature of the malady intended to be healed and the beneficial nature of the operation should be taken into consideration, as well as the good faith of the defendant.

Orders affirmed.

CADWELL *v.* FARRELL.

The Supreme Court of Illinois, 1862. 28 *Ill.* 438.

WALKER, J. It is insisted that there is a misjoinder of counts in this declaration; that the sixth count is in trespass, whilst the others are in case. This is the only question raised upon this record. If this objection is well taken, the court below erred in refusing to arrest the judgment. The sixth count avers that appellee had a spot on her left eye, which injured her personal appearance, and that appellant falsely, fraudulently and deceitfully represented and pretended to appellee, that by means of his skill and knowledge as an oculist, that he could remove the blemish from her eye, and render its appearance equal to that of her right eye, without any injury to the right eye; and that he would not take out or destroy her left eye, and that she would be well and free from the effects of the treatment in six or seven days.

That appellee, confiding in the truth of the representations thus made by appellant, and believing them to be true, was deceived, and thereby induced, at his special instance and request to treat her left eye, to make it look as well as the right eye, for the sum of thirty dollars, which she paid to him. But that appellant, well knowing as aforesaid, falsely and maliciously pretended to operate on appellee's left eye, for the pretended purpose of causing it to look as well as her right eye, and to remove the spot therefrom; and did cut and lacerate the left eye, by means of which cutting and lacerating and tearing of the left eye, she suffered great pain; and that in consequence thereof, her right eye became greatly inflamed, and she suffered great pain, and was obliged to lay out and expend large sums of money for medical attendance for her cure, and was unable to perform labor for a long space of time.

It is urged that this count charges the operation to have been performed with malice, and that a direct injury to the person, prompted by malice, constitutes a trespass, for which case can not be sustained. Direct and immediate force employed by one person against another, without his consent, with malice, constitutes trespass, however slight the injury produced; but it is otherwise when the force used is with the consent or at the request of the person against whom employed. If a dentist extract a tooth for a person

at his request, whether necessary or not, it is no wrong; but if unskilfully performed, he would become liable in case for the injury resulting from a want of proper skill. If the same act were performed with malice, and without consent, it would be an aggravated trespass, if not a crime. In this case, the operation was performed at the request of appellee. This prevents her from recovering in trespass, and had the operation been skilfully performed, she could have had no right of recovery in any form of action; but if the representations which induced the retainer were false and fraudulent, or if the proper skill was not employed, then case is properly the remedy.[1]

Nor is it alleged that appellant performed the act itself with malice, but that he maliciously pretended to perform the operation, for the purpose of improving the appearance of the eye, when he well knew that such would not be the result. Nor is it averred that the operation was maliciously performed, for the purpose of inflicting pain and injury upon appellee. Had the averment been so made, trespass might probably have been maintained. If, however, the averment had been that the operation was so performed for the purpose of cheating and defrauding appellee of her money, no one could have doubted that the count was in case, and not in trespass. The averment that the act was done falsely, would render it case. The falsity of the action is the gist, and not the malice, as it was not averred to have been designed to produce pain or injury. The word "maliciously" may be rejected as surplusage, without changing the effect of the count.

The judgment of the court below is affirmed.

Judgment affirmed.

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[1] See *accord: Hegarty* v. *Shine*, L. R. 4 Ir. 288 (1878), where the plaintiff, who was the defendant's mistress, sought to recover in trespass for assault and battery for venereal infection, claiming that though she had consented to intercourse, her consent was procured by the defendant's fraudulent concealment of his disease, and therefore the act of intercourse was an assault upon her. The case is complicated by the fact that the relations between the parties were immoral and that there were no false statements made of existing fact but merely concealment of a fact which, in view of the illegal relation of the parties, there was no duty to disclose. But the opinions of the majority of the judges in the Court of Queen's Bench and of all the judges in the Court of Exchequer Chamber proceed on the broad ground that a fraud which induced consent to an act whose nature was known did not vitiate consent so as to make such an act an assault.

In *Regina* v. *Clarence*, 16 Cox C. C. 511 (1888), it was held that a husband could not be convicted of a criminal assault upon his wife, by having intercourse with her while to his knowledge he was infected with venereal disease, she being ignorant of his condition.

The status of the criminal law on the subject is complicated and difficult. If the fraud deceives the victim as to the nature of the act, the consent so obtained is no bar to criminal prosecution for assault or even rape, *Regina* v. *Case*, 4 Cox C. C. 220 (1850). On the other hand, false statements of the object or purpose of the act, or any other fact which induces consent to an act, the nature of which is fully understood, does not vitiate consent so as to permit a conviction for rape or assault with intent to rape, *Regina* v. *Saunders*, 8 C. & P. 265 (1838), though if the defendant's object be to gratify his lascivious imagination at the expense of the

WILLEY *v.* CARPENTER.

Supreme Court of Vermont, 1891. 64 *Vt.* 212.

Trespass for assault and battery. Heard on demurrer to the defendant's second and third pleas at the December term, 1890, Ross, Ch. J., presiding. Demurrer sustained. Exceptions by the defendant, and cause passed to the Supreme Court before final judgment.

The defendant in his second plea alleged in substance that at various times and places the plaintiff had used concerning himself and wife abusive and insulting language with intent to induce an assault, and that finally, goaded to frenzy, he struck the plaintiff a single blow, which was the battery complained of.

The third plea was like the second except that it in addition alleged that the defendant was provoked to commit the assault by the conduct of the plaintiff, and that the plaintiff had entered upon this course of conduct wilfully with intent to provoke the plaintiff to commit the assault in order that he might have an action against him.

THOMPSON, J. This is an action of trespass for an assault and battery.

If the facts set forth in the third plea are taken to amount to a license by the plaintiff to the defendant to commit the alleged assault and battery, such license is no defense to this action. 2 Greenl. Ev. (10th Ed.), § 85; 1 Hill. on Torts (3 ed.) 183; 1 Bac. Abr. (Bouv. Ed.) Assault and Battery, 372. The assaulting or beating of one person by another is a breach of the peace and a misdemeanor at common law as well as by R. L., § 4228. In *Stout* v. *Wren,* 1 Hawks 420 (9 Am. Dec. 653), the plaintiff and defendant quarreled and agreed to fight and after they had gone out for that purpose the defendant asked the plaintiff if he would clear him of the law, and the latter said yes, whereupon the defendant beat him, he making no resistance. The court say: "It is equally reasonable and correct, that a man shall not recover a recompense for an injury received by his own consent; but the rule must necessarily be received with this qualification, that the act from whence the injury proceeded be lawful. Hence, in those manly sports and exercises which are thought to qualify men for the use of arms, and to give them strength and activity, if two played by consent at cudgels and one hurt the other no action would lie. But where in an action for

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modesty of the prosecutrix, her consent to expose her person to his view, if fraudulently procured, will not bar a prosecution for assault, *Rex* v. *Rosinsky,* 1 Moody 19 (1824); *Bartell* v. *State,* 106 Wis. 342 (1900), and as to the whole subject, see "The law as to consent," etc., by Theodore J. Grayson, 42 Am. L. Reg. N. S. 467 (1903).

As to the value of cases holding that the defendant is punishable criminally, as authority for the existence of civil liability for similar acts, see notes to *Galbraith* v. *Fleming,* 60 Mich. 403 (1886), and the opinions of the judges in *Hegarty* v. *Shine,* especially that of Fitzgerald, J., in the Queen's Bench, L. R. 2 Ir., p. 282.

assault and battery, the defendant offered to give in evidence that the plaintiff and he boxed by consent, from whence the injury proceeded, it was held to be no bar to the action, for as the act of boxing is unlawful, the consent of the parties to fight could not excuse the injury; *Boulter* v. *Clark,* Bull. N. P. 16."

Accord: McNeil v. *Mullin,* 70 Kans. 634 (1905); *Jones* v. *Gale,* 22 Mo. App. 637 (1886); *Grotton* v. *Glidden,* 84 Maine 589 (1892); *Willey* v. *Carpenter,* 64 Vt. 212 (1891); *Bell* v. *Hansley,* 48 N. Car. 131 (1855); all cases where the parties fought by mutual consent.

In *Logan* v. *Austin,* 1 Stewart 476 (Ala. 1828), the fact that the plaintiff had consented, on condition that he should not be prosecuted for malicious mischief, that the defendant should beat him was held to be admissible in mitigation of damages but not to be a bar to the action. But see *State* v. *Beck,* 1 Hill 363 (S. Car. 1833), where the facts were similar except that the defendant did not suggest the whipping but inflicted it at the plaintiff's request. Much stress is laid on the fact that the defendant did not intend to injure the plaintiff, but on the contrary, "in order to save him from what he considered a greater evil, reluctantly consented to inflict the stripes," and it is said that it may well be that where one gave another a license to beat him, the license is void, because "the person receiving the license entertained hostile dispositions against the other."

GALBRAITH *v.* FLEMING.

Supreme Court of Michigan, 1886. 60 *Mich.* 403.

MORSE, J. The plaintiff sued defendant in trespass for damages growing out of an alleged assault and battery. Plaintiff brings error. The plaintiff and defendant, who are brothers-in-law, met at the store of Jefferson Galbraith, at Amadore, Sanilac county, on the fourteenth day of July, 1882. The plaintiff was at the rear end of the store, mailing some letters and reading newspapers, while defendant was sitting upon the counter in the front part of the store. The defendant called the plaintiff to account for some words claimed by him to have been spoken by the plaintiff of defendant and defendant's wife, at Lexington, the day before. A quarrel ensued; the parties came together; blows were interchanged; and in the fight the plaintiff got the worst of it, and was more or less bruised and injured.

The court further instructed the jury that if the plaintiff voluntarily engaged in the fight in the first instance for the sake of fighting, and not as a means of self-defense, he could not recover unless the defendant beat him excessively or unreasonably. This was as favorable to the plaintiff as the law will admit. The law does not put a premium upon fighting, and one who voluntarily enters into a quarrel will not be afforded relief for his own wrong in damages if he come out second best. While the voluntary act on the part of the plaintiff would not preclude the state from punishing him or the defendants for breach of the peace, it nevertheless prevents him from bringing a civil action to recover compensation for injuries received by his own seeking, and in violation of law.

In this case the jury found specially that the plaintiff voluntarily

engaged in the fight with the defendant; that he used language inviting a fight, and for the purpose of bringing on an attack.

The evidence, in our opinion, justified these findings. The plaintiff's case was without merit, and the judgment below is affirmed, with costs of both courts.

The other Justices concurred.

So in *Regina* v. *Coney,* 15 Cox C. C. 46 (1882), Hawkins, J., says (p. 60): "It may be that consent can in all cases be given so as to operate as a bar to a civil action, upon the ground that no man can claim damages for an act to which he himself was an assenting party: *(Christopherson* v. *Bare,* 11 Q. B. 473.) That case, however, was decided upon a point of pleading, and must not be considered as a direct authority on this subject. It is not necessary, however, upon the present occasion to express any decided opinion upon the point, for, whatever may be the effect of a consent in a suit between party and party, it is not in the power of any man to give any effectual consent to that which amounts to, or has a direct tendency to create a breach of the peace, so as to bar a criminal prosecution. In other words, though a man may by his consent debar himself from his right to maintain a civil action, he cannot thereby defeat proceedings instituted by the Crown in the interests of the public for the maintenance of good order: (per Burrough, J., in *Rex* v. *Bellingham,* 2 Car. & P. 234.) He may compromise his own civil rights, but he cannot compromise the public interests."

Sir Thomas Ball, L. C., in *Hegarty* v. *Shine,* L. R. 4 Ir. 288, at p. 293, says: "Considerations affect prosecutions not applicable to civil actions. In the former we are concerned with public interests and consequent public policy: in the latter, with the reciprocal rights and liabilities of individuals. Mutual consent to a prize-fight might prevent the pugilists having a remedy *inter se;* but would not make it the less a breach of the peace, or exonerate those engaged in it from punishment."

See also, Young, J., in *Spead* v. *Tomlinson,* 73 N. H. 46 (1904), as to the effect of contributory negligence of a person killed, which would admittedly bar his right to damages had he been merely injured, upon a prosecution for manslaughter by negligence, and holding that the plaintiff's consent to follow the advice of a Christian Science healer and "abide by the result of his prayers" was an answer to her claim for damages for his negligent treatment of her ailment while not necessarily a bar to a prosecution for manslaughter had she died.

REID v. MITCHELL.

Court of Session, 1885. 12 *Session Cases,* 1129.

In November 1884 James Reid, crofter, Greystone, in the parish of Skene, Aberdeenshire, brought an action in the Sheriff Court at Aberdeen against Alexander Mitchell, crofter, Lyne of Skene, in the same parish, praying for £300 in name of *solatium* and damages for bodily injuries sustained by the pursuer.

The pursuer stated that on the 15th March 1884 he and the defender, along with two other men, were engaged in the employment of Mr. Hamilton of Skene, in building a stack of straw in the home farm of Skene, when the defender wilfully, recklessly, and carelessly seized the pursuer by the shoulder, and pushed him off

the stack, so that the pursuer fell backwards to the ground, alighting on his head.

The defender answered "that, as is usual in such circumstances, the pursuer and defender, together with William Machray and Samuel Copland, the other two men on the top of the stack, were frolicking with the straw as it came on the stack, and the defender accidentally knocked against the pursuer, and both fell to the ground. There was no intention on the part of the defender to push the pursuer off the stack. Their fall was a pure accident."

On 4th February 1885 the Sheriff-substitute (Dove Wilson) pronounced this interlocutor:—"Finds in fact that, on the occasion set forth in the petition, the pursuer was injured through the fault of the defender: Finds in law that the defender is liable in damages; assesses the same at the sum of £50 sterling, and discerns against the defender for that sum: Finds the pursuer entitled to expenses," &c.

The defender appealed to the Sheriff (Guthrie Smith) who on 4th April, recalled his Substitute's interlocutor; found it proved that, on the occasion libelled, while the pursuer was engaged with some others in building a stack of straw, he was unintentionally pushed off the stack, and fell and injured himself, but not through the fault of the defender; therefore assoilzied the defender from the conclusions of the action; found no expenses due, and decerned.

The pursuer appealed.

LORD JUSTICE-CLERK.—This case discloses a very unhappy affair, all the more that the defender probably had not the smallest intention of injuring anyone. It was a foolish and ridiculous romp of four men on the top of a stack of straw, which they were engaged in making, and the result was, that the pursuer, who was engaged in building the stack, but who does not appear to have been taking the least share in the romping, fell off the stack to the ground and was very seriously hurt. I think it is very clearly proved that the defender caused his fall, whether he intended to make him join in the frolic or not, and that from the momentum he acquired from the somewhat elastic footing of the straw he went against him with considerable force and so pushed him over the stack. The Sheriff-substitute has decided in favor of the pursuer, and I agree with him. The Sheriff, on the contrary, thinks that as there was no intention on the part of the defender to do the pursuer any injury, and as they were engaged in a frolic, to which the pursuer showed no objection, the defender is not liable. I am unable to concur in that view. Reid, the pursuer, was amused no doubt at his companions, but he was working, not larking. It was manifestly a dangerous proceeding, and those who engaged in it did so at their own risk, but Reid did not engage in it, and consequently did not undertake the risk. I therefore think that we should revert to the judgment of the Sheriff-substitute.

When people engage in a game involving risk, or a game generally safe, but in which accidents may happen, every player taking part in it takes on himself the risks incident to being a player, and

he will have no remedy for any injury he may receive in the course of it, unless there has been some undue violence or unfair play on the part of some of the others. He takes the risks incident to the game, and the result of these risks must lie where they fall.[1] I should say that the same principle must govern where romping suddenly arises among people collected together, whether workpeople or others—they take the risk of the romping, and unless there is foul play there will be no liability for unintended injury by one romper to another. I should even go the length of saying that if two men voluntarily engage in a pugilistic encounter, each must take the black eyes or the bloody noses which the other inflicts—or if two men voluntarily engage in a bout of single stick, each must take the raps he gets from his opponent,—and if there be no foul play there can be no injury giving rise to a claim of damages by the one against the other. We meet in the criminal courts with the case in which the death of one of the parties is the result of a fair fight. The surviving combatant is guilty of culpable homicide, because he was engaged in a breach of the peace, but if the fight has been perfectly fair the punishment is usually almost nominal. Here there was a romp going on—which had sprung up as we all know how—but I think it is according to the evidence that the pursuer took no part in it, and therefore did not incur the risks incident to it, yet the defender, as I think, attacked the pursuer and threw him over—technically he assaulted him, although he did it playfully and without any bad intention, for if a man playfully attacks another to make him engage in sport, I am of opinion that that is an assault, and if harm results that constitutes an actionable wrong. I therefore agree that we should revert to the Sheriff-substitute's judgment.

THE Court pronounced the following interlocutor:—"Find in fact that the injury sustained by the pursuer, on the occasion set forth in the petition, was caused by the fault of the defender: Find in law that the defender is liable to the pursuer in damages: Therefore sustain the appeal: Recall the judgment of the Sheriff appealed against: Affirm the judgment of the Sheriff-substitute, and of new ordain the defender to make payment to the pursuer of the sum of £50 sterling, thereby found due in name of damages, with interest thereon at the rate of 5 per cent per annum from the 4th day of February last till payment: Find the pursuer entitled to expenses in the inferior Court and in this Court: Remit," &c.[2]

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[1] See *Fitzgerald* v. *Cavin*, 110 Mass. 153 (1872), as to what constitutes undue violence in play or "fooling"; and see *Haffner* v. *Peterson*, 59 Ind. 130 (1877).

[2] *Accord: Markley* v. *Whitman*, 95 Mich. 236 (1893); *Reynolds* v. *Pierson*, 29 Ind. App. 273 (1902).

(b) False imprisonment.

STEVENS *v.* O'NEILL.

Appellate Division, Supreme Court of New York, 1900. 51 *App. Div.* 364.

VAN BRUNT, P. J. This action was brought to recover damages for an alleged false imprisonment. The answer was in effect a general denial. The questions raised upon this appeal may be embraced within two classes: *First,* whether there was evidence enough to justify the jury in finding that there was any false imprisonment; and, *second,* whether there were any errors committed in the charge of the learned justice who tried the case.

It is claimed upon the part of the defendant that there was no evidence that any restraint was exercised by him or his employés as against the plaintiff, and that her submission to search was entirely voluntary upon her part. It appears from the evidence of the plaintiff that she visited the store of the defendant in the city of New York on the 15th of December, 1897; that she went to the jewelry counter and asked the salesgirl to show her some watches. The girl showed her some which were very bright in color, and the plaintiff then asked if she had not some more subdued in character and the girl said, No. "Then she counted the watches; she said there was so many in the case when I showed them to you; 'now,' she says, 'there is one missing.' 'Well,' I said, 'probably you have sold the watch,' never thinking she thought I was the thief. Then she sent for the floorwalker and then he sent for the detective and she said I would have to be searched." The plaintiff repeated the testimony that when the woman detective came up she said: "You will have to be searched;" that then the detective sent for a man and they took the plaintiff through the store between this man and the detective to the elevator and went upstairs into a small room, where she was searched.

It is claimed upon the part of the appellant that the plaintiff asked to be searched upon the supposition that she was suspected of being the thief; and that she was willing and submitted to search for the purpose of clearing herself from suspicion, and that no restraint whatever was exercised upon her by any of the employés of the defendant.

It seems to us, when we consider the situation of the plaintiff, that she was in the store of the defendant, surrounded by persons who were employed by the defendant to detect crime, substantially accused of being a thief, and with the statement made to her "you will have to be searched," that this was the exercise of such a dominion over her that the jury might very properly find that restraint was exercised, and that the subsequent proceedings were simply carrying out the threat that they would search her. Under such circumstances the plaintiff was certainly not required to offer

physical resistance to this unjustifiable proceeding against her. The jury having resolved this question in her favor, there seems to be no ground whatever for this court to interfere. The authority of the employés of the defendant is established beyond peradventure by the testimony of the defendant himself. These were the agencies employed by him for the protection of his property; and these people, in the proceedings taken by them, were acting clearly within the scope of the authority which had been conferred upon them.

We now come to the requests to charge. There are a large number of these requests, which the court refused to charge further than he had already charged. Upon an examination of these requests it will be seen that they are all embraced within one proposition, namely, that the plaintiff can not recover unless she proves that she was detained. Various requests were made; among them that "the plaintiff has sworn that she went willingly to the room, where she claims she was searched." In regard to this proposition, it is apparent from the evidence that it was a question for the jury to determine whether the plaintiff was detained or not. The jury were not bound to find that she went willingly to the room to be searched, simply because she did not actually resist. She was surrounded by superior force, to contend beyond which was beyond her physical powers, and she had been told what she had to do, and she surrendered unconditionally; and that is all there is in the case as to her submission and willingness to be searched. The jury found such to be the facts, as they probably were. Under these circumstances the court was justified in refusing to charge such a request. The court had expressly charged that the claim against the defendant was for false arrest and imprisonment, and that the first question to be decided by the jury was whether there was an arrest. Then the court defines what false imprisonment is, namely, unlawful restraint of a person contrary to his will; and further charges the jury that if a person insists upon proving her innocence of an accusation expressed or implied, by exhibiting the contents of her pockets or her satchel, and goes voluntarily to a room for that purpose, the mere act of accompanying her there for such purpose by one or more persons would not constitute either arrest or imprisonment.[1] Here was clearly placed before the jury the fact that there must be a

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[1] See *accord: Greathouse* v. *Summerfield*, 25 Ill. App. 296 (1887); *Hershey* v. *O'Neill*, 36 Fed. 168 (1888); and *Kirk & Son* v. *Garret*, 84 Md. 383 (1896).

In *Arrowsmith* v. *Le Mesurier*, 2 Bos. N. R. 211 (1806), it was held that where a constable showed the warrant to the plaintiff, but took no further steps and the plaintiff then accompanied the constable before the magistrate, was examined and discharged, a verdict of not guilty was justified, Mansfield, J., saying that "the warrant was made no other use of than as a summons," see criticism of this case by Willis, J., in *Warner* v. *Riddiford*, 4 C. B. (N. S.) 180 (1858), p. 204, and Wilcox, J., in *Pike* v. *Hanson*, 9 N. H. 491 (1838). In *Trescott* v. *Waterloo*, 26 Fed. 592 (1885), and *Cottam* v. *Oregon City*, 98 Fed. 570 (1899), there at *dicta* to the effect that one who submits to arrest rather than pay a license tax, unlawfully demanded, and which if paid could therefore be afterwards recovered back

detention against the will of the plaintiff in order that there might be a recovery. Under these circumstances it seems to me that the court was entirely justified in refusing to charge further upon such a proposition.[2]

HERRING *v.* BOYLE.

Court of Exchequer, 1834. 1 *Crompton, Meeson & Roscoes' Rep.* 376.

TRESPASS for assault and false imprisonment.—Plea, the general issue. The plaintiff, who sued by his next friend, was an infant about ten years old. He was placed by his mother at a school kept by the defendant. On the 24th of December the plaintiff's mother went to the school and asked that the boy be permitted to come home with her. The defendant refused to permit it unless the tuition fee then due was paid. After repeated demands a writ of *habeas corpus* was sued out, thereupon the plaintiff was sent home seventeen days after the first request of his mother. No proof was given that the plaintiff knew of the denial to his mother, nor was there any evidence of actual restraint upon him. On these facts Gurney, B. was of the opinion that there was no evidence of an imprisonment to go to the jury, and he nonsuited the plaintiff.

Comyn obtained a rule to set aside the nonsuit and for a new trial, against which cause was now shown by

Hutchinson, for the defendant.—The nonsuit was right. There was no corporal touch or restraint on the plaintiff.

Comyn and *Butt,* contra.—The boy was sent by his mother to the defendant's school. She had authority to place him in the care of the schoolmaster, and she had authority to determine his continuance there. Now it was proved that the authority from the mother to the master was withdrawn, and the defendant could not justify the detention after such authority was withdrawn.

Here, when the authority to keep the boy was withdrawn, the master persisted in detaining him for the purpose of extortion. (Alderson, B.—The fallacy seems to me to be, that you assume, for the purpose of your argument, that every boy at school is in prison. If that were so, you would go a long way to convince us that when the authority to keep him there is at an end, his remaining school might be an imprisonment. That, however, is not so with regard to a boy at school. In the case of a lunatic perhaps it might be different. A person of full age restrained as a lunatic, might probably be taken *prima facie* to be detained against his will.) The assent of

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in an action of money had and received, has in a sense voluntarily submitted to the imprisonment and ought not to be permitted to recover damages therefor.

[2] *Accord: Dunlevy* v. *Wolferman,* 106 Mo. App. 46 (1904); *Efroymson* v. *Smith,* 29 Ind. App. 451 (1902), where a woman customer was accused by a clerk of stealing shoes and detained till another clerk was called who explained the matter. But see *Hershey* v. *O'Neill,* 36 Fed. 168, C. C. S. D. of N. Y. (1888), *contra, semble.*

a child of such tender years may perhaps be assumed, in the first instance, because the law will presume the assent of an infant to what is for his benefit; but that assent must be taken to be revoked when the contract for schooling is determined by the act of the mother. In the present case, the plaintiff was detained during the holidays, and it may fairly be presumed that a keeping at school during the holidays is against the will of a school-boy. (Bolland, B.—The evidence did not bring the schoolmaster and the plaintiff into contact, so as to show that there was any the least restraint of the one upon the other.) The child was kept through the holidays, and it ought to have been left to the jury, whether that was not against the plaintiff's will. Besides, in the case of a child of such tender years, the will of the parent is to be considered as the will of the child, and in this case the will of the mother was sufficiently expressed. The master declared distinctly that he would maintain him until he was compelled by *habeas corpus* to deliver him up; and he was detained at school, and such declaration of the master, coupled with the fact of the boy remaining at school during the holidays, was surely evidence to go to the jury that the master had acted on such declaration and had kept the boy there against the will both of his mother and himself. (Alderson, B.—It is clear that the assent of the plaintiff would put an end to an action in this form; that shows that the will of the mother is not the will of the child. In the present case there was no proof that the master conducted himself to the boy in a different manner in any respect before and after the refusal to deliver him up to his mother; as against the mother he detained him unlawfully; he says in effect to the mother, I will not give him up to you without a *habeas corpus*. That might however be with or without the assent of the boy. The plaintiff was bound to prove his dissent, and not to leave that question in ambiguity.)

The judgment of the court was delivered on the next day.

Bolland, B.[1]—This was an action of trespass for assault and false imprisonment, brought by an infant by his next friend. The facts of the case were these: the plaintiff had been placed by his mother at the school kept by the defendant, and it appeared that she had applied to take him away. The schoolmaster very improperly refused to give him up to his mother, unless she paid an amount which he claimed to be due. The question is, whether it appears upon the Judge's notes that there was any evidence of a trespass to go to the jury? I am of opinion that there was not, and, consequently, that this rule must be discharged. It had been argued on the part of the plaintiff that the misconduct of the defendant amounted to a false imprisonment. I can not find anything upon the notes of the learned Judge which shows that the plaintiff was at all cognizant of any restraint. There are many cases which show that it is not necessary, to constitute an imprisonment, that the hand should be laid upon the person; but in no case has any

[1] The concurring opinion of Alderson, B., and Lord Lyndhurst are omitted.

conduct been held to amount to an imprisonment in the absence of the party supposed to be imprisoned. An officer may make an arrest without laying his hand on the party arrested; but in the present case, as far as we know, the boy may have been willing to stay; he does not appear to have been cognizant of any restraint, and there was no evidence of any act whatsoever done by the defendant in his presence. I think that we can not construe the refusal to the mother in the boy's absence, and without his being cognizant of any restraint, to be an imprisonment of him against his will; and therefore I am of the opinion that the rule must be discharged.

Gurney, B.—This plaintiff complains of an assault and false imprisonment. There was no evidence of any restraint upon him. There was no evidence that he had any knowledge of his mother having desired that he should be permitted to go home, nor that anything passed between the plaintiff and the defendant which showed that there was any compulsion upon the boy; and there was nothing to show that he was conscious that he was in any respect restrained.

Rule discharged.[2]

(c) Trespass to property.

ADAMS *v.* FREEMAN.

Supreme Court of New York, 1815. 12 *Johns.* 408.

IN ERROR, on *certiorari* to a justice's Court.

This was an action of *trespass,* brought by the plaintiff in error against the defendant in error, for entering the plaintiff's house. The defendant pleaded not guilty; and, on the trial, the plaintiff proved, that, he being in bed, (whether in the day time or at night is not stated,) the defendant entered his house without permission. The plaintiff's son, by order of his father, requested the defendant to leave the house; to which the defendant answered, that he would go when he pleased. The plaintiff's wife then ordered the defendant to go off, to which the defendant gave a similar answer. The plaintiff then rose from bed, and ordered the defendant to leave his house, but he still refused to go, and remained there half an hour, without doing any other injury, and then departed.

The defendant moved for a nonsuit, and the justice decided that

[2] But see *Robalina* v. *Armstrong,* 15 Barb. 247 (N. Y. 1852), where a mother of a bastard child, four years of age, as such entitled to its custody, might maintain an action of false imprisonment in its name and right against its putative father who had taken possession of it against her consent; and *Smith* v. *Peabody,* 106 Mass. 262 (1871), where the defendant refused to tell the mother of a pauper child, seven years old, where her child was, it was held not to be false imprisonment in the absence of evidence that the defendant had the child in his custody; and see also, *Commonwealth* v. *Nickerson,* 5 Allen (Mass.) 518.

the proof was insufficient to sustain the action, and nonsuited the plaintiff, with costs.

Per Curiam. To enter a dwelling-house without license, is, in law, a trespass. Any person professing to keep an inn, thereby gives general license to all persons to enter his house. But the house of the plaintiff does not appear to have been an inn, and, therefore, to render such an entry lawful, there must be a permission, express or implied; and familiar intimacy may be evidence of general license for such purpose.[1] According to the evidence, here was no such permission, and, therefore, the act of entering the plaintiff's house was a trespass.

Judgment reversed.[2]

SECTION 5.

Trespass ab initio.

THE SIX CARPENTERS' CASE.

King's Bench, 1610. 8 *Coke* 146*a*.

In trespass brought by John Vaux against Thomas Newman, carpenter, and five other carpenters, for breaking his house, and for an assault and battery, 1 Sept. 7 Jac. in London, in the parish of St. Giles *extra* Cripplegate, in the ward of Cripplegate, &c., and upon the new assignment, the plaintiff assigned the trespass in a house called the Queen's Head. The defendants to all the trespass *proeter fractionem domus* pleaded not guilty; and as to the breaking of the house, said, that the said house *proed' tempore quo,* &c., *et diu antea et postea,* was a common wine tavern, of the said John Vaux, with a common sign at the door of the said house fixed, &c., by force whereof the defendants, *proed' tempore quo,* &c., *viz., hora quarta post meridiem* into the said house, the door thereof being open, did enter, and did there buy and drink a quart of wine, and there paid for the same, &c. The plaintiff, by way of replication, did confess that the said house was a common tavern and that they entered into it, and bought and drank a quart of wine, and paid for it: but further said, that one John Ridding, servant of the said John

[1] "The law will imply a license from the nature and exigencies of the case, the relation of the parties and the well established usages of a civilized and christian community," Bigelow, J., *Lakin* v. *Ames,* 10 Cush. 198 (Mass. 1852), p. 221.

[2] *Accord: Brown* v. *Perkins and Wife,* 1 Allen 89 (Mass. 1861), but one who has permission to enter a house does not become a trespasser by going into a room which he is forbidden to enter, *Richmond* v. *Fisk,* 160 Mass. 34 (1893), but see *Newell* v. *Whitcher,* 53 Vt. 589 (1880), where it was held that a guest in a house could maintain trespass *quare clausum fregit* against the owner thereof who entered her sleeping room at night.

Vaux, at the request of the said defendants, did there then deliver them another quart of wine, and a pennyworth of bread, amounting to 8*d.*, and then they there did drink the said wine, and eat the bread, and upon request did refuse to pay for the same: upon which the defendants did demur in law: and the only point in this case was, if the denying to pay for the wine, or nonpayment, which is all one (for every nonpayment upon request, is a denying in law), makes the entry into the tavern tortious.

At first, it was resolved when an entry, authority, or license, is given to any one by the law, and he doth abuse it, he shall be a trespasser *ab initio*:[1] but where an entry authority, or license, is given by the party, and he abuses it, there he must be punished for his abuse, but shall not be a trespasser *ab initio*. And the reason of this difference is, that in case of a general authority or license of law, the law adjudges by the subsequent act, *quo animo*, or to what intent, he entered; for *acta exteriora indicant interiora secreta*. Vide 11 H. 4, 75 b. But when the party gives an authority or license himself to do anything, he can not, for any subsequent cause, punish that which is done by his own authority or license, and therefore the law gives authority to enter into a common inn, or tavern, so to the lord to distrain; to the owner of the ground to distrain damage-feasant; to him in reversion to see if waste be done; to the commoner to enter upon the land to see his cattle, and such like. Vide 12 E. 4, 8 b. 21 E. 4, 19 b. 5 H. 7, 11 a. 9 H. 6, 29 b. 11 H. 4, 75 b. 3 H. 7, 15 b. 28 H. 6, 5 b. But if he who enters into the inn or tavern doth a trespass, as if he carries away anything; or if the lord who distrains for rent, or the owner for damage-feasant, works or kills the distress; or if he who enters to see waste breaks the house, or stays there all night; or if the commoner cuts down

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[1] *Markham* v. *Brown*, 8 N. H. 523 (1837), a case differing from the principal case only in that the defendant, a guest at the plaintiff's inn, started an affray therein; *Lamb* v. *Day*, 8 Vt. 407 (1836), defendant worked a horse seized in attachment; *Hazard* v. *Israel*, 1 Bin. 240 (Pa. 1808), an officer entering plaintiff's close in search of the goods of a third person and levying on the plaintiff's goods; *Carrier* v. *Esbaugh*, 70 Pa. 239 (1871), a sheriff lawfully levying upon goods but subsequently selling them unlawfully; *Wyke* v. *Wilson*, 173 Pa. 12 (1896); *Hopkins* v. *Hopkins*, 10 Johns. 369 (N. Y. 1813), defendant, having seized cattle damage feasant, impounded them, without having the damages lawfully assessed; *Davenport* v. *Lamson*, 21 Pick. 72 (Mass. 1838), abuse of right of way passing by the partition of land to the defendant as appurtenant to his lot; *Ganley* v. *Looney*, 14 Allen 40 (Mass. 1867), compare *Kissecker* v. *Monn*, 36 Pa. 313 (1860); *Malcolm* v. *Spoor*, 12 Metc. 279 (Mass. 1847), constable attaching plaintiff's furniture left it in possession of a drunken and unfit person; *Juchter* v. *Boehm*, 67 Ga. 534 (1881); *Stoughton* v. *Mott*, 25 Vt. 668 (1853); *Sterling* v. *Warden*, 52 N. H. 197 (1872), postmaster, entering the house of his predecessor, who had located the office there, to obtain postoffice property retained by him.

The mere intention to do a subsequent illegal act, if unexecuted, will not make the original entry upon land or seizure of goods a trespass *ab initio*, *Gates* v. *Lounsbury*, 20 Johns. 427 (N. Y. 1823).

This doctrine has never been extended to the criminal law, *State* v. *Moore*, 12 N. H. 42 (1841), a man lawfully entering a tavern bar-room does not become guilty of breaking and entering by reason of a subsequent larceny committed while there.

a tree, in these, and the like cases, the law adjudges that he entered for that purpose; and because the act which demonstrates it is a trespass, he shall be a trespasser *ab initio,* as it appears in all the said books. So if a purveyor takes my cattle by force of a commission, for the King's house, it is lawful: but if he sells them in the market, now the first taking is wrongful; and therewith agrees 18 H. 6, 19 b. *Et sic de similibus.*

2. It was resolved *per totam curiam,* that not doing, can not make the party who has authority or license by the law a trespasser *ab initio,* because not doing is no trespass;[2] and, therefore, if the lessor distrains for his rent, and thereupon the lessee tenders him the rent and arrears, &c., and requires his beasts again, and he will not deliver them, this not doing can not make him a trespasser *ab initio;* and therewith agrees 33 H. 6, 47 a. So if a man takes cattle damage-feasant, and the other offers sufficient amends, and he refuses to re-deliver them, now if he sues a replevin, he shall recover damages only for the detaining of them, and not for the taking for that was lawful; and therewith agrees F. N. B. 69 g. *temp.* E. 1. Replevin 27. 27 E. 3, 88. 45 E. 3, 9.[3] So in the case at bar, for not paying for the wine, the defendants shall not be trespassers, for the denying to pay for it is no trespass, and therefore they cannot be trespassers *ab initio;* and therewith agrees directly in the point 12 Edw. 4, 9 b. For there Pigot, Sergeant, puts this very case, if one comes into a tavern to drink, and when he has drunk he goes away, and will not pay the taverner, the taverner shall have an action of trespass against him for his entry. To

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[2] *Accord: Bell* v. *North,* 4 Litt. 133 (Ky. 1823), a sheriff omitting to sell property rightfully seized in execution; *Abbott* v. *Kimball,* 19 Vt. 551 (1847), failure of a sheriff to pay over the money realized by the sale of property, lawfully attached; *Hinks* v. *Hinks,* 46 Maine 423 (1859), defendant, having removed gates lawfully erected but which impeded his passage along a public road and neglecting to replace them, held not to be a trespasser *ab initio,* compare *Kissecker* v. *Monn,* 36 Pa. 313 (1860); *Averill* v. *Smith,* 17 Wall. 82 (U. S. 1872), and *Gardner* v. *Campbell,* 15 Johns. 401 (N. Y. 1818); *Taylor* v. *Jones,* 42 N. H. 25 (1860), *semble,* and case cited therein, a person taking goods under lawful authority and refusing to restore them after his authority is determined.

The distinction between nonfeasance and misfeasance is of comparatively modern origin; it is suggested in the case in Y. B., 33 Hen. VI. 26, pl. 12, by Littleton, then of counsel, but the decision of Prisot, J., was *contra.* It first appears in *Isaack* v. *Clark,* 2 Bull. 307, and in the principal case.

[3] *Contra:* Y B 45 Ed. III 9 b, Y B 13 Hen. IV 17 pl. 14, and see Ames, History of Trover, note 4, *infra.*

The first cases in which the doctrine of trespass *ab initio* was applied were all cases where the distrainor refused to deliver the chattels claiming them as his own, though at an early date any dealing with the chattel contrary "to the notion of a distress"—(as by the lord refusing the mesne the right to put cattle of his own in place of his tenants' cattle distrained Y B 3 Edw. IV 6 pl. 2, or working a horse taken in distress or as an estray Y B 18 Hen. VI 9 pl. 7; *Oxley* v. *Watts,* 1 Term Rep. 12 (1785), or by changing the quality of goods; *Duncomb* v. *Reeve and Green,* Croke Eliz. 783 (1601), a bailiff distraining hides for a tax due, tanned the hides, the reason given that so the identity of the thing was destroyed so that the owner could not reclaim it), came to be regarded as making the original seizure wrongful *ab initio.*

which Brian, Chief Justice, said, the said case which Pigot has put, is not law, for it is no trespass, but the taverner shall have an action of debt:[4] and there before Brian held that if I bring cloth to a tailor, to have a gown made, if the price be not agreed in certain before, how much I shall pay for the making, he shall not have an action of debt against me; which is meant of a general action of debt: but the tailor in such a case shall have a special action of debt: *scil.* that A. did put cloth to him to make a gown thereof for the said A., and that A. would pay him as much for making, and all necessaries thereto, as he should deserve, and that for making thereof, and all necessaries thereto, he deserves so much, for which he brings his action of debt: in that case, the putting of his cloth to the tailor to be made into a gown, is sufficient evidence to proof the said special contract, for the law implies it: and if the tailor overvalues the making, or the necessaries to it, the jury may mitigate it, and the plaintiff shall recover so much as they shall find, and shall be barred from the residue. But if the tailor (as they use) makes a bill, and he himself values the making and the necessaries thereof, he shall not have an action of debt for his own value, and declare of a retainer of him to make a gown, &c., for so much, unless it is so especially agreed. But in such case he may detain the garment until he is paid, as the hostler may the horse. *Vide* Br.

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[4] Many explanations have been given of the distinctions between the abuse of right to enter by the authority of law and by the license of the owner. In *Allen* v. *Crofoot,* 5 Wend. 507 (N. Y. 1830), Savage, C. J., says: "In case of a license given by law, the subsequent tortious act shows *quo animo* he entered; and having entered with the intent to abuse the authority given by law, the entry is unlawful; but where the authority or license is given by the party, he cannot punish for that which was done by his own authority." In *Esty* v. *Wilmot,* 15 Gray 168 (Mass. 1860), Hoar, J., says: "The reason for the distinction most commonly approved by modern text writers and judicial decisions is this: that an officer or other person acting by authority of law shall not be allowed to avail himself of it as an instrument of oppression. As the citizen is bound to submit to it without resistance, and has no opportunity to make provisions or stipulations for his own security, the exercise of the legal power is made conditional upon pursuing it wholly within legal limits. The abuse is held to be a forfeiture of the whole protection which the law gives to the act which it allowed." It remained for the late Professor James Barr Ames to show the origin of the distinction in his very learned and valuable article on the History of Conversion, Harv. L. R. 277 (1898), particularly pages 287 to 289, 3 Select Essay on Anglo-American Legal History, p. 417, pp. 428 to 430. As he points out, one whose chattels had been taken in distress or as an estray, could not originally appeal against the taker for felony or, later, bring trespass, since the chattel had not been taken under a claim of dominion, but must bring replevin. If, however, upon being demanded the landlord claimed title, the replevin suit could not go on, "The defendant by this assumption of dominion over the goods and repudiation of the plaintiff's right was guilty of larceny and trespass" and the remedy was by appeal or action of trespass. This also was applied so late as 1454 to the case of one finding chattels and refusing to give them up on demand, per Prisot, J., Y B 33 Hen. VI 26 pl. 12. which was followed so late as 1595 in *East* v. *Newman,* Golds. 152, though repudiated by Coke, C. J., in *Isaack* v. *Clark,* 2 Bull. 307, p. 312, "On the other hand a bailee who in repudiation of his bailor's rights, refused to give back the chattel on request, was never chargeable as a thief or trespasser," Y B 16 Hen. VII 2 pl. 7.

Distress 70, and all this was resolved by the court. *Vide* the book in 30 Ass. pl. 38, John Matrever's case, it is held by the court, that if the lord or his bailiff comes to distrain, and before the distress the tenant tenders the arrears upon the land, there the distress taken for it is tortious. The same law for damage-feasant, if before the distress he tenders sufficient amends; and therewith agrees 7 E. 3, 8 b, in the Mr. of St. Mark's case; and so is the opinion of Hull to be understood in 13 H. 4, 17 b, which opinion is not well abridged in title Trespass, 180. Note, reader, this difference that tender upon the land before the distress, makes the distress tortious; tender after the distress, and before the impounding, makes the detainer, and not the taking wrongful: tender after the impounding, makes neither the one nor the other wrongful; for then it comes too late, because then the cause is put to the trial of the law, to be there determined. But after the law has determined it, and the avowant has return irreplevisable, yet if the plaintiff makes him a sufficient tender, he may have an action of *detinue* for the detainer after; or he may, upon satisfaction made in court, have a writ for the redelivery of his goods; and therewith agree the said books in 13 H. 4, 17 b; 14 H. 4, 4; *Registr' Judic.* 37; 45 E. 3, 9, and all the books before. *Vide* 14 Ed. 4, 4 b; 2 H. 6, 12; 22 Hen. 6, 57; Doctor and Student, lib. 2, cap. 27; Br. Distress, 72, and Pilkington's case, in the fifth part of my Reports, fol. 76 and so all the books which *prima facie* seem to disagree are upon full and pregnant reason well reconciled and agreed.

STONE *v.* KNAPP.

Supreme Court of Vermont, 1857. 29 *Vt.* 501.

Trespass *quare clausum fregit.* Plea, the general issue and license. Trial by jury, June term, 1855,—Poland, J., presiding.

The plaintiff's evidence tended to prove that in the fall of 1851 the defendant purchased a piece of land near the east village in St. Johnsbury and erected a house and a coal kiln thereon; that said land did not lie upon the highway, and that to reach it the defendant had to cross a field of the plaintiff's, about thirty rods in width; that the defendant, soon after he erected his house and kiln, went on to the plaintiff's land, and made a sufficient road to enable him to pass to and from the highway with a team, and ever since had continued to travel across the plaintiff's fields and over said road, which was not fenced upon either side, and which entered the highway from the plaintiff's field through a barway.

The defendant then introduced evidence tending to prove that at the time he built his house the plaintiff gave him a license to pass and repass over his said field and through said bars until he could get a public road laid out to his place from the highway.

The plaintiff then introduced evidence tending to prove that the defendant did not keep up said bars; that he would leave said bars

open during the day, and also at night, and that by reason of such acts horses and cattle that were in the highway passed into the plaintiff's field through the said barway and injured and destroyed the plaintiff's crops in said field.

The defendant's counsel claimed that if the jury found that the defendant had license to pass over the plaintiff's field through said barway, that if he did leave the bars down, and that thereby cattle and horses came into the plaintiff's field and damaged his crops, that the plaintiff could not recover therefor in this action. But the court ruled otherwise, and instructed the jury that the plaintiff would be entitled to recover in this action for the damages so occasioned. Verdict for the plaintiff. Exceptions by the defendant.

REDFIELD, Ch. J. The evidence in this case showed that the plaintiff gave the defendant license to pass and repass on his field and through the bars until he could obtain a public highway.

This being an action of trespass, the answer to this license, which, unanswered, is a bar to the action, was, that the defendant did not keep up the bars, that he left them open during the day, and also the night and that by reason thereof damage was done by cattle running in the highway.

The only question to be determined is whether the omission to keep up the bars will deprive the party of the benefit of the license. There is nothing in the case to show that the license was given upon any express condition to be void if the bars were not properly kept up. The question must be determined upon general principles.

The law upon this subject is fully illustrated in all its bearings in the Six Carpenters' Case, 8 Coke 146a; S. C. 1 Smith's Lead. Cases 62, and English and American notes.

The abuse of an authority in law will render the party a trespasser *ab initio*. But this abuse must be something beyond mere *non feasance*. It must be a positive and active wrong, and of such a character as to fairly justify the implication that the original entry was for the purpose of committing the wrong, and not *bona fide* made under the authority which the law gave, and for the purpose for which the law gave it; *Stoughton* v. *Mott*, 25 Vt. 668.[1]

If this had been an authority in law merely, as the right of one to enter to distrain or attach property, it would be going further than any of the cases have yet gone, and quite beyond the true principle of the later decisions upon this subject, to hold that such an omission as the one complained of in this case will render the officer a trespasser *ab initio*. It would be strange to conclude that because

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[1] *Accord: Dwinnells* v. *Boynton*, 3 Allen 310 (Mass. 1862), officer, serving a search warrant commanding him to search a dwelling, took up and at once laid down some articles not covered by the warrant and also searched without authority the shop *before* searching the house: *Page* v. *DePuy*, 40 Ill. 506 (1866), a man in possession under legal process lay down for a short time on a bed; *Adams* v. *Rivers*, 11 Barb. 390 (N. Y. 1851), abusive language, in other respects a very doubtful case.

an officer in making an attachment of personal property upon premises left the bars open, that he entered for that purpose, and not with the *bona fide* purpose of executing the process.

But this is not a license in law. It is a license in fact, the permission of the party. And in such cases the law is settled beyond all question, that no abuse of the license will render the party a trespasser *ab initio*. He may be liable for the wrong, but if he had permission to enter, and kept within the range of his license,[2] no abuse of the license will revoke it, or deprive the party of its protection.[3]

The party, by the abuse of the license in fact, does not become a trespasser, but may be liable for the wrong in an action upon the case.[4]

Judgment reversed and case remanded.

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[2] In *Taylor* v. *Jones*, 42 N. H. 25 (1860), Fowler, J., says, page 42: "Such an error as a person of ordinary care and common intelligence might commit, will not amount to an abuse; but there must be such a complete departure from the line of duty or such an improper and illegal exercise of the authority to the prejudice of another. Such an action and wilful wrong perpetrated —as will warrant the conclusion that its perpetrator intended from the first to do wrong and to use his legal authority as a cover for his illegal conduct." Here the defendant under an attachment against one R. seized the plaintiff's goods which were intermingled with those of R., and after identification refused to give them up, but sold them. It was held that if the jury found that he was acting in perfect good faith, as to what he believed to be his legal rights and under such mistake as that above mentioned, they might properly find him not guilty of trespass. But as to the effect of such a sale, see *Carrier* v. *Esbaugh*, 70 Pa. St. 239 (1871), and *Hazard* v. *Israel*, 1 Bin. 240 (Pa. 1808).

See *Norton* v. *Craig*, 68 Maine 275 (1878), and *Suffern* v. *Townsend*, 9 Johns. 35 (N. Y. 1812).

[3] *Snedecor* v. *Pope*, 143 Ala. 275, 39 So. 318 (1905); *Ballard* v. *Noaks*, 2 Ark. 45 (1839); *Pike* v. *Heinzmann*, 89 Ill. App. 642 (1899); *Page* v. *DePuy*, 40 Ill. 506 (1866), *semble; Spades* v. *Murray*, 2 Ind. App. 401 (1891), landlord entering during term to make repair; *Walsh* v. *Taylor*, 39 Md. 592 (1874); *Richmond* v. *Fiske*, 160 Mass. 34 (1893), one permitted to enter the plaintiff's outer door went against his commands into his bedroom; *Beers* v. *McGinnis*, 191 Mass. 279 (1906); *Bradley* v. *Davis*, 14 Maine 44 (1836); *Edelman* v. *Yeakel*, 27 Pa. 26 (1856), here the license was from the plaintiff's predecessor in title; *Jewell* v. *Mahood*, 44 N. H. 474 (1863); *Willoughby* v. *Ry. Co.*, 32 S. Car. 410 (1889); *Allen* v. *Crofoot*, 5 Wend. 506 (1830); *Dumont* v. *Smith*, 4 Denio 319 (N. Y. 1847); *Stone* v. *Knapp*, 29 Vt. 501 (1857), facts very similar to *Hinks* v. *Hinks*, 46 Maine 423 (1859). See also, *Gregoir* v. *Leonard*, 71 Vt. 410 (1899), and compare *Kissecker* v. *Monn*, 36 Pa. 313 (1860).

[4] *Accord: Richmond* v. *Fisk*, 160 Mass. 34, and *Beers* v. *McGinnis*, 191 Mass. 279 (1906); but see *Snedecor* v. *Pope*, 143 Ala. 275, 39 So. 318 (1905), supra note 3, holding that one abusing such authority is a trespasser from the time he goes beyond the purpose for which he was permitted to enter, and compare *Norton* v. *Craig*, 68 Maine 275 (1878), and *Suffern* v. *Townsend*, 9 Johns. (N. Y.) 35.

Part 2.

Disseisin and Conversion.

CHAPTER I.

Disseisin.[1]

Bracton, fol. 161 b, Twiss's Translation, 3 Tw. Br. 17. Likewise a disseisin takes place, not only if any one ejects the true owner when present, or his agent, or his family, or does not admit him, or repels him on his return from market or from a journey, but he also effects a disseisin, if he shall not permit the owner or his agent or his family being in possession to make use of it, or at least hinders him from making a convenient use of it. And in which case, although he does not altogether expel (the owner), nevertheless he inflicts upon him a disseisin, since he takes away from him altogether the convenience of using it, or hinders him from using it conveniently, quietly, and in peace, by disquieting and disturbing his possession. Likewise a disseisin takes place not only according to what has been said above, but also if any person of greater power wishes to make use of the tenement of another against the will of the tenant, by ploughing, or by digging, by reaping and carrying away, contending that the tenement, which is another's, is his own; but if he has made no claim to the tenement, it will be another thing, because then there will be a trespass, and not a disseisin from a freehold.[2]

LITTLETON, § 279. And note that disseisin is properly, where a man entereth into any lands or tenements where his entry is not congeable, and ousteth him which hath the freehold, &c.

COKE, 2d Inst. 414. By the common law a man that is in seisin of his land may have an assise, for that he is disseised of the quiet enjoyment of his land; as when the lord, or any other that hath a rent, and oftentimes distraineth for the rent, where none is behind, the tenant shall have an assise of novel disseisin of the

[1] This section is reprinted from the late Professor James Barr Ames' Collection of Cases on Torts, by the courteous permission of his son, Richard Ames, Esq.

[2] *"Et si co animo forte ingredietur fundum alienum, non quod sibi usurpet tenementum vel jura, non facit disseysinam sed transgressionem" (Bracton, fol. 216b). See also,* 1 *Nich. Britton,* 272, 343.—*Ames.*

land, for that, by reason of the *frequencie* of distresses, he is disseised of the quiet enjoying of his land, and cannot make his advantage thereof, and *frequentia mutat transgressionem in disseisinam.*

WILLELMUS DE ESTRE *v.* ROGERUM DE SANCTO DIONISIO.

King's Court, 1230. *2 Bracton pl. 378.*

Rogerus de Sancto Dionisio et Sarra uxor eius athachiati fuerunt ad respondendum Willelmo de Estre quare contra pacem et dignitatem domini Regis arrauerunt et sulcauerunt et foderunt pasturam suam de Eckeles unde idem Willelmus queritur quod propter hoc deterioratus est et dampnum habet ad ualenciam, etc.

Et Rogerus et Sarra ueniunt et defendunt quod nichil arrauerunt nec sulcauerunt nec foderunt de pastura uel terra ipsius Willelmi, et dicunt quod pastura illa ipsorum est et non ipsius Willelmi. Et quia ipsi Rogerus et Sarra aduocant terram illam ut suam et pasturam, et idem Willemus ut suam. Consideratum est quod ipsi Rogerus et Sarra inde sine die et Willelmus perquirat sibi per breue de noua disseisina si uoluerit.[1]

ANONYMOUS.

Common Pleas, 1340. *Y B 14 Edw. III, R. S. 230, pl. 20.*

Trespass against bailiffs of Ancient Demesne, in which after the record had been, for a cause, removed into the Bench, the bailiffs continued to hold the plea, notwithstanding the removal, until the tenant who now brings this writ lost the land. The bailiffs abode judgment whether the present plaintiff ought to be answered as to this plaint, inasmuch as he showed that it was a disseisin effected on him, wherefore he might recover by novel disseisin both the freehold and damages, as appears above in Easter Term in the 12th year. And afterwards they departed in contempt of court, whereupon the plaintiff prayed judgment for himself. And the matter was pending until now. SHARESHULL rehearsed as above, and said: "Even had the bailiffs abode judgment, there is no ground upon which to give judgment for them; but since they have departed in contempt

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[1] Professor Maitland adds in a note to this case: "The time is not yet when title shall be tried in an action of trespass *vi et armis;* but this is a noteworthy attempt."

There are several reported cases of the thirteenth century in which, as in the principal case, the plaintiff failed in trespass, because the defendant's entry was under a claim of right to the freehold; *i. e.,* was a disseisin. (1253) Plac. Ab. 132, col. 2, rot. 13, Essex: (1253) Plac. Ab. 142, col. 1, rot. 9, Lanc.; (1272) Plac. Ab. 262, col. 1, rot. 18, Cant.; (1272) Plac. Ab. 262, col. 1, rot. 19, Essex. —Ames.

of the court, it seems to us that judgment shall be given against them. Therefore the court adjudges that they be taken for the contempt, and that the plaintiff do recover his damages according to his count."[1]

ANONYMOUS.

Common Pleas, 1352. *L. A., 26 Edw. III, pl.* 17.

It was found by the verdict of the Assize of Novel Disseisin that the plaintiff had cut trees on his own soil, and the tenant, who had common there, said that the soil was his soil, and ordered the plaintiff not to cut any trees, whereupon the plaintiff departed, and now brings the assise.

SHARESHULL, C. J., said that he who had no right cannot be seised of a freehold by words. But if one having a right of entry was disturbed, as he was coming to the land, from entering, it is a disseisin. Wherefore the plaintiff took nothing.

ANONYMOUS.

Common Pleas, 1618. 9 *Viner's Abridgment,* 85, *pl.* 5.

If a man hath a house and locks it, and departs, and another comes to his house, and takes the key of the door into his hand, and says that he claims the house to himself in fee without any entry into the house, this is a disseisin of the house. Admitted clearly upon evidence at the bar in an assize taken by default.

CHAPTER II.

Conversion.

"An action of trover (is) in form a fiction, and in substance founded on property for the equitable purpose of recovering the value of the plaintiff's specific property, used and enjoyed by the defendant," Lord Mansfield in *Hambly* v. *Trott,* Cowper 371 (1776), p. 374.

"In *form* it is a fiction; in *substance* a remedy to recover the value of personal property *wrongfully* converted by another to his

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[1] See also, Y. B. 11 & 12 Ed. III. (Rolls Series), 503, 505.

After the decision in the principal case the distinction between a trespass and a disseisin lost its value for the purpose of the action trespass *quare clausum fregit.* The distinction, however, is one founded in the nature of things, and still plays a prominent part in our law. Thus, a mere trespasser never gains a title by lapse of time. The wrongdoer must be also an adverse possessor, in other words a disseisor. This substitution of the term "adverse possession" for disseisin is one of the curiosities of our legal terminology.—Ames.

own use. The form supposes the defendant *may* have come lawfully by the possession of the goods. This action lies and has been brought in many cases where, in truth, the defendant has got possession *lawfully*. When the defendant takes them wrongfully, and by trespass, the plaintiff, if he sees fit to bring *this* action, waives the trespass, and admits the possession to have been *lawfully* gotten," Lord Mansfield in *Cooper* v. *Chitty*, 1 Burrow 20 (1756), p. 31.[1]

SECTION 1.

Nature of Plaintiff's Right.

ARMORY *v.* DELAMIRIE.

Court of King's Bench 1 *Strange* 505.

The plaintiff being a chimney sweeper's boy found a jewel and carried it to the defendant's shop (who was a goldsmith) to know what it was, and delivered it into the hands of the apprentice, who under pretence of weighing it, took out the stones, and calling to the master to let him know it came to three half-pence, the master offered the boy the money, who refused to take it, and insisted to have the thing again; whereupon the apprentice delivered him back the socket without the stones. And now in trover against the master these points were ruled:

1. That the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner, and consequently may maintain trover.

2. That the action will lay against the master, who gives a credit to his apprentice, and is answerable for his neglect.

3. As to the value of the jewel several of the trade were examined to prove what a jewel of the finest water that would fit the socket would be worth; and the Chief Justice directed the jury, that unless the defendant did produce the jewel, and shew it not to

[1] The declaration in trover alleges the loss of the goods by the plaintiff, their finding by the defendant (whence the name trover) and his conversion of them to his own use. The action was designed to give redress for the abuse of a possession lawfully obtained, originally by mere finding of lost chattels. The allegation of loss and of finding were held not to be transversable and the action was extended to cover the abuse of possession lawfully obtained in any way, as by bailment, etc., and was subsequently extended to cover all cases where the plaintiff's possessory right was denied or substantially impeded, becoming, with certain limitations shown in the cases given in this chapter, concurrent with trespass *de bonis asportatis* and *detinue*. See the very learned article by the late James Barr Ames, Esq., on the History of Trover, 9 Harv. L. R., 277-374; Select Essays in Anglo-American Legal History, Vol. III, p. 417.

be of the finest water, they should presume the strongest against him, and make the value of the best jewels the measure of their damages: which they accordingly did.

Accord: Tatum v. *Sharpless,* 6 Phila. 18 (1865), plaintiff, a street car conductor, found a pocketbook in the car and turned it over to the defendant, an officer of the company, to return it to the owner, no one claiming it, it was held that trover lay; *Hamaker* v. *Blanchard,* 90 Pa. 377 (1879), servant turned over to his master property found in the latter's house; *Danielson* v. *Roberts,* 44 Ore. 108 (1904), master took from servant property similarly found; *Gunzburger* v. *Rosenthal,* 226 Pa. 300 (1910), 75 Atl. 418, *semble.*

An agent or servant entrusted with property by his principal or master may maintain trover therefor, *Gunzburger* v. *Rosenthal,* 226 Pa. 300 (1910), 75 Atl. 418. The terms under which the plaintiff got possession from the true owner need not be shown, *Burton* v. *Hughes,* 2 Bing. 173 (1824), nor is it material that it was got under a contract void as between the parties thereto, *Sutton* v. *Buck,* 2 Taunt. 302 (1810).

GORDON *v.* HARPER.

Court of King's Bench, 1796. *7 Term* 9.

In trover for certain goods, being household furniture, a verdict was found for the plaintiff, subject to the opinion of this Court on the following case. On the 1st of October, 1795, and from thence until the seizing of the goods by the defendant, as after mentioned, Mr. Biscoe was in possession of a mansion-house at Shoreham and of the goods in question, being the furniture of the said house, as tenant of the house and furniture to the plaintiff, under an agreement made between the plaintiff and Mr. Biscoe, for a term which at the trial of this action was not expired. The goods in question were on the 24th of October taken in execution by the defendant, then sheriff of the county of Kent, by virtue of a writ of *testatum fieri facias* issued on a judgment at the suit of F. Broomhead and others, executors of F. Broomhead deceased, against one Borrett, to whom the goods in question had belonged, but which goods, previous to the agreement between the plaintiff and Mr. Biscoe, had been sold by Borrett to the plaintiff. The defendant after the seizure sold the goods. The question is, whether the plaintiff is entitled to recover in an action of trover.

Lord Kenyon, Ch. J. The true question is, whether when a person has leased goods in a house to another for a certain time, whereby he parts with the right of possession during the term to the tenant, and has only a reversionary interest, he can notwithstanding recover the value of the whole property pending the existence of the term in an action of trover. The very statement of the proposition affords an answer to it. If, instead of household goods, the goods here taken had been machines used in manufacture which had been leased to a tenant, no doubt could have been made but that the sheriff might have seized them under an execution against the tenant, and the creditor would have been entitled to the beneficial

use of the property during the term: the difference of the goods then cannot vary the law. The cases which have been put at the bar do not apply: the one on which the greatest stress was laid was that of a tenant for years of land whereon timber is cut down, in which case it was truly said, that the owner of the inheritance might maintain trover for such timber, notwithstanding the lease. But it must be remembered that the only right of the tenant is to the shade of the tree when growing, and by the very act of felling it his right is absolutely determined; and even then the property does not vest in his immediate landlord; for if he has only an estate for life, it will go over to the owner of the inheritance. Here however the tenant's right of possession during the term cannot be devested by any wrongful act, nor can it thereby be revested in the landlord. I forbear to deliver any opinion as to what remedy the landlord has in this case, not being at present called upon so to do; but it is clear that he cannot maintain trover.

ASHHURST, J. I have always understood the rule of law to be, that in order to maintain trover the plaintiff must have a right of property in the thing, and a right of possession, and that unless both these rights concur the action will not lie. Now here it is admitted that the tenant had the right of possession during the continuance of his term, and consequently one of the requisites is wanting to the landlord's right of action. It is true that in the present case it is not very probable that the furniture can be of any use to any other than the actual tenant of the premises; but supposing the things leased had been manufacturing engines, there is no reason why a creditor seizing them under an execution should not avail himself of the beneficial use of them during the term.

GROSE, J. The only question is, whether trover will lie where the plaintiff had neither the actual possession of the goods taken at the time nor the right of possession. The common form of pleading in such an action is decisive against him; for he declares that being possessed, &c., he lost the goods; he is therefore bound to show either an actual or virtual possession. If he had a right to the possession, it is implied by law. Where goods are delivered to a carrier, the owner has still a right of possession as against a tortfeasor, and the carrier is no more than his servant. But here it is clear that the plaintiff had no right of possession; and he would be a trespasser if he took the goods from the tenant: then by what authority can he recover them from any other person during the term? It is laid down in some of the books (a) that trover lies where detinue will lie, the former having in modern times been substituted for the old action of detinue. I will not say that it is universally true that the one action may be substituted for the other, because the authorities referred to in support of that proposition do not apply to that extent: but certainly it may be said to be a good general criterion. But it is clear in this case that detinue would not lie, because the plaintiff had no right to the possession of the specific goods at the time. And if not, it is a strong argument to

shew that trover, which was substituted in lieu of it, cannot be maintained by the present plaintiff. Much stress has been laid on what was said in *Ward* v. *Macauley*. But the only question there was, whether trespass would lie under these circumstances; and it was not necessary to determine how far trover might be maintained. It appears now very clearly upon examining that point that trover will not lie in any case, unless the property converted was in the actual or implied rightful possession of the plaintiff. In this case the plaintiff had neither the one nor the other pending the demise, and when that is determined perhaps he may have his goods restored to him again in the same state in which they now are, when it will appear that he has not sustained that damage which he now seeks to recover in this action.

Accord: Lord v. *Price*, L. R. 9 Ex. 54 (1874), plaintiff a purchaser of goods detained by vendor subject to his lien for unpaid purchase money; *Ayer* v. *Bartlett*, 9 Pick. 156 (Mass. 1829); *Fairbanks* v. *Phelps*, 22 Pick. 535 (Mass. 1839). In *Bradley* v. *Copley*, 1 C. B. 685 (1845), the principal case was extended to cover a case where the plaintiffs "were not in a position to require the possession of the goods" per Tindal C. J., they being holders of a bill of sale under which the vendor was entitled to the possession till the payment of a debt due was demanded and refused or not made; and see *National Bank of Commerce of Kansas City* v. *Morris*, 114 Mo. 255 (1892), and cases cited therein. The bailor may, however, maintain trover against third person where the bailment is determinable at his pleasure, *Manders* v. *Williams*, 4 Exch. 338 (1849); *Drake* v. *Redington*, 9 N. H. 243 (1838); *Hart* v. *Hyde*, 5 Vt. 328, 330 (1833); *Root* v. *Chandler*, 10 Wend. 110 (N. Y. 1833). The wrongful act of the bailee in destroying or selling the property or otherwise dealing with in a way injurious to his bailors reversionary interest terminates the bailment and revests the right of possession in the bailee, and trover will lie against the bailee or one purchasing from him, *Cooper* v. *Willomatt*, 1 C. B. 672 (1845), a lease from week to week; *Bryant* v. *Wardell*, 2 Exch. 479 (1848); *Sanborn* v. *Coleman*, 6 N. H. 14 (1832); *Fenn* v. *Bittleston*, 7 Exch. 152 (1851), wrongful sale by vendee in possession under a constitutional sale; *Grant* v. *King*, 14 Vt. 367 (1842). It is, however, held in England that the rehypothecation or sale by a pledgee of the thing pledged, though in violation of the terms of the bailment, does not of itself terminate it or revest the right of possession in the pledgor and trover does not lie against such pledgee till tender of amount due, *Donald* v. *Suckling*, L. R. 1 Q. B. 585 (1866); *Halliday* v. *Holgate*, L. R. 3 Exch. 299 (1868); the weight of American authority is *contra*, see *Learcock* v. *Paxon*, 208 Pa. 602 (1904), and *Mullen* v. *Quinlan & Co.*, notes to *Powell* v. *Sadler*, post p. 155.

Where the plaintiff is out of possession when the goods are converted, he must recover on the strength of his right to possession. Therefore the defendant can set up as a defence the fact that a third person has a better title, though not claiming to act by virtue thereof, *Gadsden* v. *Barrows*, 9 Exchequer (1854), though a bailee may not set up such a title against his bailor, being estopped to deny the latter's title, *White* v. *Mullet*, 6 Ex. 713 (1851), unless evicted by such paramount title, *Philips* v. *Robinson*, 4 Bing. 106 (1827), or unless he has acknowledged the better title of such third party and has delivered the property to him or holds it for him, in which case he may defend under the title and by the authority of such third party, *Rogers* v. *Lambert*, L. R. 1891, 1 Q. B. 318.

SECTION 2.

Character of Defendant's Act.

KEYWORTH *v.* HILL.

King's Bench, 1820. 3 *B. & A.* 685.

Trover against husband and wife, for a bond and two promissory notes. The declaration stated that the defendants converted and disposed of the same to their own use. Plea, not guilty. Verdict for the plaintiff.

ABBOTT, C. J. The question, in this case, arises upon a motion in the arrest of judgment. The ground of the objection is, that inasmuch as a married woman cannot acquire property, the conversion of the property can only be the act of the husband, and must be so charged. If the allegation in the declaration, that the defendants converted the property to their own use, necessarily imported an acquisition of property by them, there would be considerable weight in the objection. It seems to me, however, that that is not the necessary import of the expression, for a conversion may be by an actual destruction of the property. And if the allegation does not necessarily import that the defendants acquired a property, we are bound, after the verdict, to consider the conversion to have taken place by other means than by the acquisition of property. I am, therefore, of opinion that the declaration is sufficient, and that this rule should be discharged.

BAYLEY, J. It is quite clear in trespass that the husband and wife might be jointly sued. The reason of which is, that the action is founded on the wrongful act of the defendants. Now, it seems to me, that the action of trover is founded on the tort also. The cases cited on the part of the defendant proceed upon the supposition that the conversion could only take place by the defendants acquiring a property. It seems to me, however, that in trover the foundation of the action is not the acquisition of property by the defendants, but the deprivation of property to the plaintiffs. If the wife were to take up a book, and her husband desired her to put it in the fire and burn it, and she did burn it, that would be a conversion, and yet the husband and wife would acquire no property; so, if a man takes my horse and rides it, I may bring trover for the temporary conversion. And if there can be any case of a conversion without an ultimate change of property, we are bound, after verdict, to imply that it was such a conversion as the wife might be guilty of.

Rule discharged.[1]

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[1] *Accord: Catterall* v. *Kenyon,* 3 Q. B. (A. & E. N. S.) 310 (1842), refusal of an innkeeper's wife to deliver on demand the plaintiff's cattle, lodged with her husband by one wrongfully seizing them in execution; compare *Marshes Case,* 1 Leon. 312 (1589); *Kowing* v. *Manly,* 49 N. Y. 192 (1872), *semble,* in which the early English cases are ably discussed, and it is held that a

McKAY *v.* PEARSON.

Superior Court of Pennsylvania, 1898. 6 *Penna.* 529.

WICKHAM, J. J. S. McKay, the plaintiff, in the fall of 1893, sowed five acres of wheat on a farm that he had leased from William Turner. At the expiration of his term, in the spring of 1894, he removed from the farm. On July 4, 1894, the wheat was ripe and ready for cutting, and the plaintiff, with a man and the necessary machinery, went to the premises to harvest it, as it is now admitted he had a legal right to do.

He was there met by G. W. Pearson, the defendant, who had succeeded him as Turner's tenant, and who warned him to keep off the land. The next morning the plaintiff again sought to gain an entry, for the same purpose, and was again driven away. At the first visit, the defendant, as he admits, refused to allow the plaintiff to cut the wheat because to quote his own language, "Bill Turner told me when I rented from him that he" the plaintiff, "had no right to put the wheat in and had no right to the wheat." Turner denied that he had told the defendant this, but the matter is more interesting than important, as he could not, by anything he might say, destroy the plaintiff's rights. The plaintiff says that the defendant gave as a reason for excluding him, that Turner had not reserved the wheat in the lease, and that therefore it belonged to him, the defendant. On the second visit, the defendant told the plaintiff that he had not, the evening before, claimed ownership of the wheat, but he adhered to his positive refusal to not permit the plaintiff to enter and harvest it. The plaintiff then, perforce accepting the situation, took his machinery and man and went away, evidently hopeless, as he had a right to be, of being ever able to get his property.

Looking at all the evidence, it is plain that the defendant, unqualifiedly and absolutely, denied the plaintiff's title, and did and said that which must have led the latter to conclude, that his wheat was lost to him. He could draw no other inference from what had happened. If one locks my money in his safe or my horse in his stable and coolly tells me "I don't claim to own your property but I will never let you have it," he is guilty of a conversion. By what magic could the plaintiff gather his crop without going on the land? In the very early case of *Baldwin* v. *Cole,* 6 Mod. 212, Lord

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married woman is alone guilty of an act of conversion whereby no property was acquired or asserted, though the husband must be joined since the wife could not be sued alone; *Heckle* v. *Lurvey & Wife,* 101 Mass. 344 (1869), in which a wife was liable jointly with her husband for goods bought of a thief in her husband's absence, though bought by his orders: but see *Tobey* v. *Smith,* 15 Gray 535 (Mass. 1860), where a declaration setting forth the conversion by a husband and wife "to their own use" was held to be bad on demurrer, see *Berry* v. *Nevys,* Cro. Jac. 661 (1823), and *Gallop* v. *Symson,* Style 115 (1648), *accord. Wheeler & Wilson Mfg. Co.* v. *Heil,* 115 Pa. St. 487 (1886), in which it was held immaterial whether the contract of bailment, made by the wife alone under which she held a sewing machine which she refused to return, was one which as a married woman she had capacity to make.

HOLT, speaking of an absolute and unexplained denial, said: "The very denial of goods to him that hath the right to demand them is an actual conversion, not only evidence of it, for what is a conversion but the assuming upon one's self the property and right of disposing of another's goods." "Where the refusal is absolute and unexplained, it is plenary evidence of a conversion:" 26 Eng. & Am. Ency. of Law, 731. "Every conversion consists of, first, a dealing with the goods in a manner inconsistent with the right of the person entitled to the immediate possession; second, an intention in so doing to deny his right or assert a dominion which is inconsistent with such right:" Ibid. 735. One who purchased land whereon was felled timber that had been sold to another, of which sale he, the purchaser of the land had notice, refused to permit the purchaser of the timber to remove it. He was held liable for conversion: *Sherman* v. *Way*, 56 Barb. 188.[1]

It is not, and never was, claimed that the defendant was holding the wheat for Turner. He certainly was not keeping it for the plaintiff. The inevitable conclusion therefore is, that he was retaining it solely for some purpose of his own, and whether that purpose was malicious or mercenary is of no importance. The test is, not what the defendant has or has not acquired, but what has been the effect of his act with respect to the plaintiff, and whether it amounts to an absolute denial and repudiation of the plaintiff's right. Had the defendant informed the plaintiff that he intended to exclude him only temporarily, or long enough to get time to investigate his title, there would be reason for saying that the evidence of conversion was doubtful. But, according to the tenor of the defendant's own testimony, he had already inquired concerning the matter of title, and made up his mind that the plaintiff had no right to the wheat. It is too clear that he thought he had a technical advantage, over the plaintiff, and meant to hold it. There was nothing equivocal or uncertain in his conduct. He intended to prevent the plaintiff from getting the wheat.

Lastly, will the action of trover lie under the circumstance detailed? In Pennsylvania, growing crops, unlike trees and other spontaneous productions of the earth, are personal property, and it can not be doubted that in the present case the wheat was as fully personalty, while attached to the soil, as though actually severed

[1] The defendant, on whose land the plaintiff's logs were lying, refused to allow him to enter to take them away and threatened to sue him if he removed them, and afterward sold a part of them, accord on very similar facts, *Nichols* v. *Newsom*, 2 Murphy 302 (N. Car. 1813), but see the dissenting opinion of Hall, J., holding that mere denial of right to enter to retake the goods even coupled with threat of suit not to be a conversion, he regarding physical resistance to the removal as necessary. The mere "issuance and service" of an injunction against a tenant in possession, removing certain improvements which the landlord claimed as fixtures is held not to be a conversion, *Lacey* v. *Beaudry*, 53 Cal. 693 (1879), see *accord: Fèlcher* v. *McMillan*, 103 Mich. 494 (1894), but see *McGowen* v. *Young*, 2 Stew. 276 (Ala. 1830), where it was held conversion to enjoin an owner from removing his property from the state.

therefrom: *Backenstoss* v. *Stahler's Admrs.*, 33 Pa. 251. It might therefore be converted, by cutting or carrying it away, by applying the torch to it in the field, or by excluding the owner, when the crop was ready for harvesting, in such a manner as to clearly indicate to him an unequivocal and absolute denial of his right to the grain, and a fixed intent to permanently deprive him of all control over it. In the latter instance the conversion would be complete at once, although the wrongdoer neither then nor thereafter made nor expected to make any profit out of the transaction. Had he retained the plaintiff's wagon in his field until the weather had destroyed it, just as the elements destroyed the wheat crop, in the present case, who will say that he would not have been liable in trover? Nor would the plaintiff have been obliged to await the physical destruction before bringing suit. In *Stafford* v. *Ames*, 9 Pa. St. 343, a case much like the one in hand, the ground of the decision was that the plaintiff's agent "was prevented from cutting and threshing the wheat; he was illegally kept out of possession and had a right to immediate possession."

We see no error in the charge or answer to the points. The question, as to whether or not there was a conversion, was fairly left to the jury. The expression of opinion as to this matter, made by the learned trial judge, was fully justified by the facts, and the rule as to the measure of the damages was correctly given. It would answer no good purpose to discuss, in detail, the many assignments of error. They are all overruled.

Judgment affirmed.[2]

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[2] *Accord: Dale* v. *Jones*, 15 Ind. App. 420 (1896), facts similar to those in principal case; *Farrar* v. *Chauffetete*, 5 Denio 527 (N. Y. 1848), defendant forbade plaintiff to remove machinery from a building purchased by defendant at sheriff's sale, claiming it as a fixture; *Bolling* v. *Kirby*, 90 Ala. 215 (1889); *Hinckley* v. *Baxter*, 13 Allen (95 Mass.) 139 (1866), owner of land forbade removal of building paced on it by his consent, claiming that it was a fixture and so part of the realty; *Watts* v. *Lehman*, 107 Pa. 106 (1884); *Vilas* v. *Mason*, 25 Wis. 310 (1870); *Nichols* v. *Newsom*, 2 Murphy 302 (N. Car. 1813); *Burgess* v. *Isherwood*, 101 Mich. 319 (1894); *Stout* v. *Stoppel*, 30 Minn. 56 (1882).

In *Berry* v. *Friedman*, 192 Mass. 131 (1906), it was held that it was not conversion to refuse to tear down a part of the wall of a dwelling-house in order to permit the removal of a piano, bought in instalments, upon the reversion of the title to the vendor by the nonpayment of an instalment, even though there was an express agreement to do so, but in *Marder* v. *Heineman*, 114 App. Div. (N. Y.) 794, 100 N. Y. S. 250 (1906), there being no express agreement, it was held that [since the owner of the property is bound to permit the removal of property he allows to be placed thereon, even if the removal involved making an opening in the walls, and in *Kelsey* v. *Durkee*, 33 Barb. 410 (N. Y. 1861)], the refusal to tear down a wall to permit an outgoing tenant to remove heavy machinery was held to be conversion. *Ford* v. *Roberts*, 14 Colo. 291 (1890), *accord:* Where, however, the plaintiff fails to remove his property within a reasonable time and then removal becomes impossible by reason of the defendant's use of his land by building thereon, this is not a conversion, *Stackpole* v. *Eastern R. Co.*, 62 N. H. 493 (1883).

The defendant need not be in possession of the goods, if he prevents the plaintiff from taking possession of them, *Wansbrough* v. *Maton*, 4 A. & E. 884 (1836), the defendant leased land to the plaintiff, who thereon erected a building not attached to the freehold, the lease having terminated and the

HILLS *v.* SNELL.

Supreme Judicial Court of Massachusetts, 1870. 104 *Mass.* 173.

The plaintiff, a warehouseman of flour, had in storage two lots of flour, both marked D, one belonging to Greenough, the other to Morse & Co. The first was low grade flour, worth about $6.25 the barrel, the other a high grade flour, worth $13 to $14 the barrel. Defendants bought of Kemble & Co., twenty-eight barrels of flour, to fill the order bought of Greenough, and received a delivery order on the plaintiffs. A teamster of Kemble & Co. took the order to the plaintiffs, who by mistake delivered twenty-eight barrels of the Morse & Co. flour to the teamster, who forwarded it to the defendants. The mistake was discovered about a month later.

WELLS, J. The defendant acquired no title to the flour delivered to him by mistake. He had no contract of purchase with the owner, nor with the plaintiffs, who were bailees of the owner. If he had received it with knowledge of the mistake, or used it after notice thereof, he would have been liable for the conversion. But, under the instructions of the court, the jury must have found that the defendant was not chargeable with notice or knowledge that

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plaintiff having quitted possession, and the land being in the possession of another lessee, the defendant being on the premises, ordered men, sent by the plaintiff to remove the building, to leave the premises; *Bolling* v. *Kirby,* 90 Ala. 215 (1889); *Guthrie* v. *Jones,* 108 Mass. 191 (1871), landlord refused to allow tenant in possession to remove equipment of an eating room, claiming them as fixtures: *Bristol* v. *Burt,* 7 Johns. 254 (1810), the defendant, collector of the port of Oswego, fearing that the plaintiff intended to ship goods to Canada in violation of the Embargo Act, refused him clearance papers and stationed guards around the warehouse in which the goods were stored to prevent the plaintiff from removing them; *Crockett & Woodson* v. *Beaty,* 8 Humph. 20 (Tenn. 1847); *contra: Boobier* v. *Boobier,* 39 Maine 406 (1855); *Polley* v. *Lenox Iron Works,* 2 Allen (84 Mass.) 182 (1861); *England* v. *Cowley,* L. R. 8 Exch. 126 (1873), per Kelley, C. B., and Bramwell, B., Martin, B., *contra.* See also, *McDonald* v. *Bayha,* 93 Minn. 139 (1904), where the defendant, in whose name the plaintiff had bought goods, in consequence of a quarrel as to compensation, having instructed the seller not to deliver the goods to the plaintiff, was held guilty of conversion.

As to whether it be conversion to prevent the plaintiff in possession of goods from removing them, see, holding that it is, *Bristol* v. *Burt,* 7 Johns. 254 (N. Y. 1810); Martin, B., in *England* v. *Cowley,* L. R. 8 Exch. 126 (1873); *Guthrie* v. *Jones,* 108 Mass. 191 (1871), where the defendant claims them, as fixtures, to be his property—in neither *Bristol* v. *Burt,* 7 Johns. 254 (N. Y. 1810), nor *England* v. *Cowley,* L. R. 8 Exch. 126 (1873), did the defendant claim property in the goods, though in *England* v. *Cowley,* the defendant refused to allow the goods to be moved in order not to lose his right to distrain them for rent due upon the premises on which they were; *contra:* Kelley, C. B., and Bramwell, B., in *England* v. *Cowley,* L. R. 8 Exch. 126 (1873); *Guthrie* v. *Jones,* 108 Mass. 191 (1871), where the defendant claimed practically identical with those in *Guthrie* v. *Jones,* 108 Mass. 191 (1871). In both *England* v. *Cowley,* L. R. 8 Exch. 126 (1873), and *Bristol* v. *Burt,* 7 Johns. 254 (N. Y. 1810), a denial of the right to remove deprived the owner of substantially all the actual benefit of possession, the plaintiff, in *England* v. *Cowley,* being the holder of a bill of sale, and the goods in *Bristol* v. *Burt* being only valuable for sale or manufacture.

the flour delivered was not the same he had bought; and that he used it in good faith, deriving no benefit from the plaintiffs' mistake. No demand appears to have been made upon him while the flour was in his possession. So that, if he is to be held responsible at all, it must be on the ground that he used the flour as his own, "supposing and believing it to be the flour he had bought" and paid for.

The declaration contains one count in contract, upon implied assumpsit for the price or value of the flour; and one in tort for its wrongful conversion. The action is brought by the warehouseman, and is founded on their possession and special rights as bailees. But for all purposes of the defense the case stands precisely as if they were the general owners.

The elements of tort are also wanting. The unauthorized appropriation of personal chattels will generally be sufficient of itself to enable the true owner to maintain an action for their conversion. A purchase, in good faith, from one who has not title and no right to transfer the property, will not constitute a defense. Even an auctioneer or broker, who sells property for one who has no title, and pays over to his principal the proceeds, with no knowledge of the defect of title or want of authority, is held to be liable for its conversion to the real owner. *Coles* v. *Clark*, 3 Cush. (Mass.) 399. *Williams* v. *Merle*, 11 Wend. (N. Y.) 80. *Hoffman* v. *Carow*, 20 Wend. (N. Y.) 21; S. C. 22 Wend. (N. Y.) 285. *Courtis* v. *Cane*, 32 Verm. 232. But this severe rule of law will not be applied when the act of appropriation can be justified as having been authorized in any manner by the owner of the property. Thus when, upon a conditional sale, the property is delivered and time given for compliance with the condition, one who purchases and resells the property before the right to perfect the title, by such compliance, has been terminated, is not liable for a conversion to the general owner who subsequently resumes his right to its possession. *Vincent* v. *Cornell*, 13 Pick. (Mass.) 294.[1] When the owner has given to another, or permitted him to have, control of the property, no one can be held responsible in tort for its conversion who merely makes such use of the property, or exercises such dominion over it, as is warranted by the authority thus given. *Strickland* v. *Barrett*, 20 Pick. (Mass.) 415. *Burbank* v. *Crooker*, 7 Gray (Mass.) 158.

In this case, the plaintiffs delivered the flour to Kemble & Hastings as the flour purchased by them from Greenough. Against the plaintiffs therefore, the delivery to Kemble and Hastings and the sale by them to the defendant was an authority to him to treat

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[1] See *Rodgers* v. *Brittain*, 39 Mich. 477 (1878), purchaser of chattels at a sale in apparent conformity with a valid chattel mortgage held not to be conversion.

Contra: Hart v. *Carpenter*, 24 Conn. 427 (1856); *Sims* v. *James*, 62 Ga. 260 (1879); *Fisk* v. *Ewen*, 46 N. H. 173 (1865); *Bean* v. *Edge*, 84 N. Y. 510 (1881), trover against landlord who had caused chattels conditionally sold to tenant to be distrained. As to validity of conditional sales as against purchaser from vendee for value without notice, see *Harkness* v. *Russell*, 118 U. S. 663 (1886).

it as his own. That it was so delivered by mistake might have entitled the plaintiffs to reclaim the property from one having it in possession; or to recover its value from one who had disposed of it with knowledge of the mistake. *Chapman* v. *Cole,* 12 Gray (Mass.) 141. But they can not take advantage of their own mistake to convert into a tort that which has been done in good faith in pursuance of authority given by themselves.

The instructions given to the jury were in accordance with these principles, and were sufficient. It is not necessary to consider in detail those prayed for. They do not reach the point upon which, in our view, the case turns.

Exceptions overruled.[2]

(b) Knowledge that the chattel is the subject of property.

SIR FRANCIS VINCENT *v.* LESNEY.

Court of Common Pleas, 1625. 1 *Croke, Charles* 18.

Trespass: for that the defendant *accipitrem ipsius Francisci percussit* with his staff, upon which stroke the hawk died. The defendant pleaded not guilty; and it was found for the plaintiff, and damages assessed to six pounds.

Secondly, it was alleged, that the declaration was not good, because it is said *accipitrem ipsius Francisci,* and he doth not show that she was reclaimed; for a hawk is *feroe naturoe,* and, if not reclaimed, the plaintiff can not have any property in her, nor can she be said to be *ipsius Francisci:* And to confirm this *Spencer's case* was cited 5 Co. 34.—But the court held the declaration to be good enough, being in an action of trespass for striking and killing, &c. which he only may have who hath the possession. And it differs from *Spencer's case;* for there it was an action of trover and conversion, which lies not but of a hawk reclaimed, and which may be known by her vervels, bells, or by some other mark whereby notice can be taken of her owner. Whereupon it was adjudged for the plaintiff.

"No intention of gain to the wrongdoer or to any one else is essential, if an injury be done to the owner by an act negativing his right of property. But when the chattel is not known to be property, there can be no interference with the ownership and no conversion without an appropriation. In such case a defendant might in some other form of action be made to answer for any benefit acquired by himself, or for any injury done to the property by a wrongful act, but if he did not use the chattel as property, he could not in *trover* be

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[2] *Accord: Waring* v. *Penna. R. Co.,* 76 Pa. 491 (1874), no conversion as against carrier to consume oil wrongfully delivered by mistake, unless defendant knowingly took advantage of it; *Tousley* v. *Board of Education,* 39 Minn. 419 (1888), the plaintiff, a member of the defendant Board, approved the payment of the purchase-price of wood which he now claims, to a third party from whom the defendant had innocently purchased them.

held to have converted it," Wardlaw, J., in *Nelson* v. *Whetmore,* 1 Rich. 318 (S. Car. 1845), the plaintiff's slave, Frank, represented himself to the defendant to be a free negro and induced him to take him as a servant to Washington, where he disappeared, it was held to be essential to inquire whether the defendant knew Frank to be a slave; *Quay* v. *McNinch,* 2 Mill. C. R. 78 (S. Car. 1818), defendant at Chester, Pa., hired a runaway slave to drive him to South Carolina, believing him to be a free negro; *Glover* v. *Riddick,* 11 Ired. 582 (N. Car. 1850), the defendant gave certificates of freedom to plaintiff's slaves, believing them to be free, this was held to be "no evidence of an act of ownership on the part of the defendant—it expressly disclaims it."

(c) Intent to deal with the chattel.

SALT SPRINGS NATIONAL BANK *v.* WHEELER.

Commission of Appeals of New York, 1872. 48 *N. Y.* 492.

HUNT, C. The advantage of an action in trover, rather than an action in assumpsit, in the collection of a debt, is apparent. It gives a right to hold to bail during the pendency of the action, and the right of imprisonment upon an execution, in addition to the usual resort to the property of the defendant. To procure this advantage the plaintiffs have passed by their plan and obvious remedy, of an action against the defendant for a breach of contract, and have brought an action of trover. The question is whether they can sustain it.

During the autumn of 1865, the defendant being indebted to the firm of Jaycox & Green in the sum of $1,012.18, that firm drew upon him for the amount in three several bills of exchange at one month each. These bills were discounted by the plaintiff at about the time of their several dates, and had all matured before the 30th day of December. On that day one of them had been due two and a half months, the second nearly two months, and the last a few days. These drafts were severally transmitted by the plaintiff to the defendant for acceptance and payment, he being engaged in the business of a banker also. Before the 30th day of December the defendant failed and made an assignment. On that day the plaintiff's agent demanded of him the three drafts in question. He replied that he thought he had returned them to the plaintiff. Upon reflection and examination he stated that he could not find them, and that he might have burned them up in destroying other papers that he considered of no value. It was not pretended by any witness that the defendant asserted any title to the bills or claimed any right to hold or retain them. There was no reason to doubt the accuracy of the defendant's statement. The judge finds that they were lost, mislaid or destroyed through the negligence of the defendant. He also finds that he "converted the same."

To authorize the action of trover, two things are necessary: 1. Property in the plaintiff with a right of possession; and 2. A conversion by the defendant of the thing to his own use. This con-

version consists of the appropriation of the thing to the party's own use and beneficial enjoyment, or in its destruction, or in exercising dominion over it in defiance of the plaintiff's right, or in withholding it under a claim of title. (1 Greenl. Ev., § 642, and cases cited.) The destruction referred to as constituting a conversion is an intentional destruction, not an accidental act. Thus, a misdelivery of goods by a bailee is a conversion. (Id., and *Deming* v. *Barclay,* 2 B. & A. 702; *Seyd* v. *Hay,* 4 T. R., 260.) But the accidental loss by the carrier is not. (*Ross* v. *Johns,* 5 Burr. 2825; *Dwight* v. *Benton,* 1 Pick. (Mass.) 50.) A *wrongful* sale is a conversion, but a purchase in good faith is not in the first instance a conversion. (Id., § 642.) The accidental loss or destruction of an article by one lawfully in its possession has never been held to be a conversion. (*Bromley* v. *Coxwell,* 2 B. & P., 438; *Cairns v. Bleecker,* 12 J. R., 300; *Jervis* v. *Jolliffe,* 6 id., 9.)

Judgment reversed.[1]

SECTION 3.

Non Feasance.

MULGRAVE *v.* OGDEN.

Queen's Bench, Hilary Term, 1591. *Croke, Elizabeth,* 219.

ACTION SUR TROVER of twenty barrels of butter; and counts that he *tam negligenter custodivit* that they became of little value. Upon this it was demurred, and held by all the justices, that no action upon the case lieth in this case; for no law compelleth him that finds a thing to keep it safely; as if a man finds a garment, and suffers it to be moth-eaten; or if one findeth a horse and giveth it no sustenance; but if a man find a thing and useth it, he is answerable, for it is conversion; so if he of purpose misuseth it, as if one finds paper and puts it into the water, &c.; but for negligent keeping no law punisheth him. *Et adjournatur.*

[1] In *Wellington* v. *Wentworth,* 8 Metc. 548 (Mass. 1844), the plaintiff's cow, which he had negligently allowed to be at large, joined the defendant's herd, and was driven with it from Massachusetts to New Hampshire for pasture. The defendant never discovered that there was a strange cow in his herd until his return, having without his knowledge lost one of his own, so that the accession of the plaintiff's cow merely filled up the herd to its proper number. He immediately returned the cow, with a calf which it had had, to the plaintiff. It was held that there was no conversion. See also, *Young* v. *Vaughan,* 1 Houst. 331 (Del. 1857), where it was held that trespass *de bonis asportatis* would not lie in closely similar facts; and *Van Valkenburgh* v. *Thayer,* 57 Barb. 196 (N. Y. 1870), where it was held to be no conversion to drive a flock, with which the plaintiff's sheep had mingled, to the defendant's knowledge, to the latter's premises, where the sheep were separated and the plaintiff's driven back to the place where they had joined the flock.

HAWKINS *v.* HOFFMAN.

Supreme Court of New York, 1844. 6 *Hill* 586.

Action on the case, tried at the New York circuit in May, 1843, before KENT, C. Judge. The declaration contained counts against the defendant as a common carrier of passengers and goods on the Hudson River, and complained of the loss of the plaintiff's trunk and its contents. There was also a count in trover.

The plaintiff was a merchant who employed one Mason as his traveler, going from place to place with samples of his goods. In May, 1842, Mason took passage at New York on the defendant's steamboat for Poughkeepsie, having with him, together with other baggage, a trunk containing samples, the property of the plaintiff, which he put on board the boat at New York. On arriving at Poughkeepsie this trunk was not put in Mason's carriage but was left on the dock, and while Mason was looking up his other baggage, was put back on the boat, probably by some of the hands who handled the baggage and who supposed it had been landed by mistake. The trunk was carried on to Albany and when Mason went there the next day in search of it it could not be found.[1]

The plaintiff contended that even if the trunk be regarded as merchandise, and not as the necessary baggage of Mason as a traveler, the defendant was answerable for the act of his servant in returning the trunk to the boat and that the cause should go to the jury on the count in trover.

The judge, however, ordered a nonsuit, which the plaintiff now moved to set aside.

By the Court, BRONSON, J.[2] Trover will lie where the goods have been lost to the owner by the act of the carrier, though there may have been no intentional wrong; as where the goods are by mistake, or under a forged order, delivered to the wrong person. (*Youl* v. *Harbottle*, Peake Cas. 49; *Devereux* v. *Barclay*, 2 Barn. & Ald. 702; *Stephenson* v. *Hart*, 4 Bing. 476; *Lubbock* v. *Inglis*, 1 Stark. R. 104.) But it will not lie for the mere omission of the carrier; as where the property has been stolen, or lost through his negligence, and so can not be delivered to the owner. The remedy in such cases is assumpsit, or a special action on the case. (Anon., 2 Salk. 655; *Ross* v. *Johnson*, 5 Burr. 2825; and see *Dewell* v. *Moxson*, 1 Taunt. 391; 2 Saund. 47, f; *McCombie* v. *Davies*, 6 East, 538.) Mere nonfeasance does not work a conversion of the property; and although the owner may have another action, he can not maintain trover. Here, the trunk was lost, and the plaintiff can only recover, if at all, upon the counts which charge the defendant as a carrier.[3] A demand and refusal would not alter the case, for

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[1] The facts are much condensed from those given in the report.

[2] A large part of the opinion, holding that the trunk was not the necessary baggage of a traveler, is omitted.

[3] *Accord: Emory* v. *Jenkinson*, Tappan 254 (Ohio 1818), horse kicked by another horse while in the custody of the defendant, who acted either as inn-

as the trunk was either stolen or lost the defendant could not deliver it. Demand and refusal are only evidence of a conversion where the defendant was in such a condition that he might have delivered the property if he would.

New trial denied.

FARRAR *v.* ROLLINS.

Supreme Court of Vermont, 1864. *37 Vt.* 295.

Trover for a sled. Plea: Not guilty. *Verdict for plaintiff.*

POLAND, C. J. It is fairly to be inferred from the exceptions that the plaintiff's sled was in the defendant's possession at the time the plaintiff requested the defendant to return it.

The plaintiff did not claim that the defendant obtained possession of it wrongfully, but that he loaned it to him, or to his servant, Cole, so that there was no conversion by a wrongful taking. But the plaintiff claims that it was unlawfully detained and withheld from him by the defendant when he called for or demanded it.

The plaintiff requested the defendant to return the sled to his (the plaintiff's) house, where he got it. This the defendant refused to do, on the ground that when Cole borrowed the sled he borrowed it for himself, and not for the defendant. The defendant made no

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keeper or agister, in either case his liability was in an action on the case for negligence; *Alabama &c. R. Co.* v. *Kidd*, 35 Ala. 209 (1859); *Davis & Son* v. *Hurt*, 114 Ala. 146 (1896), goods negligently lost by warehouseman; *Ross* v. *Johnson*, 5 Burr. 2825 (1772); *Bowlin* v. *Nye*, 10 Cush. 416 (Mass. 1852); *Wamsley* v. *Atlas S. S. Co.*, 168 N. Y. 533 (1901); *Parsons* v. *United States Ex. Co.*, 144 Iowa 745 (1909), all cases where goods were negligently lost or injured in the course of carriage by a common carrier; *Tinker* v. *Morrill*, 39 Vt. 477 (1866), negligent custody of goods received from attaching officer; *Dearbourn* v. *Union Bank*, 58 Maine 273 (1870); *Savage* v. *Smythe*, 48 Ga. 562 (1873); failure to pay a debt for which the defendant had pledged the plaintiff's stock with the latter's consent, held to be no conversion; *Jones* v. *Gilmore*, 91 Pa. 310 (1879). But see *Donlin* v. *McQuade*, 61 Mich. 275 (1886), where it was held to be the duty of the bailee (a skating rink proprietor) to preserve property entrusted to him (skates checked by a patron) and his refusal to return them, because of his inability to find them, was a conversion; and see *Thompson* v. *Moesta*, 27 Mich. 182 (1873). *A fortiori*, the bailee is not liable where the goods are taken from him without consent by superior force. *Abraham* v. *Nunn*, 42 Ala. 51 (1868); or by officers acting under regular or apparently regular legal authority, *Traylor* v. *Hughes*, 88 Ala. 617 (1889); *Niagara Ins. Co.* v. *Campbell Stores*, 101 App. Div. (N. Y.) 400 (1905), affirmed 184 N. Y. 582 (1906); *Clegg* v. *Boston Warehouse Co.*, 149 Mass. 454 (1889).

Nor is a man liable in conversion because he did not drive from his premises or plant the plaintiff's slave, who had come there without his invitation. *Lexington &c. R. Co.* v. *Kidd*, 7 Dana 245 (Ky. 1838); *Jones* v. *Allen*, 1 Head 626 (Tenn. 1858).

A man who, by negligence or positive misconduct, injures or causes the injury of another's property not in his possession is not guilty of trover. *Smith* v. *Archer*, 53 Ill. 241 (1870), an owner of "breachy" cattle, not liable for neighbor's crops consumed by them when they escaped from their pasture; *Jones* v. *Allen*, 1 Head 626 (Tenn. 1858), negro stabbed at corn husking at which whisky had been given to all present, black and white alike.

claim to the sled, and had no objection to the plaintiff's taking it; he only refused to carry it to the plaintiff's house, claiming he was under no obligation to do so. If the borrowing was really on behalf of the defendant, so that it was his duty to have returned it to the plaintiff, his refusal to do so was no conversion; it was a mere breach of contract, for which he might be liable in a proper action.

The principle is undoubted that where one has the property of another in his possession, with no right to retain it, and being called on to surrender it to the owner, refuses, he is guilty of conversion, and trover will lie. But here was no refusal to surrender the sled to the plaintiff, and no withholding it from him; indeed, the plaintiff did not ask to have it delivered to him. He claimed that the defendant should carry the sled to his house, which the defendant refused. If this refusal was wrongful, it was no conversion. There was no repudiation of the plaintiff's right to the sled, and no assertion or exercise of any dominion over it by the defendant inconsistent with the plaintiff's right. The plaintiff could have his sled when he called for it, but insisted that the defendant should fulfil his duty, or perform his contract by carrying it home.

Judgment reversed and case remanded.[1]

SECTION 4.

Misfeasance.

(a) Sale and delivery of possession.

CONSOLIDATED COMPANY *v.* CURTIS.

L. R. 1892 1 *Q. B.* 495.

HENN COLLINS, J. "There can be no conversion by a mere bargain and sale without a transfer of possession. The act, unless in market overt, is merely void, and does not change the property or

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[1] *Accord: Forehand* v. *Jones*, 84 Ga. 508 (1889), a tenant farming on shares, refused to convey the landlord's share of the cotton picked to the gin-house as he had agreed to do; the right of the owner is to take his property at and from the place where it is. *Richards* v. *Pitts Ag. Works*, 37 Hun 1 (N. Y. 1885), "Mere passivity and quiescence can not make the defendant liable for a conversion." *Gillett* v. *Roberts*, 57 N. Y. 28 (1874), one into whose possession goods have lawfully come, is not guilty of a conversion, even though his right to possession has terminated, for neglect in or refusing to convey them, upon the owner's demand, to a place designated by the owner, *Gillett* v. *Roberts*, 57 N. Y. 28 (1874); nor to remove them from his premises, *Dame* v. *Dame*, 38 N. H. 429 (1859), plaintiff permitted to erect a house on land subsequently conveyed to defendant; *O'Connell* v. *Jacobs*, 115 Mass. 21 (1874). The defendant is not bound to assist the plaintiff in removing his goods, nor is silence tantamount to a denial of possession unless the goods are upon the

the possession[1] *Lancashire Wagon Co.* v. *Fitzhugh,* 6 H. & N. 502, and per BRETT, J. in *Hollins* v. *Fowler, a fortiori,* mere intervention as broker or intermediary in a sale by others is not a conversion. This is the case put by BRAMWELL, L. J., in *Cochrane* v. *Rymill,* 40 L. T. N. S. 744, of an introduction by an auctioneer of a purchaser to a vendee.[2]

HARRIS *v.* SAUNDERS.

Court of Appeals of South Carolina, 1835. *2 Strobhart Eq. 370, Note.*

Trover for a negro.

The facts as re-put by EARLE, J., were substantially as follows:

The plaintiff was an illegitimate son of one John Harris. There was evidence that by a deed which was lost but whose contents was proved by the draftsman and the subscribing witness, that John Harris conveyed the negro to the plaintiff, received a life estate in

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defendant's person or under his then immediate personal control, *Richards* v. *Pitts Ag. Works,* 37 Hun 1 (N. Y. 1885).

Where, however, the action of the defendant is necessary to the plaintiff's obtaining legal possession and it is the defendant's legal duty to act, refusal to do so constitutes conversion, *Bank of America* v. *McNeil,* 10 Bush 54 (Ky. 1873), defendant refused to transfer on its books, shares of stock for which plaintiff was assignee with power of attorney to transfer to his own name.

[1] *Accord: Traylor* v. *Horrall,* 4 Blackf. 317 (Ind. 1837), neither vendor nor purchaser liable where possession was not taken under the sale; *Forth* v. *Pursley,* 82 Ill. 152 (1876); *Herron* v. *Hughes,* 25 Cal. 555 (1864), an elaborate conspiracy to defraud the plaintiff of his goods by a sale under a void judgment, held to be no conversion, the goods never being in the custody of the officer selling them, who did not attempt to deliver them to the purchaser, "it amounted to nothing more than a verbal agreement between the parties to take and convert the property of another. The whole proceeding was *vox et preterea nihil;*" *Fuller* v. *Tabor,* 39 Maine 519 (1855), taking a quit claim deed for a house not attached to the soil and recording it, held to be no conversion: *Davis* v. *Buffum,* 51 Maine 160 (1863), landlord giving a deed for fixtures which tenant had right to remove; *Burnside* v. *Twitchell,* 43 N. H. 390 (1861), the taking of a mortgage held not to be a conversion. But where a mortgage, though possession be not taken, injures the plaintiff's property rights, the giving of such mortgage is a conversion, *Ivers & Pond Piano Co.* v. *Allen,* 101 Maine 218 (1906), the plaintiff made a conditional sale of a piano to the defendant, which not being recorded was, by statute, valid only as between the parties thereto, the defendant mortgaged the piano to a third party who recorded it, held to be a conversion, though the condition of the sale had not been broken and the piano was destroyed by fire while in defendant's possession.

The mere assertion of title by one not in possession is not a conversion, *Forth* v. *Pursley,* 82 Ill. 152 (1876); *Gillet* v. *Roberts,* 57 N. Y. 28 (1874), *semble;* not even if the goods are marked with the defendant's name, *Penny* v. *State,* 88 Ala. 105 (1889), or cattle are branded with his brand, *Sawyer* v. *Kenan,* 95 Ga. 552 (1894), or if receipts therefor are taken out in the defendant's name, if turned over to the plaintiff, *Penny* v. *State,* 88 Ala. 105 (1889).

[2] The case was thus put by Bramwell, L. J., "Supposing a man were to come into an auctioneer's yard, holding a horse by the bridle and to say, 'I want to sell my horse, if you will find a purchaser I will pay commission.' And the auctioneer says, 'Here is a man who wants to sell a horse, will any one buy him?' If he then and there finds a purchaser, and the seller himself hands

himself. John Harris kept the deed in his own possession, on his death his administrator searched his papers, but not finding the deed, in settling the estate sold the negro to one Hora, who sold him to Miller, who sold him to Saunders, the defendant, who sold him to one Hollingsworth before the action was brought; and this was the only conversion alleged.[1]

A motion for non-suit was made which the court denied. The jury found for the plaintiff and the defendant appealed on the ground, *inter alia,* that he was entitled to a non-suit, there being no wrongful conversion of the negro and because trover will not lie on the facts stated and proved by the plaintiff.

Curia, per EARLE, J.[2] The first question on the motion for non-suit is, whether there was any conversion by the defendant to sustain the action. As I apprehend it will only be necessary to inquire what constitutes a conversion, to afford a satisfactory answer to the question. A conversion may arise either by a wrongful taking of the chattel, or by some other illegal assumption of ownership, by illegally using, or by misusing it; or by a wrongful detention; perhaps more accurately defined by another writer, thus a conversion seems to consist in any tortious act, by which the defendant deprives the plaintiff of his goods, either wholly or but for a time. Any act of the defendant inconsistent with the plaintiff's right of possession, or subversive of his right of property, is a conversion. Here the defendant, after the accrual of the plaintiff's title, and right of possession, having the slave in his own hands by purchase from one who had no title, sold him to another who carried him beyond the plaintiff's reach, and put the price in his pocket. If this be not a conversion, and a very effectual one too, it is difficult to imagine what would constitute a conversion.[3] The argument is, that inasmuch as the defendant was not aware of the plaintiff's title, he

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over the horse, there could be no act on the part of the auctioneer which could render him liable to an action of conversion." See *accord, Turner* v. *Hockey,* 56 L. J. Q. B. 301 (1887), as explained by Henn Collins, J., in *Consolidated Co.* v. *Curtis,* L. R. 1892, 1 Q. B. 495. So "if the auctioneer or broker does nothing more than settle the price as between a vendor and purchaser of goods and takes his commission, he is not liable as for a conversion, should it turn out that the vendor was not entitled to sell," Romer, J., *Barker* v. *Furlong,* L. R. 1891, 2 Ch. 172, p. 181; and see *Bank* v. *Cassidy,* 71 Mo. App. 186 (1897).

As to whether a delivery of possession by a bailee, as auctioneer, to complete a de facto sale known by him to have been made, is a conversion, see *National Mercantile Bank* v. *Rymill,* 44 L. T. (N. S.) 767 (C. A. Eng. 1881), holding it to be no conversion, but see Henn Collins, J., in *Consolidated Co.* v. *Curtis,* L. R. 1892, 1 Q. B. 495, *contra;* and see *Fisk* v. *Ewen,* 46 N. H. 173 (1865); Bramwell, L. J., *Cochrane* v. *Rymill,* 40 L. T. (N. S.) 744 (C. A. Eng. 1879), p. 746.

[1] The facts stated by Earle, J., are greatly condensed.

[2] The residue of the opinion dealing with the proof of the execution and contents of the deed and the defendant's contention that, he being a *bona fide* holder for value, the gift was fraudulent as to him, is omitted.

[3] *Accord: Featherstonhaugh* v. *Johnston,* 8 Taunton 237 (1818); *Kyle* v. *Gray,* 11 Ala. 233 (1847); *Davis* v. *Hurt,* 114 Ala. 146 (1896); *Dwight* v. *Brewster,* 1 Pick. 50 (Mass. 1822); *Thomas Mfg. Co.* v. *Huff,* 62 Mo. App. 124 (1895); *Thompkins* v. *Haile,* 3 Wend. 406 (1829); *Morrill* v. *Moulton,* 40 Vt. 242 (1867). In such case no demand is necessary.

is not liable after the sale. It is not denied that he would be liable if he had retained the property, and refused to give it up. Can the sale make any difference, when he thereby made property of him, and has the proceeds in his pocket? The sale was an act by which the plaintiff is wholly deprived of his property; and it was not the less his property because the defendant was not aware of his title, and purchased from another. If the defendant is not liable, the plaintiff is without redress, as the former owners stand on the same footing. But there is no weight in the objection. If authority were needed to support the position, it may be found in *Cooper* v. *Chitty,* 1 Burr. 20, where the sheriff levied on the goods of a bankrupt, after an act of bankruptcy committed, of which he was ignorant; in an action by the assignees, he was held guilty of a conversion. And in *Bloxham* v. *Hubbard,* 5 Ea. Rep. 407, it was held that the sale of a ship, which was afterward lost at sea, by the defendant, who claimed under a defective conveyance from a trader, before his bankruptcy, was a sufficient conversion to enable the assignees of the bankrupt to maintain trover, without demand and refusal.

The motion for non-suit can not prevail.

GANTT, J. RICHARDSON, J. HARPER, CH. BUTLER, J. EVANS, J. JOHNSTON, CH. JOHNSON, CH. and DESAUSSURE, CH. concurred.

O'NEALL, J. absent at the argument.

Motion refused.

HOLLINS *v.* FOWLER.

House of Lords, 1875. *L. R., 7 House of Lords,* 757.

This was an appeal on a case stated, on which the Court of Queen's Bench had given judgment for Fowlers, the plaintiffs in the action, which judgment had been affirmed in the Exchequer Chamber.

Fowler & Co. were merchants at Liverpool. Hollins & Co. carried on the business of cotton brokers there.

In December, 1869, Fowler & Co. instructed their brokers, Messrs. Rew, to sell for them thirteen bales of cotton. A person named Hill, a clerk to H. K. Bayley, a cotton broker at Liverpool, proposed to purchase on his master's account. Messrs. Rew refused to sell unless the name of a responsible person was given as the purchaser. Hill then said that Bayley was buying as a broker for Thomas Seddon, of Bolton. The inquiries as to Mr. Seddon being quite satisfactory, Messrs. Rew forwarded to Fowlers, their principals, a sold note, in these terms: "Liverpool, Dec. 18, 1869. Messrs. Fowler Brothers. We have this day sold on your account the undermentioned cotton." Then came the description, "Thirteen bales—American—at 12*d.*, per Minnesota," and the buyer's name was given thus: "Thomas Seddon, *per* H. K. Bayley." The payment was to be "cash within ten days, less 1½ per cent. discount."

A counterpart of this note was sent to Bayley himself. On the same day Bayley sent to Messrs. Rew a sampling and delivery order, and the bales were delivered to him, and removed to his warehouse. On the same day, also, Messrs. Rew sent to Bayley the following note: "Mr. Thomas Seddon, *per* Messrs. H. K. Bayley & Co. Bought from Fowler Brothers, *per* Rew & Freeman, brokers, 13 bales American cotton, *ex* Minnesota, at 12*d* per lb., subject to the rules and regulations of the Liverpool Cotton Brokers' Association. Payment in cash, within ten days, less 1½ per cent. discount."

On the 23d of December, H. K. Bayley, being thus in possession of the cotton, offered the same to Francis Hollins (one of the defendants), who consented to purchase the thirteen bales at 11½*d* per pound, and who purchased at the same time twenty-five other bales of cotton from H. K. Bayley on the same terms. Messrs. Hollins, under the usual form of order, sampled the cotton on the same day. They had on that morning received a message from Messrs. Micholls, cotton spinners at Stockport (for whom they were in the habit of purchasing cotton), stating that on that day Mr. Micholls would be in Liverpool to purchase cotton through the Messrs. Hollins, and those gentlemen had bought the cotton from H. K. Bayley believing it to be of the sort which Messrs. Micholls would require. On examining the cotton, Mr. Micholls agreed to take it. Messrs. Hollins were in the habit of thus buying cotton in the belief that their customers would take it. If any particular customer did not take the cotton thus speculatively purchased for him, Messrs. Hollins disposed of it to some other customer. In the latter part of the 23d of December, Bayley received a delivery in these terms: "Please deliver the bearer. . . . cotton, *ex* Minnesota, at 11¾*d*. per lb., bought this day for Micholls & Co., Francis Hollins & Co." The thirteen bales were delivered on the following morning to Messrs. Hollins, by whom they were at once forwarded to Micholls & Co., at Stockport. Bayley received the price of the cotton from Hollins & Co., which was repaid by Micholls & Co., together with a sum for commission and porterage, the defendants, Messrs. Hollins, not obtaining a profit on the cotton, but merely receiving a broker's commission on its purchase.

Messrs. Fowler, not having received payment for the cotton at the stipulated time (ten days), applied to Mr. Seddon, and then learnt that he had never employed H. K. Bayley to purchase cotton for him. Application was then made to Messrs. Hollins for the bales of cotton, when the answer given was, "the cotton was bought by one of our spinners, Messrs. Micholls & Co., for cash, and has been made into yarn long ago, and as everything is settled up, we regret we can not render your client any assistance." The action for trover was afterwards brought.

The cause was heard before Mr. Justice WILLES, at the Liverpool Springs Assizes, 1870, when the facts above stated having been proved, the learned judge left two questions to the jury: first, whether the thirteen bales in question had been bought by the defendants as agents in the course of their business as brokers; and,

secondly, whether they dealt with the goods as agents for their principals. Both questions were answered in the affirmative, and Mr. Justice WILLES then directed the verdict to be entered for the defendants, reserving leave to the plaintiffs to move to enter the verdict for them.

A rule was afterwards obtained for that purpose, and on the 25th of November, 1870, was made absolute. On appeal to the Exchequer Chamber, the judges were equally divided in opinion, and so the judgment of the court below stood affirmed.

This appeal was then brought.

The judges were summoned, and Mr. Justice Blackburn, Mr. Justice Mellor, Mr. Justice Brett, Mr. Baron Cleasby, Mr. Justice Grove, and Mr. Baron Amphlett, attended.

The Solicitor General (*Sir John Holker*), and *Mr. Herschell*, Q. C., for the plaintiffs in error, defendants in the action.

Mr. Joseph Kay, Q. C., and *Mr. Bigham* (*Mr. C. Russell*, Q. C., with them) for the defendants in error, plaintiffs in the action.

The LORD CHANCELLOR proposed the following question to the judges:—

Whether, under the circumstances stated in the joint case on appeal, the respondents (the plaintiffs in the action) were entitled to have a verdict entered for them for the value of the thirteen bales of cotton mentioned in the declaration.

BLACKBURN, J. My Lords, it appears from the statement in the case that Fowlers, the plaintiffs, had delivered into the actual custody of Bayley, a broker, thirteen bales of cotton, their property, they believing that they had sold these bales to Seddon, through Bayley, as Seddon's broker, after they had refused to trust Bayley himself; and believing that Bayley was the agent of Seddon to receive delivery; so that Fowlers thought that they were transferring the property to Seddon, but were mistaken, as in fact Bayley had no authority from Seddon either to purchase or to take delivery.

Under such circumstances the property and legal right to the possession remained in Fowlers, and Bayley could not (except by a sale in market overt) confer on any one, however innocent, a title superior to his own. He could not do it under the Factors Acts, because he was not entrusted by the plaintiffs as their agents; nor could he do it as being a person in whom the property had vested, subject to being divested by the plaintiffs, for no property, even defeasible, ever passed from the plaintiffs, as there never was any contract with any one, though they erroneously thought there was one with Seddon.

These points were decided, as I think rightly, in the case of *Hardman* v. *Booth*, 1 H. & C. 803.

From the terms of the reservation (set out in the note to the report of the present case, L. R. 7 Q. B. 620), it appears the defendant had an opportunity to have that case reviewed in a Court of Appeal, if so advised, for it is said that, "The defendants be at liberty to argue, if necessary, that the sale by Bayley under the

circumstances gave a good title to a *bona fide* purchaser for value without notice." The Court of Queen's Bench, being bound by the decision of a court or co-ordinate jurisdiction, could not so hold; and the defendants have not raised the point for a Court of Appeal.

I proceed to state the farther facts.

Hollins, the defendants, as brokers, acting for Messrs. Micholls, and Messrs. Micholls, as customers, acting through the defendants as brokers, dealt with Bayley in a manner which would have been quite right, if Bayley had been an honest man, or, even a dishonest man, if intrusted by the plaintiffs with the possession of the goods, as an agent, for sale.

And the defendants and Micholls were both innocent of any knowledge of any infirmity in Bayley's title, and not only were they innocent, but I think there is nothing amounting even to the evidence of negligence on the part of the defendants in dealing with Bayley without further inquiry, nor, *a fortiori,* in Micholls who trusted the defendants to act for him, and deal with Bayley because the defendants selected him.

Under those circumstances, your Lordships ask the question, whether the plaintiffs were entitled to have a verdict entered for them for the value of the thirteen bales of cotton.

And I answer that question in the affirmative. However hard it may be on those who deal innocently and in the ordinary course of business with a person in possession of goods, yet, as long as the law, as laid down in *Hardman v. Booth,* 1 H. & C. 803, is unimpeached, I think it is clear law, that if there has been what amounts in law to a conversion of the plaintiff's goods, by any one, however innocent, that person must pay the value of the goods to the real owners, the plaintiffs. See *Stephens* v. *Elwell,* 1 H. & C. 803, and *Garland* v. *Carlisle,* 4 Cl. & F. 693.

And, accordingly, I think it has not been disputed by any one, that if the plaintiffs had sued Micholls, who has worked this cotton up into yarn, Micholls must have had judgment against him for the value of the cotton, and would be liable to pay the price over again, though he honestly transmitted the price to the defendants, Hollins, who honestly handed it to Bayley.

And I take it that if the defendants have done what amounts in law to a conversion, they also must be liable to pay the plaintiffs.

It is hard on them, I agree, but I do not think that it is harder than it would have been on Micholls. Indeed, I think, that if the plaintiffs were told that they had recourse, at their option, against either the broker or spinner, they might, without any obvious injustice, have said: Then make the broker pay, for he went to Bayley's so that if there is any fault it is his.

But we can not act on any notions of hardship.

When a loss has happened through the roguery of an insolvent, it must always fall on some innocent party; and that must be a hardship. Had the Legislature thought fit to make a sale in the cotton market at Liverpool equivalent to a sale in market overt, the loss

would have fallen on the plaintiffs.[1] As it is, it falls on any one who has done what the law esteems a conversion.

We must, I apprehend, in such cases look only to the question, whether on the established principles of law the complaining party makes out that the loss should fall on the innocent defendant rather than on himself, the equally innocent plaintiff.

If, as is quite possible, the changes in the course of business since the principles of law were established make them cause great hardships or inconvenience, it is the province of the Legislature to alter the law. That has been done to a considerable extent by the Factors Acts, and it may be expedient to extend that alteration farther, but those Acts have not as yet been extended so far as to embrace the case of any one, whether as a broker or otherwise, dealing with a person in the position of Bayley in this case. And I apprehend your Lordships will not, in your judicial capacity, depart from the established principles of law to meet the hardship of a particular case, even if you were so convinced of that hardship as to be willing in your legislative capacity to concur in a change of the law in future. But this leaves open what I take it is the real question in this case, viz., whether what the defendants did amounts on the established principles of law to a conversion.

I own that it is not always easy to say what does and what does not amount to a conversion. I agree with what is said by my Brother Brett in his judgment below, that in all cases where we have to apply legal principles to facts, there are found many cases about which there can be no doubt, some being clear for the plaintiff, and some clear for the defendant, and that the difficulties arise in doubtful cases on the border line between the two.

I think many cases which at first seem difficult are solved if the nature of the action is remembered.

Lord Mansfield says, in *Cooper* v. *Chitty*, 1 Burr. 20; 1 Sm. L. C. 417: "The bare defining of this kind of action and the grounds upon which a plaintiff is entitled to recover in it, will go a great way towards the understanding, and consequently the solution, of the question in this particular case. In form it is a fiction, in substance a remedy to recover the value of personal chattels wrongfully converted by another to his own use. The form supposes the defendant may have come lawfully by the possession of the goods. This action lies, and has been brought in many cases where in truth the defendant has got the possession lawfully. When the defendant takes them wrongfully, and by trespass, the plaintiff, if he thinks fit to bring this action, waives the trespass, and admits the possession to have been lawfully gotten."

It is generally laid down that any act which is an interference

[1] Though a sale in market overt conveys a good title to the purchaser and protects him in dealing with them, at least until after the thief has been prosecuted at the true owner's suit and so title revested in him and demand made upon such purchaser, so that neither the purchaser of the goods nor any dealings with them prior to such demand is a conversion, yet the market overt affords no protection to the vendor or his agents in selling, and the sale is a

with the dominion and right of property of the plaintiff is a conversion, but this requires some qualification.

From the nature of the action, as explained by Lord Mansfield, it follows that it must be an interference with the property which would not, as against the true owner, be justified, or at least excused, in one who came lawfully into the possession of the goods.[2]

And in considering whether the act is excused against the true owner it often becomes important to know whether the person, doing what is charged as a conversion, had notice of the plaintiff's title.

There are some acts which from their nature are necessarily a conversion, whether there was notice of the plaintiff's title or not. There are others which if done in a *bona fide* ignorance of the plaintiff's title are excused, though if done in disregard of the title of which there was notice they would be a conversion. And this, I think, is borne out by the decided cases. Thus a demand and refusal is always evidence of a conversion. If the refusal is in disregard of the plaintiff's title, and for the purpose of claiming the goods either for the defendant or for a third person, it is a conversion. If the refusal is by a person who does not know the plaintiff's title, and having a *bona fide* doubt as to the title to the goods, detains them for a reasonable time, for clearing up that doubt, it is not a conversion; see *Issac* v. *Clarke,* 1 Buls. 306, see p. 312; and *Vaughan* v. *Watt.* The principle being, as I apprehend, that the detention, which is an interference with the dominion of the true owner, is, under such circumstances excused, if not justified.

So the finder of goods is justified in taking steps for their protection and safe custody till he finds the true owner. And therefore it is no conversion if he *bona fide* removes them to a place of security. And so far the general statement that an asportation is a conversion must be qualified.

I can not find it anywhere distinctly laid down, but I submit to your Lordships that on principle, one who deals with goods at the request of the person who has the actual custody of them, in the *bona fide* belief that the custodier is the true owner, or has the authority of the true owner, should be excused for what he does if the act is of such a nature as would be excused if done by the authority of the person in possession, if he was a finder of the goods, or intrusted with their custody.

I do not mean to say that this is the extreme limit of the excuse, but it is a principle that will embrace most of the cases which have been suggested as difficulties.

Thus a warehouseman with whom goods have been deposited is guilty of no conversion by keeping them, or restoring them to the person who deposited them with him, though that person turns out to have had no authority from the true owner; see *Heald* v. *Carey,* 11 C. B. 977, and *Alexander* v. *Southey.*

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conversion in both the vendor ordering it and the auctioneer making it, *Ganly* v. *Ledwidge,* Irish R. 10 C. L. 33 (1876), especially per Bany, J., pp. 35-36.

[2] The mere custody of goods for one who has tortiously obtained them is not a conversion, *Bolling* v. *Kirby,* 90 Ala. 215 (1889).

And the same principle would apply to the cases alluded to by my Brother Hannen in his judgment in the court below, of persons "acting in a subsidiary character, like that of a person who has the goods of a person employing him to carry them, or a care-taker, such as a wharfinger." It will enable us also to answer a question put during the argument at your Lordships' bar. It was said: "Suppose that the defendant had sent the delivery order to Micholls, who had handed it to the railway company, requesting them by means of it to procure the goods in Liverpool and carry them to Stockport, and the railway company had done so, would the railway company have been guilty of a conversion?"

I apprehend the company would not, for merely to transfer the custody of goods from a warehouse at Liverpool to one at Stockport, is *prima facie* an act justifiable in any one who has the lawful custody of the goods as a finder, or bailee, and the railway company, in the case supposed, would be in complete ignorance that more was done. But if the railway company, in the case supposed, could have been fixed with knowledge that more was done than merely changing the custody, and knew that the company's servants were transferring the property from one who had it in fact to another who was going to use it up, the question would be nearly the same as that in the present case. It would, however, be very difficult, if not impossible, to fix a railway company with such knowledge.

And on the same principle I take it the ruling of Lord Tenterden in *Greenway* v. *Fisher* may be supported; for the packer was merely giving facilities for the transport of the goods from one place to another, and was ignorant of the circumstances which made it wrong against the true owner to remove the goods, though I admit that his decision is not put by Lord Tenterden on this ground, but on that of the packer's being a public employment, which I think my Brother Brett, in his judgment below, correctly shows to be a mistaken ground; I think the public nature of his employment was strong evidence that he was doing no more than assist in the change of custody, which was, on the principle suggested, excused in one ignorant of all that made the change of custody wrongful, but I do not see how in itself it made any difference. A packer is not, like a carrier or inn-keeper, bound to receive all goods brought to him.

I think, however, it is but candid to admit that the principle I have submitted to your Lordships, though it will solve a great many difficulties, will not solve all.

In Comyns' Digest it is said, "If a man deliver the oats of another to B. to be made oatmeal, and the owner afterwards prohibits him, yet B. makes the oatmeal, this is a conversion." *Per* Berkly, 1638.

To this every one would agree; but suppose the miller had honestly ground the oats and delivered the meal to the person who brought the oats to him before he even heard of the true owner. How would the law be then? Or, suppose the plaintiffs in the case

at your Lordships' bar had, for some reason, brought the action against Micholls' men who assisted in turning this cotton into twist? The principle I have suggested would hardly excuse such conversions; and yet I feel that it would be hard on them to hold them liable. If ever such a question comes before me, I will endeavor to answer it. I think it is not necessary now to do so; for I think that what the defendants are found to have done in the present case amounts to a conversion, and is not in any way excused.

I do not rely on the ground, taken in the earlier part of my Brother Cleasby's judgment below, that the defendants themselves were the purchasers from Bayley, for though, if it were left to me to draw inferences of fact, I should draw that inference, I doubt if it is open to me so to do after the finding of the jury affirming that the defendants were agents. But though it is to be taken in favor of the defendants that they acted throughout as brokers, and only as brokers, for Micholls, I still think them guilty of a conversion.

The case against them does not rest on their having merely entered into a contract with Bayley, or merely having assisted in changing the custody of the goods, but on their having done both. They knowingly and intentionally assisted in transferring the dominion and property in the goods to Micholls, that Micholls might dispose of them as their own, and the plaintiffs never got them back. It is true that they did it as brokers for Micholls, and not for any benefit for themselves; but that is not material; see *Parker* v. *Godin.* There, "the jury (considering the defendant acted only as a friend, and that it would be hard to punish him) found a verdict for the defendant. But upon application to the court, a new trial was granted, upon the fact of its being an actual conversion in the defendant, notwithstanding that he did not apply the money to his own use."

No doubt in that case the friend, it may be inferred, knew of the bankruptcy, and was therefore not an innocent party. But that remark will not apply to *Stephens* v. *Elwall,* where Lord Ellenborough says: "The clerk acted under an unavoidable ignorance and for his master's benefit when he sent the goods to his master, but nevertheless his acts may amount to a conversion; for a person is guilty of a conversion who intermeddles with my property and disposes of it, and it is no answer that he acted under authority from another, who had himself no authority to dispose of it." No case harder than that of the defendant in *Stephens* v. *Elwall* can well be imagined, unless, perhaps, that of a sheriff who seized the goods which, in consequence of a secret act of bankruptcy, had become the goods of the assignees. He was liable to them in trover; see *Garland* v. *Carlisle,* 4 Cl. & F. 693. The Legislature altered the law to avoid that hardship, making the loss in future fall on the assignees; and the Legislature may, to avoid the hardship on persons situated like the defendants, extend the protection now given to purchasers in market overt, and to persons dealing with agents intrusted under the Factor's Acts, to brokers dealing with any one in the ordinary markets. Those who agree with the opinion expressed

by the Lord Chief Baron, L. R. 7 Q. B. 641, that it is unreasonable and unjust that they should be bound, at their peril, to inquire into the title of the sellers with whom they deal, would support an alteration of the law to that effect. Many, having regard to the interest of the true owners of goods, would object to it. But I think that the law, as it exists, does not protect such brokers.

The conversion in the case of *Stephens* v. *Elwall* consisted in assisting in transferring the goods from Deane to the defendant's master in America, with intent to transfer Deane's *de facto* property to the defendant's master. Deane's title was bad against the plaintiffs, who were assignees of Spencer, because he had bought them from Spencer after an act of bankruptcy, though of that the defendant was ignorant, unavoidably ignorant, says Lord Ellenborough.

The conversion in the present case consists in, by means of the delivery order, transferring the goods from Bayley to Micholls with intent to transfer *de facto* Bayley's property to Micholls. Bayley's title was bad against the now plaintiffs, though of that the defendants were ignorant. I can see no possible distinction between the two cases. No doubt *Stephens* v. *Elwall* may be overruled in this House, but I do not think it wrong, and no decision cited, or of which I am aware, seems to me in conflict with it. *Ross* v. *Johnson,* cited by my Brother Brett, is not in point. There the defendant had received goods as plaintiff's warehouseman. They were lost, and the ruling of the court was, that though an action might lie for negligence, if there was any, there was no conversion.

The Lancashire Wagon Co. v. *Fitzhugh,* 6 H. & N. 502, was an action for the injury to the reversionary interest of the plaintiffs in certain goods let to one Pell for a term. The sheriff had seized and sold those goods under an execution against Pell. He had a right to sell Pell's limited interest, but none to sell the plaintiffs' interest, and the question raised, or at least intended to be raised, on the record was, whether the sheriff had done anything injurious to plaintiffs' interest. I have failed to see how the decision bears upon the point now in dispute, except in so far as the decision, that though a sale is no conversion, a sale and a delivery to one who uses the goods is, makes against the defendants.

I need hardly say, that where there has been so great a difference of judicial opinion, I express my opinion with diffidence; but the reasons I have given lead me to form the opinion I have expressed, and I therefore answer your Lordships' question in the affirmative.

BRETT, J. In the judgment which in this case I delivered in the Exchequer Chamber, I endeavored to fix exactly the question which had to be determined. I did so because I thought, with deference, that it had been overlooked in the judgments given in the Court of Queen's Bench. I venture again to draw attention particularly to the same point, because I think it has been disregarded by some of the judges in the Exchequer Chamber. In the Queen's Bench, Mellor, J., says: "It is needless to consider now, whether if the

defendant Hollins had expressly purchased these goods for Micholls, Lucas & Co., he would not have had a good defence to this action, because that point did not, in fact, arise. It would seem that these goods were bought on speculation, &c. Then, the defendant, being alone responsible to the seller, deals with the goods by selling them to a third party." He then quotes from the opinions of *Lush, J.*, and *Martin* and *Chasby,* BB. This judgment seems to be founded on the view that the defendants became principals in the purchase of the cotton so as to buy as principals from Bayley and sell as principals to Micholls & Co. It is because all these judgments are founded upon the same interpretation of the evidence, and of the findings of the jury, that I venture, as I have said, to call particular attention to the direction of Willes, J., to the findings of the jury, and to the form of the leave reserved. They can be best understood by considering the course of business with which the judge and jury were dealing. What is that course of business?

Liverpool is the cotton mart for Lancashire and Yorkshire. A Liverpool cotton broker instructed to purchase makes contracts in Liverpool for the purchase of cotton by his clients in the country districts. He informs his country client of the completion of the contract by a bought note forwarded to him in the country. The cotton is at the time of the contract usually warehoused in Liverpool. If the cotton has been bought by sample, or according to one of the Liverpool known enumerations of kind or quality, the country client may desire to exercise an opinion on the cotton purchased for him. If so, he requests the broker to obtain for him a bulk sample, which the broker does, and forwards it. Again, the country client does not require immediate delivery from the Liverpool warehouse: but when later he does, he requests his broker to forward the cotton. The broker then obtains or signs a delivery order, and by a carter receives delivery from the warehouse, and forwards the cotton to a Liverpool railway station. This is done generally after the broker has had many transactions in cotton passing through his hands for other clients. It is an addition to the more regular business of brokers, which Liverpool cotton brokers have undertaken. It was in order to test the legal effect of this new course of business, and the liability of the brokers who carry it on, in the case of the immediate seller, through them of the cotton, being fraudulent or unauthorized to sell the cotton, but such defect being unknown to the broker, that Willes, J., left two questions to a Liverpool special jury, first, whether the thirteen bales were bought by the defendants as agents in the course of their business as brokers; and, secondly, whether they dealt with the goods only as agents for their principals. I submit, therefore, that the very foundation of this case is that the defendants made the contract as agents and brokers only, and that they did not buy or sell as principals, and that in obtaining the sampling order and sample, and in obtaining or signing the delivery order, and in receiving and forwarding the cotton, they acted, so far as knowledge or recollection and intention went, merely as agents for Micholls, Lucas & Co.,

to examine for them, to forward to them, goods assumed at the time to be their goods without any reference to the contract by which the goods became theirs. The question of law is, whether such dealing with goods can lay a mere agent open to an action of trover. The question in business, and it is a most important one for Liverpool, is, whether the cotton brokers of Liverpool may with safety, so long as they do no more, add to their proper function of brokers the business of forwarding cotton to the Liverpool stations for their clients. If they may, it seems to be an addition to their business of mere brokers innocent as regards others, and convenient for them and their clients. If the brokers may not safely perform this small function of forwarding to the station, another agent must be introduced by the country principal to do it, to the great inconvenience of such principal.

The real question, which I cannot doubt it was the intention of Justice Willes to have discussed, is, whether every actual dealing with a chattel in a manner inconsistent with the right of a true owner gives to the true owner a right of action in trover against every person so dealing, except a common carrier, or whether the dealing with the chattel, in order to support against him who has dealt with it an action of trover, must not be with intention to interefere with the property in the chattel. I believe that he desired to have set at rest the divergence of opinion on this point between Baron Martin and the other barons in the case of *Burroughes* v. *Bayne*. In that case Baron Martin says: "But the word 'conversion,' by a long course of practice, has acquired a technical meaning. It means detaining goods so as to deprive the person entitled to the possession of them of his dominion over them." Farther on he explains what he intends by this. He quotes from the judgment of Alderson, B., in *Fouldes* v. *Willoughby*, thus: "Any asportation of a chattel for the use of the defendant or a third person amounts to a conversion, for this simple reason, that it is an act inconsistent with the general right of dominion which the owner of the chattel has in it, who is entitled to the use of it at all times and in all places. When, therefore, a man takes that chattel, either for the use of himself or another, it is a conversion." "I," says Martin, B., "entirely accede to this view of the law, which is simple and of easy application." It is obvious that Martin, B., took a very large view of the term "conversion." And that the question of the right interpretation of the term is very important, for upon it may depend whether a defendant is to be held liable in trover for the full value of the chattel in dispute or in trespass for perhaps only nominal damages. In the same case of *Burroughes* v. *Bayne*, Channell, B., says: "I desire it to be understood that I do not mean to state, or suggest that every detention is a conversion; I guard myself against any such supposition. Every asportation is not a conversion, and therefore it seems to me that every detention cannot be a conversion. If it were, the mere removal of a chattel, independently of any claim over it in favor of the party himself, or any one else whatever, would be a conversion. The asportation of a chattel

for the use of the defendant or third person amounts to a conversion, and for this reason, whatever act is done inconsistent with the dominion of the owner of a chattel at all times and places over that chattel is a conversion. On the other hand the simple asportation of a chattel, without any intention of having further use of it, though it may be a sufficient foundation for an action of trespass, is not sufficient to establish a conversion." Bramwell, B., says: "It certainly is not every detention of goods, although there is no right to detain them, that is a conversion, in my judgment at all events." Again: "The result is, you must in all cases look to see not whether there has been what may be called a withholding of the property, but a withholding of it in such a way as that it may be said to be a conversion to a man's own use." Again: "If I am to be considered as having wrongfully detained them, though you went away and sent for them the next morning, your damages are a farthing. Instead of which, by the use of the word 'conversion,' the defendant is made liable for the value of the billiard table which he cannot recover from any one else. Therefore, on consideration of all the facts, had I been one of the jury, I should have found that there was not an assertion of dominion inconsistent with the title of the plaintiff," &c. In the judgment in the Exchequer Chamber, Martin, B., repeated the same view of a conversion which he had stated in *Burroughes* v. *Bayne*: "But as regards the action of trover," he says, "I think it is well settled that the assumption and exercise of dominion—and asportation is an exercise of dominion—over a chattel, inconsistent with the title and general dominion which the true owner has in and over it, is a conversion, and that it is immaterial whether the act done be for the use of the defendant himself or of a third person." Now the greater part of the propositions thus enunciated by Martin, B., are identical with the propositions of the other judges. All, I think, agree that the assumption and exercise of dominion over a chattel, inconsisent with the title of the true owner, is a conversion. All would agree that the detaining goods so as to deprive the person entitled to possession of them or his dominion over them is a conversion, if by the word "dominion" in the last proposition is intended "title as owner." The essential difference between the view of Baron Martin and the other judges I have mentioned is in the sense in which this word "dominion" is used by him and them. When Baron Martin speaks of interfering with the dominion of the true owner, he means interfering with the mere possession or right of possession of the owner. The other judges mean an interference or dealing with, or doing some act in negation of, the title as owner, of the true owner. Baron Martin holds that every asportation or detention which cannot be justified, i. e., which is not done for the true owner, is a conversion. Baron Channell and Baron Bramwell hold that a mere simple asportation or detention is not of itself a conversion, but only when either is done in a manner or with an intention inconsistent with the proprietary title, as owner, of the true owner. If the findings of the jury in the present case are to be treated as I have suggested they should be treated, then the question

in this case is, what is the proper definition of the term "conversion" in a case in which an asportation of the chattel is relied on as the conversion? If the first finding is to be treated as a binding decision that the defendants in making the contract acted only as brokers, so that they did not themselves buy the cotton as buyers, and so that they did not sell it as sellers, then what they thus did is clearly, I think, no conversion. The reasons for this I gave in my judgment below. If the second finding is treated as a decision that the asportation was a mere simple asportation, made without intention of or relation to interference with any one's title, then such asportation is no conversion unless the definition of Martin, B., is preferred to that of Barons Bramwell and Channell. It cannot fail to be observed that the definition of Martin, B., includes the cases of a carrier, wharfinger, warehouseman, and packer, even when there is no demand and refusal; and that in order to meet the difficulty, he, in his judgment in the Exchequer Chamber, declares that the case of a carrier is to be excepted, because he is bound by law to receive and carry the goods of every one who brings goods to him; and that the case of a packer is not properly an exception, and that the case of *Greenway* v. *Fisher* is wrongly decided. I endeavored in the Exchequer Chamber to explain all the cases which are called exceptional, by showing that the definition of a conversion laid down by Bramwell and Channell, BB., is the correct definition, and that if so, the cases referred to are properly decided, not because they are exceptions to, but because they are outside the rule. I cannot assist much farther upon this point than I endeavored to do in that judgment, to which I beg to refer. In addition, however, I may say that in *Simmons* v. *Lillystone,* Parke, B., says: "Here the defendant never intended to take to himself any property in the timber," and, "We are all of opinion that there was no sufficient evidence of a conversion. In order to constitute a conversion there must be an intention of the defendant to take to himself the property in the goods, or to deprive the plaintiff of it." If the last phrase be expanded, it clearly means "or to deprive the plaintiff of the property in the goods." I conclude, therefore, as before, that the defendant cannot be properly made liable in trover on the first part of the leave reserved in this case, because he was acting only as a broker, to make a contract between other parties, and none with himself; nor on the second part of the leave reserved, because the court was bound to treat the asportation, which was relied on as an actual conversion, as a simple asportation made without intent to interfere in any manner with the title of or ownership in the cotton. I cannot agree with the view which seems to me to be expressed by Martin, B., in *Burroughes* v. *Bayne,* that the action of trover is equivalent to an action of trespass, and was invented in order to replace the action of detinue, avoiding only the right of the defendant to wage his law. I believe that it was invented in order to provide a remedy in damages, where there has been a trespass, and more than trespass to goods, namely, acts done with the intention of transferring or interfering with the title to or ownership of them,

or where without an original trespass there have been acts done with the intention of transferring or interfering with the title to or ownership of them, or which have been done as acts of ownership of them. I am still of opinion that a possession or detention which is a mere custody or mere asportation made without reference to the question of the property in chattels is not a conversion. I answer your Lordships' question by saying that in my opinion the judgments in the Court of Queen's Bench and Exchequer Chamber ought to be reversed, and that judgment in the action ought to be entered for the defendants.

LORD CHELMSFORD. My Lords, * * * I think the judgments of the Court of Queen's Bench and of the Exchequer Chamber are right and ought to be affirmed.

Judgment of the Court of Exchequer Chamber affirmed.[3]

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[3] *Accord: Fort* v. *Wells,* 14 Ind. App. 531 (1895), two brokers, one of whom sold chattels for a thief and turned over the proceeds to him, and the other bought them for and shipped them to his principal, held guilty of conversion; *Bercich* v. *Marye,* 9 Nev. 312 (1874), broker selling mining stock for customer, in ignorance of the latter's lack of title; *Anderson* v. *Nicholas,* 5 Bosworth Super. Ct. Rep. 121 (N. Y. 1859); *Williams* v. *Merle,* 11 Wend. 80 (N. Y. 1833), produce broker who purchased goods, received the inspector's certificate, took the goods from the inspector's office and shipped them to his principal. So commission merchants are guilty of conversion if they, as agents, buy and pay for the chattels, receive the shipping documents and have the chattels shipped to their principals, *Cassidy Bros.* v. *Elk Grove etc. Co.,* 58 Ill. App. 39 (1894); *Arkansas City Bank* v. *Cassidy,* 71 Mo. App. 186 (1897). So auctioneers are guilty of conversion if they sell and deliver the chattels for one having no title thereto, *Consolidated Co.* v. *Curtis,* L. R. 1892, 1 Q. B. 495; *Cochrane* v. *Rymill,* 40 L. T. (N. S.) 744 (1879); *Ganly* v. *Ledwidge,* Ir. R. 10 C. L. 33 (1876); *Johnston* v. *Henderson,* 28 Ont. Rep. 25 (1898); *Hoffman* v. *Carow,* 20 Wend. 21 (N. Y. 1838), 22 Wend. 285 (N. Y. 1839); *Swim* v. *Wilson,* 90 Cal. 126 (1891); *Robinson* v. *Bird,* 158 Mass. 357 (1893); *Kearney* v. *Clutton,* 101 Mich. 106 (1894); *a fortiori,* where the auctioneer has notice of the plaintiff's claim of title, *Milliken* v. *Hathaway,* 148 Mass. 69 (1888); *Iredale* v. *Kendall,* 40 L. T. (N. S.) 362 (1878); *contra, Frizzell* v. *Rundle,* 88 Tenn. 396 (1889).

As to an auctioneer taking no part in the delivery of the chattels, but merely arranging the sale, see *Consolidated Co.* v. *Curtis,* L. R. 1892, 1 Q. B. 495; and cases cited in Note 1 thereto.

So a servant is guilty of conversion if he, acting for his master's benefit and by his orders, sells another's goods, *Perkins* v. *Smith,* 1 Wilson 328 (1752), or pledges them, *Parker* v. *Godin,* 2 Strange 813 (1728), or if he, on behalf of his master, receives possession of goods sold to his master and turns them over to him, *Stephens* v. *Elwall,* 4 M. and S. 259 (1815); *Gage* v. *Whittier,* 17 N. H. 312 (1845), though here the servant had himself arranged the sale (see *Burditt* v. *Hunt,* 25 Maine 419 (1845), where a servant, who had been sent by his master to carry to the latter goods bought by him, was held not guilty of conversion), or who by his master's command takes goods from the owner's possession, *Thorp* v. *Burling,* 11 Johns. 285 (N. Y. 1814); *Lee* v. *Mathews,* 10 Ala. 682 (1846); *Miller* v. *Wilson,* 98 Ga. 567 (1896); *Warder, Bushnell & Co.* v. *Harris,* 81 Iowa 153 (1890); or otherwise does any act which if done by the master would constitute a conversion, *Donahue* v. *Shippee,* 15 R. I. 453 (1887), cutting plaintiff's grass by mistake; *Elmore* v. *Brooks,* 6 Heisk. 45 (Tenn. 1871), railroad agent, under orders of superintendent, refused to deliver goods to consignee.

See also, *Jelks* v. *Hayward,* L. R. 1905 2 K. B. 460, high sheriff selling goods seized by him in execution; *Fine Art Society* v. *Union Bank,* L. R. 17

VARNEY *v.* CURTIS.

Supreme Judicial Court of Massachusetts, 1913. 213 *Mass.* 309.

This is an action for the conversion of certain bonds, among others four Northern Pacific-Great Northern joint bonds.

LORING, J. So far as now material the facts found by the judge were as follows: The plaintiff's husband died in February, 1902. Some of the securities here in question came to her under her husband's will and some of them had been owned by her before his death. Soon after her husband's death these bonds were delivered by the plaintiff to her son-in-law, Symonds by name, a stockbroker, to be kept by him for her in his safe deposit box. In April, 1902, the son-in-law opened an account with the defendants for the sale of stocks and bonds on margin and delivered to them as security for that account, inter alia, four of the plaintiff's Northern Pacific-

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Q. B. D. 705 (1886), bank collecting for depositor post office order with forged endorsement, (for cases where bank has collected checques for depositors and placed proceeds to their accounts, see Grant on Banking, 6th Ed., p. 45, and *Kaufman* v. *State Savings Bank,* 151 Mich. 65 (1908)); *Koch* v. *Branch,* 44 Mo. 542 (1869), presentation and collection of a government voucher for a brother, who had innocently purchased it from a thief, held a conversion, though the proceeds were turned over without deduction of commission: *Kimball* v. *Billings,* 55 Maine 147 (1867), grocer, to oblige customer, sold bonds for her without compensation; *Wing* v. *Milliken,* 91 Maine 387 (1898), defendant, as agent for his brother, sorted goods for sale and sold a part; *McPheters* v. *Page,* 83 Maine 234 (1891), butcher cut up into steaks, etc., a deer illegally seized and assisted the officer who had seized it to deliver them as presents to his friends; *Dudley* v. *Hawley,* 40 Barb. 397 (N. Y. 1863), jeweler selling jewels for a patron; *Flanders* v. *Colby,* 28 N. H. 34 (1853), defendant assisted a friend to carry off and conceal his property in order to defraud creditors, in ignorance of a chattel mortgage thereon; and see *Walker* v. *First National Bank,* 43 Ore. 102 (1903), a bank received a bill of lading, forwarded it to the consignee and received the money for the goods before they were delivered, held no conversion.

It was, however, held in *Leuthold* v. *Fairchild et al.,* 35 Minn. 99 (1886), that "an agent or servant who, acting solely for his master or principal, and by his direction and without knowing of any wrong, or being guilty of gross negligence in not knowing it, disposes of, or assists the master to dispose of, is not thereby rendered liable for the conversion of the property." Gilfillan, C. J., pp. 111-112. In that case the defendant was the agent and wheat inspector of the owner of a grain elevator who had tortiously sold the plaintiff's wheat and assisted in all the sales. So in *Hodgson* v. *St. Paul Plow Co.,* 78 Minn. 172 (1899), a servant who receives and disburses a trust fund under the direction of his master held not guilty of conversion, but if the agent applies the proceeds to his own benefit he is liable, *Dolliff* v. *Robbins,* 83 Minn. 498 (1901), a warehouseman sold wheat for one having no title thereto and endorsed over the wheat tickets collected the proceeds and applied them to the payment of a debt owed by his principal to him.

So in *Walker* v. *First National Bank,* 43 Ore. 102 (1903), it was held that a bank in transferring a bill of lading and collecting the proceeds merely as a collecting agent, was not guilty of conversion; and see *Leuthold* v. *Fairchild,* 35 Minn. 99 (1886); and in *Roach* v. *Turk,* 9 Heisk. 708 (Tenn. 1872), *Fargason* v. *Hall,* 159 S. W. 221 (Tenn., 1913); and *Abernathy* v. *Wheeler,* 13 Ky. L. 730 (1890), it is held that a factor, commission agent or warehouseman is not guilty of conversion, in selling and delivering goods in ignorance of the invalidity of his principal's title.

Great Northern joint bonds with forged indorsements. The last of January, 1904, Symonds directed the defendants to transfer this account to Colton & Co. Pursuant to that direction the defendants, on February 1, 1904, delivered to Colton & Co. all the stocks and bonds which they were then carrying on margin for Symonds, and the bonds held by them as security for that margin account (including these four bonds), on receiving from Colton & Co. $10,515.54, the amount due to them from Symonds. In this connection the judge made the following finding and ruling: "The defendants in making delivery to E. S. Colton & Co. knew that the bonds previously held by them as collateral would be held by Colton & Co. as collateral, and intended that result. The court, in so far as it is a question of fact, finds as a fact, and in so far as it is a question of law, rules as matter of law, that such a delivery by defendants was more than a mere transfer of physical possession of the bonds to Colton & Co., by order of Symonds. It was a transfer of possession of the bonds which they held as collateral with the intention that the transferrees should also hold them as collateral. The court also finds as a fact that the defendants were not obliged to make such delivery in the performance of any duty which they owed to Symonds by contract as bailees or pledgees under him. They did it voluntarily in pursuance of his instructions and as a means of obtaining payment of the debt he owed to them. They had no knowledge or notice that the plaintiff was the true owner of the bonds, but the court rules that the act of delivery to Colton & Co. with the intention above stated was an exercise of ownership, in exclusion of the rights of the true owner, an act of dominion, and a conversion."[1]

The twenty-first and twenty-second rulings asked for are based on *Loring* v. *Mulcahy*, 3 Allen 575, and *Leonard* v. *Tidd*, 3 Metc. 6, and the contention is that this case comes within these decisions.[2]

It is settled that where a bailee receives on deposit goods from one in possession but without title to them, and afterwards restores

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[1] Only so much of the facts in the opinion of the court as deals with the conversion of these bonds is given. The residue of their opinion is omitted, in which the court held that the trial judge was justified in holding that, by reason of the dealings of the parties immediately before the bonds were received, the defendant took these bonds as collateral with notice of the invalidity of Symonds' title thereto, and this constituted a conversion, and also that the mere taking as collateral in good faith and without notice these four Northern Pacific-Great Northern bonds was not of itself a conversion.

[2] The twenty-first and twenty-second rulings asked for were in these words: "(21) The delivery of the bonds to Colton & Co. by the defendants in accordance with the directions of the plaintiff's agent, George E. Symonds, was equivalent to a return of the said bonds to George E. Symonds and therefore constructively a return to the plaintiff and for such bonds the plaintiff is not entitled to recover, it being agreed that the bonds had not depreciated during the period that the defendants held the same. (22) The delivery of the bonds to Berry & Co. by the defendants in accordance with the directions of the plaintiff's agent, George E. Symonds, was equivalent to a return of the said bonds to George E. Symonds and therefore constructively a return to the plaintiff and for such bonds the plaintiff is not entitled to recover. It being agreed that the bonds had not depreciated during the period that the defendants held the same."

them to the possession of the bailor in ignorance of the rights of the true owner, he is not guilty of a conversion. *Loring* v. *Mulcahy,* 3 Allen 575; *Hill* v. *Hayes,* 38 Conn. 532; *Steele* v. *Marsicano,* 102 Cal. 666; *Frome* v. *Dennis,* 45 N. J. Law 515; *Nelson* v. *Iverson,* 17 Ala. 216. For other cases where the temporary use of the property of another made by a defendant acting in good faith under a mistake of fact has been held or said not to be a conversion, see *Strickland* v. *Barrett,* 20 Pick. 415; *Wellington* v. *Wentworth,* 8 Metc. 548; *Spooner* v. *Manchester,* 133 Mass. 270, 43 Am. Rep. 514; *Shea* v. *Milford,* 145 Mass. 525, 14 N. E. 769; *Gurley* v. *Armstead,* 148 Mass. 267, 19 N. E. 389, 2 L. R. A. 80, 12 Am. St. 555.

It is pointed out in Pollock on Torts, 374, in connection with this rule, that a bailee is estopped under those circumstances to deny the title of the bailor. That means in returning the goods to the bailor the bailee does no more than perform the duty he owes to the bailor. For that reason he cannot be guilty of a conversion for doing that.

In *Leonard* v. *Tidd,* 3 Metc. 6, this principle was applied in a case where the defendants acting in good faith received as security for a debt due to them from the pledgor a gun, the property of the plaintiff which was in the possession of the pledgor, and returned the property pledged to the wrongful pledgor upon payment of the debt due them from him. The same reasoning was adopted in *Loring* v. *Mulcahy,* ubi supra. That is to say, in such a case, so far as the true owner is concerned the pledgee is in possession under one to whom the true owner had given possession, and by returning the pledged property to the wrongful pledgor the pledgee does nothing more than perform the duty he owes the wrongful pledgor under the circumstances in effecting a restoration of the original status in quo, to wit, in putting back the property into the possession of the wrongful pledgor where originally it had been put by the true owner.

But in the case at bar the plaintiff's bonds, which the defendants received in good faith from Symonds in whose possession the plaintiff had put them, were not returned to Symonds. On the contrary they were delivered by Symonds' direction to persons who to the defendant's knowledge were lending money to Symonds on the security of these bonds. That is to say, the defendants in place of restoring the bonds to Symonds delivered them to a third person in obedience to a subsequent act on the part of Symonds which was an act of ownership and not of mere possession.

The question whether under those circumstances the pledgor is guilty of a conversion has not arisen in this commonwealth. In *Leonard* v. *Tidd,* 3 Metc. 6, the gun was not delivered by the pledgee to the purchaser from the wrongful pledgor. In that case the wrongful pledgor "took the gun from a room in the defendant's house and delivered it to Pratt," the purchaser from the wrongful pledgor. See 3 Metc. at page 7. That is to say, the sale in that case was made by the wrongful pledgor and the gun was taken from the pledgee by the wrongful pledgor and delivered by him to the pur-

chaser. All that the defendant did was to take the proceeds of the tortious sale. That is not a conversion. See *Polley* v. *Lenox Iron Works,* 2 Allen (Mass.) 182. In *Parker* v. *Lombard,* 100 Mass. 405, there was no delivery by the bailee in obedience to a subsequent act of dominion exercised by the bailor. In that case the bailee delivered the goods to the person who was entitled to receive them under the instructions given him by the bailor when the original bailment was made. In other words, that was a case where the bailee delivered to the person in whose behalf the bailee was told the bailment was made when it was made.

Blackburn, J., in answering the question proposed to the judges by the House of Lords in *Hollins* v. *Fowler,* L. R. 7 H. L. 757, 767, gave it as his opinion that if the bailee in such a case "could have been fixed with knowledge that more was done than merely changing the custody, and knew that the company's servants (i. e. servants of the bailee) were transferring the property from one who had it in fact to another who was going to use it up, the question would be nearly the same as that in the present case." In "the present case" Blackburn, J.'s, answer to the question put to the judges was that the defendant was guilty of a conversion. The decision in *Hudmon Brothers* v. *Du Bose,* 85 Ala. 446, 5 So. 162, 2 L. R. A. 475, goes farther. In *Hudmon Brothers* v. *Du Bose* it was held that a warehouseman who delivered cotton stored with him not to the bailor but to the holder of the storage receipt issued to the bailor when the cotton was put in storage, was guilty of a conversion without its being shown that knowledge had been brought home to the warehouseman that more was being done than "merely changing the custody." • Somerville, J., in delivering the opinion in that case, said that what may be for convenience called the rule of *Leonard* v. *Tidd* "does not include a restoration of the bailor's dominion by an act, the essential nature of which is in defiance of the true owner's title, or the probable consequence of which will be to put the property beyond his reach."

Exceptions overruled.

(b) Purchase and taking possession thereunder.

HYDE *v.* NOBLE ET AL.

Supreme Court of Judicature of New Hampshire, 1843. 13 *N. H.* 494.

Trover for certain boards, planks and shingles alleged to have been converted by the defendants in January, 1840.

In November, 1839, the plaintiff and others were owners of a quantity of lumber at Hallowell and Gardiner in Maine, which was manufactured there at mills hired by the plaintiff, who had possession and full control of the mills and the lumber for himself and the other owners.

In that month the plaintiff contracted with one Kenniston,

master of the schooner "Prospect," to take a cargo of lumber from Hallowell and Gardiner to Weymouth, Mass., and caused the lumber to be put on board.

In the course of the voyage the vessel put into Portsmouth, on account of a severe storm which caused her to leak badly. In order to lighten the ship, part of the lumber was taken out at Portsmouth, where the defendant bought some of the lumber of Kenniston.

The court submitted it to the jury upon other evidence in the case whether Kenniston had authority from the plaintiff to sell the lumber, and that he had no authority as master of the vessel to sell any part of the cargo unless there was a necessity for doing so for the purpose of making repairs, which appeared not to be the case.

The court further instructed the jury, there being evidence that a demand had been made upon Moses Noble, one of the defendants, who had refused to deliver the timber, and who had admitted that the other defendants were his partners, that the defendants having purchased the lumber, the demand upon one of them, they being partners, was sufficient. That the plaintiff, if he had not authorized the sale, by reason of his ownership and possession as agent, was entitled to recover the entire value of the lumber sold to the defendants.[1]

PARKER, C. J.[2] The plaintiff had a sufficient property in the lumber to enable him to maintain trover, if the defendants are liable. He was part owner of the lumber, and although others were interested in it, yet it appears that he hired the mills at which it was manufactured, had possession of them and of the lumber and had the complete control of it. It is evident that he might have sold it, being accountable to those interested, for the proceeds, and it seems that he had shipped it for that purpose. He had, then, a general property in part, and a special property in the residue, and the latter alone is sufficient for the purpose of this action. *Jones* v. *Sinclair,* 2 N. H. 320; *Knight* v. *Legh,* 4 Bing. 489. The sale by Kenniston terminated the bailment, and the plaintiff had the right of possession. *Sanborn* v. *Colman,* 6 N. H. 14; *Sargent* v. *Gile,* 8 N. H. 325.

The purchase by the defendants, taking possession as they appear to have done, and holding it as their own property, was a conversion. They received the possession from one who had no authority to deliver it to them, under a sale which purported to vest the property in them; and they, by the purchase, undertook to control it as their own property. This was an assumption of power over it, inconsistent with the rights of the plaintiff. Purchasing the property from one who had no right to sell, and holding it to their own

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[1] The court also refused to instruct the jury that an action of assumpsit, which had been brought against Kenniston for breach of his contract to transport and deliver the property billed, in which the plaintiff had recovered damage for the value of the property without satisfaction, constituted a bar to the maintenance of the action.

[2] That part of the opinion is omitted in which the court decides that the judgment against Kenniston does not constitute a bar in the present action.

use, is a direct act of conversion, without any demand and refusal. Their possession was unlawful in its inception, by reason of the want of authority in Kenniston to make the transfer. It is only where a party obtains the possession lawfully, that it is necessary to show a demand and refusal. *Sanborn* v. *Colman,* 6 N. H. 14; *Galvin* v. *Bacon,* 2 Fairf. R. 28; *Wilkinson* v. *King,* 2 Camp. 335; *Bristol* v. *Burt,* 7 Johns. R. 254; *Bates* v. *Conkling,* 10 Wend. (N. Y.) 389. *Judgment on the verdict.*[3]

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[3] *Accord: Hurst* v. *Gwennap,* 2 Starkie 306 (1817); *Cooper* v. *Willomatt,* 1 C. B. 672 (1845), purchase from bailee of goods for hire; *McNeill* v. *Arnold,* 17 Ark. 154 (1856), "the very act of purchasing the slaves by McNeill was at war with any title the appellees may have thereto and his subsequent possession was adverse to their claim;" *Donnell* v. *Thompson,* 13 Ala. 440 (1848); *Omaha, etc., Co.* v. *Tabor,* 13 Colo. 41 (1889); *Wright* v. *Skinner,* 34 Fla. 453 (1894); *Robinson* v. *McDonald,* 2 Ga. 116 (1847); *Sims* v. *James,* 62 Ga. 260 (1879); *Clark* v. *Lewis,* 35 Ill. 417 (1864); *Smith* v. *McLean,* 24 Iowa 322 (1868); *Harlan* v. *Brown,* 4 Ind. App. 319 (1891), purchase from one who had bought a note from the plaintiff when the latter was so drunk as to be incapable of doing business; *Shoemaker* v. *Simpson,* 16 Kans. 43 (1876); *Galvin* v. *Bacon,* 11 Maine 28 (1833), *bona fide* purchase of goods wrongfully sold by bailee for use; *Riley* v. *Boston Water Power Co.,* 11 Cush. 11 (Mass. 1853); *Carter* v. *Kingman,* 103 Mass. 517 (1870); *Heberling* v. *Jaggar,* 47 Minn. 70 (1891), purchase at executor's sale of goods of A seized under execution against B: *Trudo* v. *Anderson,* 10 Mich. 357 (1862), *semble,* the actual decision being that the goods wrongfully sold by the plaintiff's servant could be replevied in the hands of an innocent purchaser for value; *Kramer* v. *Faulkner,* 9 Mo. App. 34 (1880); *Dixon* v. *Caldwell,* 15 Ohio St. 412 (1864), purchase of land warrant transferred by forged endorsement; *Ward* v. *Carson River Co.,* 13 Nev. 44 (1878), purchase at invalid tax sale; *West Jersey R. Co.* v. *Trenton Car Co.,* 32 N. J. L. 517 (1866); *Black* v. *Jones,* 64 N. Car. 318 (1870), purchase of a horse wrongfully taken by a quartermaster of the Federal Army and branded as United States property: *Biddle* v. *Bayard,* 13 Pa. 150 (1850), Auditor General's certificate lost by plaintiff and bought by defendant as broker for another from a *bona fide* purchaser from the finder; *Carey* v. *Bright,* 58 Pa. 70 (1868): *Rice* v. *Yocum,* 155 Pa. 538 (1893), sewing machine agent took, with wife's consent, in exchange for a new machine, a sewing machine belonging to her husband; *Rosum* v. *Hodges et al.,* 1 S. Dak. 308 (1890), purchase of grain sold by owner's servant without authority; *Deering* v. *Austin,* 34 Vt. 330 (1861); *Wilson* v. *Rucker,* 1 Call 500 (Va. 1799), lost military certificate purchased from finder; *Eldred* v. *Oconto Co.,* 33 Wis. 133 (1873).

One leasing chattels from a lessee of the owner is liable in trover, *Crocker* v. *Gullifer,* 44 Maine 491 (1858); see also, *St. Louis, V. & T. H. R. Co.* v. *Kaulbrumer,* 59 Ill. 152 (1871), where the railroad was held to have converted fence posts taken by a contractor and built into the fence which he was building for it and which it accepted and used, and *Clark* v. *Wells,* 45 Vt. 4 (1872), where the defendant made a conditional sale of a wagon to X, who had a new running gear put in by the plaintiff, which was to remain his property until paid for, X not paying for the wagon the defendant took possession of it, this was held to be conversion.

In *Rodgers* v. *Brittain,* 39 Mich. 477 (1878), one who purchases at a sale made in apparent conformity with a genuine chattel mortgage is held not to be guilty of conversion, even after demand. While in *Dean* v. *Cushman,* 95 Maine 454 (1901), it was held, that, though a sale by a mortgagor in possession puts an end to his right of possession and is a conversion of the chattel mortgaged, the purchaser is not guilty of conversion in merely taking possession under the sale, until demand and refusal, since the sale conveyed at least the right to redeem the goods.

A purchaser from a conditional vendee in possession is generally held to

(c) Wrongful taking and asportation.

BISHOP AND JOURDAIN *v.* VISCOUNTESS MONTAGUE.

Court of Common Pleas, 1604. *Croke Charles* 50.

Trover. Upon a special verdict, the case was, that the defendant's bailiff seized the beasts for an heriot, whereas there was not any due, whereto the defendant agreed, and converted them; whereupon the action was brought. The sole question was, whether he ought to have this action, or an action of trespass? For they all agreed, that trespass lay by reason of her agreement.

Foster, for the plaintiff, argued that this action well lay; for it is at his election whether he will admit himself to be out of posses-

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be a conversion, *Sims* v. *James,* 62 Ga. 260; *Clark* v. *Wells,* 45 Vt. 4; *Whipple* v. *Gilpatrick,* 19 Maine 427 (1841); *Fisk* v. *Ewen,* 46 N. H. 173 (1865); *contra: Vincent* v. *Cornell,* 13 Pick. 294 (Mass. 1852), though if the purchaser resells before demand, *Carter* v. *Kingman,* 103 Mass. 517 (1870), or refuses to deliver upon demand, *Hart* v. *Carpenter,* 24 Conn. 427 (1856), he is guilty of conversion. Where a stipulation that title be retained in the vendor, though possession be given the vendee, is held to be invalid as to a purchaser for value without notice, while the sale by the conditional vendee is a conversion, the purchaser gets a good title and neither taking possession nor subsequent sale or destructive use by him of the chattel is conversion; as to the validity of such stipulations, see *Harkness* v. *Russell,* 118 U. S. 663 (1886).

Contra: Parker v. *Middlebrook,* 24 Conn. 207 (1855), where it was said that a *bona fide* purchaser from one in actual and apparently lawful possession "can not be in a worse position than the finder of a chattel which has been casually lost;" the plaintiff, who posed as a widow and using the name of her first husband, conveyed her furniture by a bill of sale in payment of meat furnished her by the defendant, she brought trover in the name of her husband alleging that the goods were his as her husband; *Wood* v. *Cohen,* 6 Ind. 455 (1855); but see *Harlan* v. *Brown,* 4 Ind. App. 319 (1891); and *Rich* v. *Johnson,* 61 Ind. 246 (1878), where it is said that one purchasing on credit from an agent is bound to take notice that he has only authority to sell for cash; *Burckhalter* v. *Mitchell,* 27 S. Car. 240 (1887). In *Barrett* v. *Warren,* 3 Hill 348 (N. Y. 1842), it was said that a *bona fide* purchase or bailment from one in apparently lawful possession is not a trespass, though trover or replevin in the *detinet* would lie after demand and refusal: in *Gillett* v. *Roberts,* 57 N. Y. 28 (1874), it was held that trover did not lie until demand, *Tompkins* v. *Fonda Glove Co.,* 188 N. Y. 261 (1907), the mere purchase of the goods, followed by taking possession, was held not to be a conversion, unless the purchaser had sold, destroyed or consumed the goods, *Pease* v. *Smith,* 61 N. Y. 477 (1875); see *Bean* v. *Edge,* 84 N. Y. 510 (1881), holding that it is conversion for a landlord to seize and sell goods in his tenant's possession under a conditional sale; nor is a *bona fide* transferee from a vendee under a conditional sale so protected unless he has parted with value, *Davis* v. *Bliss,* 187 N. Y. 77 (1907).

The mere taking as a pledge is held to be a conversion, in *McCombie* v. *Davies,* 6 East 538; *Hotchkiss* v. *Hunt,* 49 Maine 213 (1860); *contra: Spackman* v. *Foster,* L. R. 11 Q. B. 99 (1883), as to which see Clerk and Lindsell on Torts, 2nd Ed., 214; *Leuthold* v. *Fairchild,* 35 Minn. 99 (1886); *Varney* v. *Curtis,* 100 N. E. 650 (Mass. 1913), p. 654; and see *Leonard* v. *Tidd,* 3 Metc. 6 (Mass. 1841).

sion or not, for he might have had a replevin if he would; and in this action the trover is not traversable, but the conversion only is material.

Herne *è contra;* because the property is gone by the taking, so as he cannot dispose of them, 6 Hen. 7, and here the proper action is trespass.

Warberton accord.; for trespass and trover are contrary actions: for it cannot be, that he should have property and no property, at one and the same time. And there is not here any word of the writ true; for he hath not any property at the time of the conversion. 27 Ass. And of that opinion was Daniel.

But Anderson, Walmsley, and Kingsmil, *è contra;* and that he had election to bring either of the actions at his pleasure.—Wherefore it was adjudged for the plaintiff.[1]

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[1] On the first argument of this case the court was equally divided, Cro. Eliz. 824 (1600). The opinion of Warberton represents the original state of the authorities. In *Bassett* v. *Maynard,* 1 Rolle Abridgment, 105 M, p. 5 (1601), it was held that "If I cut certain wood and a stranger take it out my possession, although I may have an action of trespass, still I may also have an action on the case (*i. e.,* trover) at my election." Ever since it has been no bar to the action of trover that the goods were taken from the possession of the plaintiff, *Forsyth* v. *Wells,* 41 Pa. 291 (1861); *Clark* v. *Whitaker,* 19 Conn. 319 (1848); *Bruner* v. *Dyball,* 42 Ill. 34 (1866); *Western Union Tel. Co.* v. *Franklin Construction Co.,* 70 N. H. 37 (1899); *Moody* v. *Whitney,* 34 Maine 563 (1852); *Nelson* v. *Burt,* 15 Mass. 204 (1818). So where trees or crops are cut, or coal or other minerals are mined, the owner may waive the trespass to his realty and sue in trover for trees, crops, etc., which, when severed from the realty by the defendant, became personalty, *Nelson* v. *Burt,* 15 Mass. 204 (1818), *Forsyth* v. *Wells,* 41 Pa. 291. (1861), *Moody* v. *Whitney,* 34 Maine 563 (1852); *Hunt v. City of Boston,* 183 Mass. 303 (1903); *Johnson* v. *Walker,* 23 Nebr. 736 (1888). In *Sanderson* v. *Haverstick,* 8 Pa. St. 294 (1848), the cutting of trees, though piled and allowed to remain on the owner's land was held to be conversion, and see *Donahue* v. *Shippee,* 15 R. I. 453 (1887).

Trover lies against a thief for goods stolen by him, *Hutchinson* v. *Merchants and Mechanics Bank,* 41 Pa. 42 (1861), though the action is suspended until the criminal prosecution has been duly prosecuted and ended and the statute of limitations does not run till termination of the criminal proceedings, *Hutchinson* v. *Merchants and Mechanics Bank,* 41 Pa. 42 (1861), though the action may be brought pending the prosecution, *Keyser* v. *Rodgers,* 50 Pa. 275 (1865).

Originally replevin was the exclusive remedy for a wrongful distress, and though trespass early became concurrent with replevin in such case and though, since the principal case and *Bassett* v. *Maynard,* 1 Rolle Abridgment, 105 M. p. 5, conversion had become concurrent with trespass for a wrongful disseisor taking, it was not till *Tinkler* v. *Poole,* 5 Burr. 2657 (1770), that trover was held to lie for a wrongful distress. *Shipwich* v. *Blanchard,* 6 T. R. 298 (1795), *Reynolds* v. *Shuler,* 5 Cowen 323 (N. Y. 1826); *Connah* v. *Hale,* 23 Wend. 462 (N. Y. 1840), *accord,* and see the learned notes to *Bassett* v. *Maynard* and *Tinkler* v. *Poole* in 1 Ames Cases on Torts, pp. 273-274.

A wrongful attachment or levy is a conversion. *Abercrombie* v. *Bradford,* 16 Ala. 560 (1849); *Jones* v. *Buzzard,* 2 Ark. 415 (1839); *Woods* v. *Keyes,* 14 Allen 236 (Mass. 1867); *Johnson* v. *Farr,* 60 N. H. 426 (1880); *Stuart* v. *Phelps,* 39 Iowa 14 (1874); *Goode* v. *Langley et al.,* 7 B. & C. 26 (1827); *Glasspoole* v. *Young,* 9 B. & C. 696 (1829).

It is no more necessary in an action of trover than in an action of trespass that there is no manual seizure or removal of the goods, *Wintringham*

v. *Lafoy*, 7 Cowen 735 (N. Y. 1827); *Miller* v. *Baker*, 1 Metc. 27 (Mass. 1840), it is enough that the officer exercises dominion over the goods against the owner's will and to the exclusion of the owner's possession; *Johnson* v. *Farr*, 60 N. H. 426 (1880), *Reynolds* v. *Shuler*, 5 Cowen 323 (N. Y. 1826), *Shipwich* v. *Blanchard*, 6 T. R. 298 (1795), where the plaintiff to redeem the goods paid the rent and expenses; *Abercrombie* v. *Bradford*, 16 Ala. 560 (1849), the plaintiff to regain possession gave a bond. Nor is the taking the less tortious when one yields to the force displayed and surrenders the goods without resistance to a marshal armed with a warrant, *Mathews* v. *Stewart*, 44 Mich. 209 (1880).

YEAGER *v.* WALLACE.

Supreme Court of Pennsylvania, 1868. 57 *Pa.* 365.

Error to the District Court of Philadelphia.

Action of Trover by John M. Yeager, Jr., and A. DeHart, trading as Yeager & DeHart, to the use of Wallace receiver, etc., of the partnership against John M. Yeager, Sr., to recover the value of marble which the defendant claimed to have purchased from the firm.

One witness for the plaintiff testified that about the beginning of 1860, he was at the yard of the partners when the Yeagers, father and son, were there engaged in removing stone; that the father gave orders to the carmen to take the stone. After some had been removed, DeHart came to the yard and in the hearing of the father, as the witness thought, forbade the carmen to remove any more, but the carmen continued to remove it. The marble was removed to the yard of the father, and the son also went to that yard and worked there. Another witness testified that when DeHart forbid the removal of the marble, the father told the carmen to go on, that he had bought it; DeHart said it was not his; all the marble worth carrying away was taken; the father paid the son something over $400.

There was evidence for the plaintiff that the marble taken was worth $1,411.

The defendant gave evidence that the marble taken was worth about $500. The son testified that on the 8th of January, 1860, he had sold the marble to his father for $473.35, received the money and delivered the stone the next day, that the actual cost of what he sold was $380; he also testified that DeHart looked into the car when the stone was being removed and went away without saying anything; and that the witness had transacted all the business of the partnership during its continuance.

The defendant requested the court to charge, *inter alia:*

"The plaintiffs cannot recover in this action, unless proof be made that they made a demand upon the defendant before this suit was brought, for the delivery of the marble in question, and the defendant refused to deliver it."

The Court refused to charge as requested.

The jury found a verdict for the plaintiffs for $3,243.39.

The defendants obtained a rule for a new trial; but upon the

plaintiffs releasing all the verdict above $1,835, the rule was discharged.

AGNEW, J.[1]—In the absence of an actual conversion, a demand and refusal must be proved, to maintain the action of trover against the defendant who came lawfully into the possession of the goods. But where the possession itself is obtained by force or fraud a demand is not necessary. The wrongful act of the party is the evidence of his intention to convert. These are familiar principles amply supported by the authorities cited and not denied by the plaintiff in error. But he takes the position that a sale by a competent party, and possession delivered under it, gives such a lawful possession as to require a demand and refusal, even though the transaction be tainted with fraud. This, however, is a misconception of the state of his case. The court below left it to the jury to find whether the sale made by the younger Yeager to his father was a gross violation of the duty he owed to his partner, Mr. DeHart, whether it was made without DeHart's assent, and whether under the circumstances giving the father notice of DeHart's dissent. The evidence is that DeHart came to the shop while the elder Yeager was there directing the removal of the stones and objected to the removal, that he ran up to the carmen and told them to remove no other stone at their peril, and that the elder Yeager was within hearing distance. The judge also left it to the jury to say whether the sale was a fraud upon the partnership; in point of fact a collusive sale between the son and father in which neither ought to have participated. The verdict therefore establishes that the sale was made by one partner against the dissent of the other, with notice of the dissent to the purchaser, and in fraud of the partnership. It was not a sale by a party competent to pass a lawful possession to the purchaser. The partnership relation makes each partner the agent of the others when acting within the scope of his power; but when his agency is denied and his act forbidden by his copartner with notice to the party assuming to deal with him as the agent of the firm, his act is not that of the firm, but his individual act only. The case presented therefore a possession acquired by fraud in the face of the dissent of the other partner, making it a tortious and not a lawful possession. Demand and refusal were not necessary to establish a conversion.

Finding no error in the record, the judgment is affirmed.[2]

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[1] Only so much of the opinion is given as relates to the 7th point.

[2] Where goods are delivered under a contract of sale induced by the vendee's fraudulent misrepresentations, the vendor can, on discovering the fraud, without previous demand, bring trover against the vendee, *Strayhorn* v. *Giles*, 22 Ark. 517 (1861); *Thompson* v. *Rose*, 16 Conn. 71 (1844), *semble; Moody* v. *Drown*, 58 N. H. 45 (1876), or against any subvendee of his who has participated in the fraud; *Luckey* v. *Roberts*, 25 Conn. 486 (1857), or has knowledge thereof, or of facts sufficient to put him on inquiry, *Gage* v. *Epperson*, 2 Head 669 (Tenn. 1859); *Butters* v. *Haughwout*, 42 Ill. 18 (1866); *Thurston* v. *Blanchard*, 22 Pick. 18 (Mass. 1839); *Holland* v. *Bishop*, 60 Minn. 23 (1895).

Where the fraudulent vendee assigns the goods to an assignee for the benefit of creditors, who is, of course, not a purchaser for value, "the legal title

FOULDES *v.* WILLOUGHBY.

In the Exchequer, June 1, 1841. 8 *M. & W.* 540.

Trover for divers, to wit, two horses. Plea: Not guilty. The cause was tried before Maule, J., at the last spring assizes for Liverpool, and on the 15th of October, 1840, the plaintiff had embarked on board the defendant's ferry-boat at Birkenhead, having with him two horses, for the carriage of which he had paid the usual fare. It was alleged that the plaintiff misconducted himself and behaved improperly after he came on board the steamboat, and when the defendant came on board he told the plaintiff that he would not carry the horses over, and that he must take them on shore. The plaintiff refused to do so, and the defendant took the horses from the plaintiff, who was holding one of them by the bridle, and put them on shore on the landing-slip. They were driven to the top of the slip, which was separated by gates from the high road, and turned loose on the road. They were shortly afterwards seen in the stables of a hotel at Birkenhead, kept by the defendant's brother. The plaintiff remained on board the steamboat, and was conveyed over the river to Liverpool. On the following day the plaintiff sent to the hotel for the horses, but the parties in whose possession they were refused to deliver them up. A message, however, was afterwards sent to him by the hotel-keeper, to the effect that he might have the horses on sending for them and paying for their keep; and that if he did not send for them and pay for their keep, they would be sold to pay the expense of it. The plaintiff then brought the present action. The horses were subsequently sold by auction. The defence set up at the trial was, that the plaintiff had misconducted him-

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is in the assignor at the time he makes the assignment, and that title passing to the assignee, who is innocent of fraud, a demand by the vendor must be made before an action for its recovery can be brought," *National Butchers, etc., Bank* v. *Hubbell,* 117 N. Y. 384 (1889), Peckham, J., p. 398; *contra: Farley* v. *Lincoln,* 51 N. H. 577 (1872). As to the necessity of demand before bringing trover against a sheriff levying upon the goods while in the fraudulent vendee's possession, see *Thompson* v. *Rose,* 16 Conn. 71: *Acker* v. *Campbell,* 23 Wend. 371 (1840); *Bussing* v. *Rice,* 2 Cush. 48 (Mass. 1848), in the two latter cases it being held that replevin lies without demand.

So any fraudulent scheme or any illegal pressure whereby one induces another to give or deliver such other's property to him, is a conversion without more; *Porell* v. *Cavanaugh,* 69 N. H. 364 (1898), defendant, who had been induced by fraud of one X to part with his property which came into the hands of the plaintiff, an innocent purchaser for value, induced the latter to return the property by falsely stating that his sale to X was conditional; *Baird* v. *Howard,* 51 Ohio St. 57 (1894), sale by man helplessly drunk; *Dean* v. *Ross,* 178 Mass. 397 (1901), spiritualistic medium induced widow to give her certain bonds by pretended messages from deceased husband; *Hagar* v. *Norton,* 188 Mass. 47 (1905); and see *Corr* v. *Elder,* 9 Pa. Super. Ct. 228 (1899); *Summersett* v. *Jarvis,* 3 Brod & Bing. 2 (1822), a farmer gave up his books to an assignee under a void commission of bankruptcy.

Where goods are delivered by mistake, the transferee is liable if, but only if, he takes, retains, or disposes of it with knowledge of the mistake. *Chapman* v. *Cole,* 12 Gray 141 (Mass. 1858).

self and behaved improperly on board, and that the horses were sent on shore in order to get rid of the plaintiff, by inducing him to follow them. The learned judge told the jury that the defendant, by taking the horses from the plaintiff and turning them out of the vessel, had been guilty of a conversion, unless they thought the plaintiff's conduct had justified his removal from the steamboat, and he had refused to go without his horses; and that if they thought the conversion was proved, they might give the plaintiff damages for the full value of the horses. The jury found a verdict for the plaintiff with £40 damages, the value of the horses.

In Easter term last, the rule was obtained calling upon the plaintiff to show cause why the verdict should not be set aside on the ground of misdirection, both as to the proof of a conversion, and also as to the amount of damages; against which rule

W. H. Watson and *Atherton* now showed cause. The evidence showed that which clearly amounted to a conversion, and it was not affected by the circumstance that the plaintiff had the means afterwards, if he had chosen, of obtaining the horses again. A wrongful removal of a chattel, even for a few yards, amounts in law to a conversion. (LORD ABINGER, C. B. According to that argument, every trespass is a conversion.) If a man takes and rides another person's horse without his consent, however short a distance, it is in law a conversion. (ALDERSON, B. In that case there is a user of the horse. LORD ABINGER, C. B. In this case the horses were turned out of the boat by the defendant because the owner refused to take them out, and not with any view to appropriate them to his own use, but to get rid of their owner. ALDERSON, B. If a man were to remove my carriage a few yards, and then leave it, would he be guilty of a conversion?) In the notes to *Wilbraham* v. *Snow*, 2 Saund. 470, it is said; "Whenever trespass for taking goods will lie, that is, where they are taken wrongfully, trover will also lie, for one may qualify but not increase a tort;" citing *Bishop* v. *Montague*, 2 Cro. Eliz. 824. (LORD ABINGER, C. B. I cannot agree to that position, at least to the extent for which it is now used.)

Crompton in support of the rule.

LORD ABINGER, C. B. This is a motion to set aside the verdict on the ground of an alleged misdirection; and I cannot help thinking that if the learned judge who tried the cause had referred to the long and frequent distinctions which have been taken between such a simple asportation as will support an action of trespass, and those circumstances which are requisite to establish a conversion, he would not have so directed the jury. It is a proposition familiar to all lawyers, that a simple asportation of a chattel, without any intention of making any further use of it, although it may be a sufficient foundation for an action of trespass, is not sufficient to establish a conversion. I had thought that the matter had been fully discussed, and this distinction established, by the numerous cases which have occurred on this subject; but, according to the argument put forward by the plaintiff's counsel to-day, a bare *asportovit* is a sufficient transaction to support an action of trover. I entirely dis-

sent from this argument; and therefore I think that the learned judge was wrong in telling the jury that the simple act of putting these horses on shore by the defendant amounted to a conversion of them to his own use. In my opinion, he should have added to his direction, that it was for them to consider what was the intention of the defendant in so doing. If the object, and whether rightfully or wrongfully entertained is immaterial, simply was to induce the plaintiff to go on shore himself, and the defendant, in furtherance of that object, did the act in question, it was not exercising over the horses any right inconsistent with, or adverse to, the rights which the plaintiff had in them. Suppose, instead of the horses, the defendant had put the plaintiff himself on shore, and on being put on shore the plaintiff had refused to take the horses with him, and the defendant had said he would take them to the other side of the water, and had done so, would that be a conversion? That would be a much more colorable case of a conversion than the present, because, by separating the man from his property, it might, with some appearance of fairness, be said the party was carrying away the horses without any justifiable reason for so doing. Then, having conveyed them across the water, and finding neither the owner nor any one else to receive them, what is he to do with them? Suppose, under those circumstances, the defendant lands them, and leaves them on shore, would that amount to a conversion? The argument of the plaintiff's counsel in this case must go the length of saying that it would. Then, suppose the reply to be that those circumstances would amount to a conversion, I ask, at what period of time did the conversion take place? Suppose the plaintiff had immediately followed his horses when they were put on shore, and resumed possession of them, would there be a conversion of them in that case? I apprehend, clearly not. It has been argued that the mere touching and taking them by the bridle would constitute a conversion, but surely that cannot be: if the plaintiff had immediately gone on shore and taken possession of them, there could be no conversion. Then the question, whether this were conversion or not, cannot depend on the subsequent conduct of the plaintiff in following the horses on shore. Would any man say, that if the facts of this case were, that the plaintiff and defendant had had a controversy as to whether the horses should remain in the boat, and the defendant had said, "If you will not put them on shore, I will do it for you," and, in pursuance of that threat, he had taken hold of one of the horses to go ashore with it, an action of trover could be sustained against him? There might, perhaps, in such a case, be ground for maintaining an action of trespass, because the defendant may have had no right to meddle with the horses at all; but it is clear that he did not do so for the purpose of taking them away from the plaintiff, or of exercising any right over them, either for himself or for any other person. The case which has been cited from Strange's Reports, of *Bushel* v. *Miller,* seems fully in point. There the plaintiff and defendant, who were porters, had each a stand on the Custom-house Quay. The plaintiff placed goods belonging to a third

party in such a manner that the defendant could not get to his chest without removing them, which he accordingly did, and forgot to replace them, and the goods were subsequently lost. Now suppose trespass to have been brought for that asportation, the defendant, in order to justify the trespass, would plead that he removed the parcels, as he lawfully might, for the purpose of coming at his own goods; and the court there said that whatever ground there might be for an action of trespass in not putting the package back in its original place, there was none for trover, inasmuch as the object of the party removing it was one wholly collateral to any use of the property, and not at all to disturb the plaintiff's rights in or dominion over it. Again, suppose a man puts goods on board of a boat, which the master thinks are too heavy for it, and refuses to carry them, on the ground that it might be dangerous to his vessel to do so, and the owner of the goods says, "If you put my goods on shore, I will go with them," and he does so; would that amount to a conversion in the master of the vessel, even assuming his judgment as to the weight of the goods to be quite erroneous, and that there really would be no danger whatever in taking them? In order to constitute a conversion, it is necessary either that the party taking the goods should intend some use to be made of them, by himself or by those for whom he acts, or that, owing to his act, the goods are destroyed or consumed, to the prejudice of the lawful owner. As an instance of the latter branch of this definition, suppose, in the present case, the defendant had thrown the horses into the water, whereby they were drowned, that would have amounted to an actual conversion; or as in the case cited in the course of the argument, of a person throwing a piece of paper into the water; for, in these cases, the chattel is changed in quality, or destroyed altogether. But it has never yet been held that the single act of the removal of a chattel, independent of any claim over it, either in favor of the party himself or any one else, amounts to a conversion of the chattel. In the present case, therefore, the simple removal of these horses by the defendant, for a purpose wholly unconnected with any the least denial of the right of the plaintiff to the possession and enjoyment of them, is no conversion of the horses, and consequently the rule for a new trial ought to be made absolute.

With respect to the amount of damages, it was altogether a question for the jury. I am not at all prepared to say, that if the jury were satisfied that there had been a conversion in this case, they would be doing wrong in giving damages to the full value of the horses. I do not at all rest my judgment on that point, but put it aside entirely. If the judge had told the jury that there was evidence in the case from whence they might infer that a conversion of these horses had taken place at some time, it would have been different; but his telling them that the simple act of putting them on shore amounted to a conversion, I think was a misdirection, on which the defendant is entitled to a new trial.

ALDERSON, B. I am of the same opinion. As to the last point, it would be a strange thing to disturb the verdict on the ground

that the jury had given as damages the full value of these horses; for it appears that they were ultimately sold, and the plaintiff never regained possession of them. If, therefore, the original act of taking the horses really amounted to a conversion of them, it would be a strong proposition for us to say that the plaintiff was not entitled to recover their full value, as damages for the wrongful act done. But the mere circumstance which the learned judge in this case put to the jury, as constituting the conversion, does not necessarily amount to one. Any asportation of the chattel for the use of the defendant, or a third person, amounts to a conversion; for this simple reason, that it is an action inconsistent with the general right of dominion which the owner of the chattel has in it, who is entitled to the use of it at all times and in all places. When, therefore, a man takes that chattel, either for the use of himself or another, it is a conversion. So, if a man has possession of my chattel, and refuses to deliver it up, this is an assertion of a right inconsistent with my general dominion over it, and the use which at all times, and in all places, I am entitled to make of it, and consequently amounts to an act of conversion. So the destruction of the chattel is an act of conversion, for its effect is to deprive me of it altogether. But the question here is where a man does an act the effect of which is not for a moment to interfere with my dominion over the chattel, but, on the contrary, recognizing throughout my title to it, can such an act as that be said to amount to a conversion? I think it cannot. Why did this defendant turn the horses out of his boat? Because he recognized them as the property of the plaintiff. He may have been a wrongdoer in putting them ashore; but how is that inconsistent with the general right which the plaintiff has to the use of the horses? It clearly is not; it is a wrongful act done, but only like any common act of trespass to goods with which the party has no right to meddle. Scratching the panel of a carriage would be a trespass; but it would be a monstrous thing to say that it would be a ground for an action of trover; and yet to that extent must the plaintiff's counsel go if their argument in this case be sound. But such is not the law; and the true principle is that stated by Chambre and Holroyd, JJ., when at the bar, in their argument in the case of *Shipwick* v. *Blanchard*, 6 T. R. 298, that "in order to maintain trover the goods must be taken or denied with intent to convert them to the taker's own use, or to the use of those for who he is acting." This definition, indeed, requires an addition to be made of it; namely, that the destruction of the goods will also amount to a conversion. For these reasons I think, in the case before us, the question ought to have been left to the jury to say whether the act done by the defendant of seizing these horses and putting them on shore, was done with the intention of converting them to his own use, i. e., with the intention of impugning, even for a moment, the plaintiff's general right of dominion over them. If so, it would be a conversion; otherwise not.

ROLFE, B. In every case of trover there must be a taking with the intent of exercising over the chattel an ownership inconsistent with

the real owner's right of possession. Now suppose, instead of actually removing the horses from the boat, the defendant had waved his hand, or cracked a whip, and so made the animals jump out of the boat, would that amount to a conversion? I do not see how, on the hypothesis of Mr. Watson, any other answer could be given than in the affirmative; for if the principle be that anything which controls the position of the chattel while in my possession, will amount to a change of ownership, I do not see how the effecting of that change by frightening the animal which constitutes my property, is distinguishable from any other means adopted for that same purpose. Again, suppose I, seeing a horse in a ploughed field, thought it had strayed, and under that impression led it back to pasture, it is clear that an action of trespass would lie against me; but would any man say that this amounted to a conversion of the horse to my own use? Or suppose a man drives his carriage up into an inn yard, and the innkeeper refuses to take it and his horses in, but turns them out into the road, could it be said that he thereby converted them to his own use? Surely not. The same principle applies to the case which has been cited, of *Bushel* v. *Miller,* where a party was held to have a right to move certain goods of another person, provided he put them back again; his not putting them back may give the other a right to bring trespass against him, on the ground that his subsequent neglect made him a trespasser *ab initio;* but it is clear that there was no conversion of the chattel. So that we find the distinction to which I have alluded, between trespass and trover, continually recognized in law. I quite agree with my Brother Gurney, that if the learned judge in the present case had not put the conversion to the jury as founded on the single fact of taking the horses on shore, but had left it for their consideration on the whole case as it stood, not only was there evidence of a conversion, but there was such as would have fully warranted the jury in coming to the conclusion at which they arrived. The question, however, was not so left to the jury, and this rule is to set aside the verdict for misdirection must therefore be made absolute.

Rule absolute.[1]

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[1] Even an intentional act, whose obvious result is the destruction of a chattel, is not a conversion if done to protect the doer's property from destruction. *McKeesport Saw Mill Co.* v. *Pennsylvania Co.*, 122 Fed. 184 (1903), the defendant in order to protect the false work and fender of their bridge dislodged and in so doing broke up the plaintiff's barge which had slipped its moorings: or to disencumber their premises from the intrusion of the plaintiff's goods, *Forster* v. *Juniata Bridge Co.*, 16 Pa. St. 393 (1851), *semble*, a part of a bridge carried away by a flood lodged on the defendant's island, Gibson, C. J., said, p. 399, that "the defendant after notice given might have disencumbered his land of it by casting it back into the river, but he could not appropriate it to his own use," but see, *contra*, *Aschermann* v. *Philip Best Brewing Co.*, 45 Wis. 262 (1878), the owner of a premises, upon which plaintiff's goods unlawfully were, held liable in conversion for his acts necessary for the use of his premises whereby the goods were destroyed, and see *Munford* v. *Taylor,* 2 Metc. 599 (Ky. 1859), where it was held that the false imprisonment of the plaintiff's runaway slaves, who escaped from the prison and fled the state was a conversion, though the officers in good faith believed them guilty of the crime for which they were arrested under invalid process.

GUDE CO. *v.* FARLEY.

Supreme Court of New York, Appellate Division, 1898. 25 *N. Y. Misc.* 502.

Trover for an advertising sign. Appeal from the judgment of the Municipal Court of the City of New York, borough of Manhattan, first district, rendered in favor of the defendant upon a trial had before the court without a jury.

The facts as stated by Giegerich, J., were substantially as follows: The defendant's grantor had leased the premises to one McMenamey, for one year from May 1st, 1897, with the right of renewal for four years, the lessee covenanting not to underlet any part of the premises except the second or third floors. The lessee, without the consent of the lessor, granted to the plaintiff the use of the roof with the right to erect and maintain advertising signs thereon for five years from January 1st, 1898. The plaintiffs on December 30th, 1897, erected a sign upon the roof ten feet long and twenty-five feet wide. The defendant, on December 31st, 1897, purchased the fee subject to the lease and notified both the lessee and the plaintiff to remove the sign. They having refused, the defendant had the sign removed and stored in his cellar and notified the plaintiff that it was at its disposal.

GIEGERICH, J. "It appears from the evidence that McMenamey occupied only the first or stone floor of the premises thus demised, which were twenty-five feet square and three stories high. According to a stipulation entered into upon the trial, it also appears that the defendant's grantor collected no rent from the tenant (McMenamey) at any time after the erection of the sign and that no rent became due to him after that date.

The remarks of the trial justice wherein he concludes that the facts as proved did not constitute a conversion, are fully concurred in by me. 'If a man, who has no right to meddle with goods at all, removes them from one place to another, an action may be maintained against him for a trespass; but he is not guilty of a conversion of them, unless he removed the goods for the purpose of taking them away from the plaintiff, or of exercising some dominion or control over them for the benefit of himself or some other person.' 2 Addison on Torts (6th ed.), § 519, p. 626. 'It has never yet been held,' observes the learned author, 'that the single act of removing a chattel, independent of any claim over it, either in favor of the person himself or any one else, amounts to a conversion.' *Id.* 627."

"In *Houghton* v. *Butler*, 4 T. R. 364, where a gate had been wrongfully erected by the plaintiff, so as to obstruct the defendant's right of way, and the latter took it down and put it in a convenient place for the use of the plaintiff, it was held that this did not amount to a conversion."

"The foregoing rules were distinctly recognized and applied in the case of *Eldridge* v. *Adams*, 54 Barb. (N. Y.) 417. There the plaintiff let to the defendant a buggy, which he had hired for a year

from one Jenkins. The wagon was injured while in use by one Hall, and the plaintiff, after its return to him, sent it to the shop of a man named Francisco for repair. Hall afterwards promised the plaintiff that he would pay for such repairs, and the defendant became his surety therefor. Subsequently the defendant and Hall had the wagon removed to another shop for repair, and, before suit was brought, returned it to the custody of the plaintiff. A verdict was directed for the plaintiff subject to the opinion of the court at General Term, but the latter tribunal held that the defendant was not liable, and, accordingly, directed judgment in his favor. Held by the court (per James, J., p. 423): 'the defendant in this case was guilty only of a mere asportation of the buggy; he did not interfere with the plaintiff's dominion over the buggy; his title was recognized and acknowledged throughout; it was not taken or detained with the intent to convert it to the defendant's use, or the use of any one else; he assumed no ownership over it; it was not injured while in his possession. In fact there was no element in the proof on which a conversion could be predicated.' "

The defendants in *Farnsworth* v. *Lowery,* 134 Mass. 512, wrongfully removed certain glass plates from a case to which they claimed title, and of which they took possession, and left said plates in the custody of the person who had theretofore held the case. Held, insufficient to maintain an action for conversion of the plates, even if plaintiffs were ignorant of their whereabouts. The opinion there is by Field, J., who thus sums up the evidence: "It is contended that this wrongful removal of the plates from the case was a conversion, because it is an exercise of dominion over them inconsistent with the rights of the plaintiffs. But the dominion which the defendants exercised in removing the plates from the case was exercised, not by virtue of any claim of property in the plates, or of any right of possession or control over the plates, but by virtue of a claim of a right of property in the case with which the plates were connected, and there is no evidence recited which would have warranted the jury in finding that the defendants removed the plates from the case for any other purpose than that of separating the property of the plaintiffs from the case which the defendants claimed to own, that they might take and carry away only the property they claimed. Such a wrongful intermeddling with plates we think, does not amount to a conversion. There was no intent to deprive the plaintiffs of their property in, or of their rights of possession over, the plates, and no actual deprivation. The removal was incidental to the taking and carrying away of the case, and the plates continued in the custody of the person who, so far as appears, was in possession of the room in which the case was placed, and had the custody of the case. The evidence of a conversion is no stronger than if it proved that a stranger without right had taken the plates from the case and left both in the room. This would be a trespass, but not a conversion." (p. 519.)

The foregoing principles were also applied in *Shea* v. *Inhabitants of Milford,* 145 Mass. 525, where the town, one of the de-

fendants, contracted with the firm of Mead, Mason & Company, for the construction of a granite stone building, and the latter sublet the stone work thereon to the plaintiff. Before the structure was completed the plaintiff was requested by both the contractors and the town's agent to remove, to another part of the land, certain chattels which had been used by him in the performance of his work, and upon his refusal, the defendants, without unnecessary damage, removed the same to another part of the land. It was there held by W. Allen, J., that even had the plaintiff an unrevoked license to have the chattels on the land, an action for conversion could not be maintained. "The evidence," he says, "negatived a conversion of the property by the defendants, and showed that they claimed no title to it, assumed no dominion over it, and did nothing in derogation of the plaintiff's title to it, and that all that was claimed by the defendants was the right to remove the goods from one place to another on their land. All that was done was in assertion of their right in the land, and in recognition of the plaintiff's right of property in the chattels. If the plaintiff had the right to occupy the land, which he claimed, the act of the defendants was wrongful, and they would be liable to the plaintiff for damages for breach of contract, or for the trespass, but not for the value of the property converted to their own use."

I think the principle is fairly deducible from these authorities that the mere removal of a chattel from one place to another, in the absence of any claim of ownership or the exercise of any dominion thereover, does not amount to a conversion.

It might at first glance be claimed that the foregoing views are at variance with the principles of the decision in *Roe* v. *Campbell,* 40 Hun (N. Y.) 50, but there the facts were entirely different. The plaintiff had sold a buggy conditionally to one Broderick, retaining in himself the title thereto until a note given for the purchase-price should be met. Before the note matured, however, Broderick sold the wagon to the defendant, and the plaintiff brought a suit for conversion. The distinction becomes apparent from a reading of the following portion of the opinion, delivered by Smith, P. J., contained at page 52: "If the defendant, on being notified of the plaintiff's title and demand of possession, had simply stored the wagon in his barn at Wolcott, where it was at the time of the demand, while he was availing himself of the plaintiff's consent to take time to consider whether he would comply with the demand, he would not have been liable."

In the case at bar the defendant seems to have acted upon the theory that the agreement between plaintiff and the lessee operated as a subletting, rather than a license, thus causing the prohibitive clause against subletting contained in the lessor's lease to become operative, and, by virtue of the deed, vesting in the defendant title to the sign, upon its annexation, as part of the freehold, and that, therefore, the plaintiff had neither property, general or special, nor the immediate right of possession therein or thereto. Whether or not this position is well taken need not be considered in view of the

conclusion above reached anent the defendant's freedom from liability for his acts. The latter having at the very outset requested the plaintiff and McMenamey to remove the sign from the roof, and they having failed to comply therewith, its removal was obviously not made for the purpose of depriving the plaintiff of ownership therein, but merely to change its position from a part of the building where defendant claimed it had no right to be. Under these circumstances, and in view of the fact that the defendant apprised plaintiff that the sign was subject to its order, of which the latter did not avail itself, it is clear, upon principle and authority, that the defendant's acts in the premises did not amount to a conversion. Such notice by the defendant to the plaintiff was, in my opinion, a positive recognition of the latter's ownership of the sign and inconsistent with the idea of the former's exercising dominion over it.

For these reasons, to my mind, the judgment should be affirmed.

BEEKMAN, P. J., concurs; GILDERSLEEVE, J., not sitting.

Judgment affirmed, with costs.

Accord: Mattice v. *Brinkman*, 74 Mich. 705 (1889), plaintiff's goods were removed from one part of a building to another to enable the defendant to take possession; and see *Weakley* v. *Evans*, 46 S. W. 1070 (Tenn. 1897), *semble; Sparks* v. *Purdy*, 11 Mo. 219 (1847), plaintiff, collector of St. Louis appointed by the court, was allowed to use a room in the Court House, having been removed from his office and another appointed in his stead, his goods were immediately taken from his room and placed on a portico outside it, and pointed out to the plaintiff as his. The plaintiff not removing them, they were afterwards placed in an old, ill fastened room, by some one unknown, whence they were stolen. It was held that while the plaintiff might recover trespass, trover would not lie. Scott, J., saying: "The bare removing of one's chattels from one spot to another, without denying his ownership, but on the contrary acknowledging it, can not be a conversion." Temporary custody of the plaintiff's property for the purpose of taking an inventory of it as the plaintiff's property was held, in *Jordan* v. *Greer*, 5 Sneed 165 (Tenn. 1857), not to be a conversion of it.

McGONIGLE *v.* BELLEISLE CO.

Supreme Judicial Court of Massachusetts, 1904. 186 *Mass.* 310.

LATHROP, J. This is an action for tort in three counts. The first count is for breaking and entering the plaintiffs' close, the second for the conversion of money and goods, and the third for the use of excessive force in removing the plaintiffs. The jury returned a verdict for the defendant on the first count, being so directed by the presiding judge, and for the plaintiffs on the last two counts; and the case is before us on the defendant's exceptions.

The facts in the case may be briefly stated as follows: The plaintiffs were tenants at will of one Marston. On February 24, 1903, Marston executed a lease to the defendant for the term of eighteen months from March 1st, 1903. On March 10th, the defendant gave the plaintiffs notice in writing that it had taken a lease of

the premises and requested the plaintiffs to quit the premises, as it desired to occupy the same for its own use. An action by summary process was brought by the defendant to recover possession of the premises. On March 27th, the agents and servants of the defendant, by its direction went to the premises occupied by the plaintiffs, and immediately after gaining possession removed the plaintiffs' goods to a storehouse. On the next day the defendant gave notice to the plaintiffs where the goods were, and offered to remove them to any place the plaintiffs might desire, without any expense to them. The evidence was conflicting as to whether there was any opposition to the removal of the goods after possession was obtained; and there was evidence tending to show that the plaintiffs resisted the attempt of the defendant to enter the premises and to obtain possession, and requested the return of a trunk alleged to contain money after it had been placed on a wagon for removal, but were driven away.

The remaining exception relates to the refusal of the judge to give an instruction requested and to the instructions given. The request was as follows: "If the defendant had the right to remove the goods of the plaintiffs and to obtain possession of the premises wherein they were, the defendant was justified in taking reasonable precaution to prevent the loss or damage to the goods or effects of the plaintiffs by putting them in a suitable place for storage at the expense of the defendant, subject to the order of the plaintiffs, giving them reasonable notice that the same were stored for safe keeping, subject to the order of the plaintiffs."

The instructions given were as follows: "If you are satisfied from the evidence that the servants or agents of the defendant took goods, and held those goods a moment longer than was reasonable and necessary to remove them from the premises against the will of the plaintiffs, then the plaintiffs can recover the value of the goods. If you think in all the defendant did in taking the goods of the plaintiffs to the storehouse, it was not acting in opposition to the will of the plaintiffs, did not take control of the goods against the will of the owners but was acting together peaceably with the plaintiffs and set up no claim against the will of the owners, the defendant is not liable. But if you think that the defendant undertook to remove the goods beyond the premises to the storehouse, if you are satisfied from that time, or at that time, that the plaintiffs expressed a wish against that, or sought to retain to themselves the possession of the goods, then the act of the defendant is an act of ownership in opposition to the wishes of the plaintiffs and the defendant is responsible for the value of such goods. If you think that there was such a control and you think that any property was lost afterwards, although it was taken by somebody not a servant of the defendant, the defendant is responsible. All the defendant had a legal right to do with the goods was to take them and remove them from the premises; it could set them down in the street, set them down anywhere. From the moment they were off the premises, the right which the law gave the defendant to take possession of the goods was at an

end. If, after that time, it exercised any control over the goods in opposition to the will of the plaintiffs, they were responsible, and they were responsible from that moment for the value of all the goods which they so took."

We are of opinion that on the evidence in the case the instruction requested was stated too broadly and the rulings were right. The defendant had a right to put the goods off the premises. *Clark* v. *Keliher,* 107 Mass. 406. But it had no right to exercise control or dominion over them beyond this, without the assent of the plaintiffs express or implied. "Conversion may be shown by the exercise of control over the property, inconsistent with the right of the owner, and by excluding him from the possession or depriving him of it." Allen, J., in *Scollard* v. *Brooks,* 170 Mass. 445, 448.

In the case before us there was evidence that the plaintiffs were present, and, if so, they could have taken care of their own goods. There was also evidence of a refusal by the defendant's agents and servants to deliver up a trunk said to contain money. The case differs from *Lash* v. *Ames,* 171 Mass. 487, in several respects. In that case the house was full of old building materials, which had to be removed from the building and could not be placed in the street without becoming a public nuisance. It was necessary that they be moved away, and the owner of the land offered to take them wherever the tenant wished. The tenant would give no directions. In the case before us, the taking away and storing were without consulting the plaintiffs.

The order must be

Exceptions overruled.

Accord: Forsdick v. *Collins,* 1 Starkie 138 (1816); *Electric Power Company* v. *New York,* 36 App. Div. (N. Y.) 383 (1899), the defendant City caused wires, unlawfully maintained by plaintiff, upon housetops and chimneys, to be cut down and removed to and stored in the Corporation Yard; *Electric Power Co.* v. *Metropolitan Telephone & Telegraph Co.,* 75 Hun 68 (1894), affirmed 148 N. Y. 746, here, however, the goods were carried away and do not appear to have been stored for the plaintiff's use.

GURLEY *v.* ARMSTEAD.

Supreme Judicial Court of Massachusetts, 1889. 100 *Mass.* 267.

DEVENS, J. The defendant, who was a job teamster, removed the goods alleged to have been by him converted from a room in the dwelling-house of one Whittier to the store of one Davis, and there delivered them to Whittier, by whose direction he had acted. Although the goods were in the house of Whittier, they were in a room hired by the plaintiff from him. The contract between them was one for rent, and not for storage, Whittier reserving no control over the room. It was, however, neither locked nor fastened, although no goods were in it except those of the plaintiff. In all that he did the defendant acted in good faith, without any intention of depriving the rightful owner of her property, and in ignorance of

the fact that the plaintiff was such owner, neither asserting title in himself nor denying title to any other, nor exercising any act of ownership except by the removal above stated.

The legal possession of the goods was, under these circumstances, undoubtedly in the plaintiff, and as they were in the room hired by her, the actual possession was also hers. The apparent control of them was, however, in Whittier, as they were in his house, and he had further the present capacity to take actual physical possession, as the room in which they were was neither locked nor fastened.

It is conceded that whoever receives goods from one in actual, although illegal, possession thereof, and restores the goods to such person, is not liable for a conversion by reason of having transported them. *Strickland* v. *Barrett,* 20 Pick. 415. *Leonard* v. *Tidd,* 3 Metc. 6.[1] And this would be so apparently, even if the goods thus received were restored to the wrongful possessor, after notice of the claim of the true owner. *Loring* v. *Mulcahy,* 3 Allen 575. *Metcalf* v. *McLaughlin,* 122 Mass. 84.[2]

Upon the precise question raised, we have found no direct au-

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[1] *Accord: Frome* v. *Dennis,* 45 N. J. L. 515 (1883), the plaintiff had left his plow on the farm of C, until he should come and take it away. The farm, with the plow upon it, passed into the possession of H, who lent it to the defendant, who used it for three days and returned it to H, whose property he believed it to be; it was held that "he surrendered it to the possessor from whom he had received it, without any intention of enlarging or changing his title, without any reference to anybody's title * * * neither in the use nor in the surrender by the defendant does there appear any repudiation of the owner's right or any exercise of dominion inconsistent with such right. His acts may have constituted a trespass but not a conversion," per Dixon, J., p. 519.

Where, however, the bailee does more than restore the goods bailed to the mere possession of the bailor, as where a warehouseman received mortgaged cotton for storage and gave a warehouse receipt therefor, his delivery of it to a third party on the production of such receipt, was held in *Hudmon* v. *Du Bose,* 85 Ala. 446 (1888), since this was the "restoration of the bailor's dominion by an act, the essential nature of which is in defiance of the true owner's title or the probable consequence of which will be to put the property beyond his reach," Somerville, J., p. 448; but see *Leuthold* v. *Fairchild,* 35 Minn. 99 (1886), a bank endorsed over bills of lading to a purchaser upon payment of drafts attached, and *Leonard* v. *Tidd,* 3 Metc. 6 (Mass. 1841), where a pledgee delivered the pledge to the pledgor, in order that he might deliver it to a purchaser from him, the pledgee accepting the purchaser's promise to pay the price as part payment of the pledgor's debt; and *Parker* v. *Lombard,* 100 Mass. 405 (1868), where the defendant, a warehouseman, rented a warehouse in which was the cotton in question from one P, who by mistake told him that the cotton belonged to H; it was held that he was not guilty of conversion in notifying H to remove the cotton and making delivery to him, since he, having been "entrusted with the possession merely," had transferred "the possession in accordance with the directions of the person from whom he received it, without notice of any better title, and without undertaking to convey a title."

The mere taking the custody of goods from one having no title thereto is not a conversion, *Deering* v. *Austin,* 34 Vt. 330 (1861).

[2] In *Metcalf* v. *McLaughlin,* 122 Mass. 84 (1877), the defendant, a teamster, carried household goods from one house to another for a mortgagor thereof, after notice that the terms of the mortgage forbade their removal.

In *Loring* v. *Mulcahy,* 3 Allen 575 (Mass. 1862), it was held that one re-

thority, nor was any cited in the argument; but the principle on which the decisions above cited rest is not unreasonably extended when it is applied to the circumstances of the case at bar. The act of removing goods by direction of the wrongful possessor of them is an act in derogation of the title of the rightful owner; but the party doing this honestly is protected because from such actual possession he is justified in believing the possessor to be the true owner. He does no more than such possessor might himself have done by virtue of his wrongful possession.[3]

The defendant was a job teamster, and thus in a small way a common carrier of such wares and merchandise as could appropriately be transported in his team or wagon. He exercised an employment of such a character that he could not legally refuse to transport property such as he usually carried, which was tendered to him at a suitable time and place with the offer of a reasonable compensation. If he holds himself out as a common carrier, he must exercise his calling upon proper request and under proper circumstances. *Buckland* v. *Adams Express Co.*, 97 Mass. 124. *Judson*

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ceiving stolen goods as a naked bailee, a mere depositary, and permitting his bailor to remove them is not guilty of conversion, unless ***demanded*** by the true owner while in his possession; *accord*, *Nelson* v. *Iverson*, 17 Ala. 216 (1850); *Rembaugh* v. *Phipps*, 75 Mo. 422 (1882), even though the owner has notified the defendant of his title, but see *Hudmon* v. *Du Bose*, 85 Ala. 446 (1888), where it was, also held that the recording of a chattel mortgage is constructive notice of the mortgagor's title; in *Hill* v. *Hayes*, 38 Conn. 532 (1871), *Loring* v. *Mulcahy* is cited with approval, though the decision was that mere suspicion that the bailor had no title to the goods did not make their return to him a conversion and that a charge, that the defendant was guilty, if she knew the property was stolen when she returned it to the bailor, was sufficiently favorable to the plaintiff, the verdict having been given for the defendant; *contra*, *Powell* v. *Hoyland*, 6 Exch. 67 (1851), and see *Hindmarch* v. *Hoffman*, 127 Pa. 284 (1889), where in an action of ***indebitatus assumpsit*** to recover against one with whom a thief had deposited moneys stolen from the plaintiff and who had, after the plaintiff's attorney had notified him of the plaintiff's claim, turned it over to the thief, it was said, p. 289, that "the defendant did not better his position by improperly handing over the money to those, who had no right whatever to it, after he knew that it had been stolen and that the plaintiff was the true owner;" and see *Lester* v. *Delaware, L. & W. R. Co.*, 92 Hun 342 (N. Y. 1895).

[3] Where the bailee does no more than change the location of the goods and not the possession of them, as where he carries goods for one in actual, though wrongful possession, from one place to another and there redelivers them to him, there is no conversion, see Blackburn, J., in *Hollins* v. *Fowler*, 41 L. J., Q. B. 277, and Romer, J., in *Barker* v. *Furlong*, 1891 2 Ch. Div. 172, p. 182; "The carrier and packing agent are generally held not to have converted because by their acts they merely purport to change the position of the goods and not the property;" *Thorp* v. *Burling*, 11 Johns. 285 (N. Y. 1814), a cartman who had taken the plaintiff's goods from his possession, acting as the innocent agent of other defendants would, it was said, not have been liable had "the other defendants reduced the goods to possession and had Woodruff (the cartman) then received the goods to carry;" *Strickland* v. *Barrett*, 20 Pick. 415 (Mass. 1838), a teamster who at the request of a mortgagor in possession, carried the goods out of the state and there redelivered them to the mortgagor, was not guilty of conversion unless he knew the mortgagor's purpose to deprive the mortgagee of his goods; *Smith* v. *Colby*, 67 Maine 169 (1878), *semble*.

v. *Western Railroad*, 6 Allen, 486. His means of ascertaining the true title of the freight confided to him are of necessity limited. He must judge of this as it is fairly made to appear. If Whittier had actually gone into the room, as he might readily have done, and taken physical possession of the goods, the defendant upon well established authority would have been justified in obeying the order, and transporting the goods to Whittier at another place; and he should not be the less justified where Whittier, in apparent control of the goods in his own house, and capable of immediately taking them into his actual custody by entering the room through the unlocked door, has directed the removal.

If a person standing near and in sight of a bale of goods lying on the sidewalk belonging to another, and thus in the legal possession of such other, is able at once to possess himself of it actually, although illegally, and directs a carrier to remove it and deliver it to him at another place, compliance with this order in good faith cannot be treated as a conversion; and apparent control, accompanied with the then present capacity of investing himself with actual physical possession, must be equivalent to illegal possession in protecting a carrier who obeys the order of one having such control.

Judgment for the defendant.[4]

SECTION 4.

(d) Destruction of and injury to chattels.

SIMMONS *v.* SYKES.

Supreme Court of North Carolina, 1841. 3 *Iredell* 98.

Trover for a canoe which the plaintiff had lent to the defendant. A witness proved that the defendant had brought the canoe to the dock of the witness and left it there; that a short time afterwards it was missing from the dock and that later he had seen it some distance off stranded on the beach and broken up.

DANIEL, J. This action is Trover. If there be a deprivation

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[4] *Accord: Nanson* v. *Jacob*, 93 Mo. 331 (1887); *White Live Stock Commission Co.* v. *Chicago, M. & St. P. R. Co.*, 87 Mo. App. 330 (1900); *Shellnut* v. *Central of Ga. R. Co.*, 131 Ga. 404 (1908); Willis, J., *Sheridan* v. *New Quay Co.*, 4 C. B. (N. S.) 618 (1858), p. 648; *Lee* v. *Bayes*, 18 C. B. 599 (1856), p. 609, and this even though the carrier do not deliver them to the consignor, but to a purchaser from him, *Shellnut* v. *Ry.*, 131 Ga. 404 (1908); but see Blackburn, J., in *Hollins* v. *Fowler*, 41 L. J. Q. B. 277. If, however, demand be made by the true owner a subsequent delivery to the consignor or to his order will be a conversion; *Lee* v. *Bayes*, 18 C. B. 599 (1856); *Georgia R. & Banking Co.* v. *Haas*, 127 Ga. 187 (1906); *Atchison, T. & S. F. R. Co.* v. *Jordon Stock-Food Co.*, 67 Kans. 86 (1896); *Shellenburg* v. *Freemont, E. & M. V. R. Co.*, 45 Nebr. 487 (1895); *Wells* v. *American Express Co.*, 55 Wis. 23 (1882); *contra, Kohn* v. *Richmond & Danville R. Co.*, 37 S. Car. 1 (1891), or even if notice be given of the plaintiff's title, *Lester* v. *Delaware, L. & W. R. Co.*, 92 Hun 342 (N. Y. 1895).

of property to the plaintiff, it will constitute a conversion, though there be no acquisition of property to the defendant. *Keyworth* v. *Hill,* 3 B. & A. 687.[1] If the property had been lost by the bailee, or stolen from him, or had been destroyed by accident or from negligence, this action could not have been sustained, but *case* would have been the proper remedy. 2 Saund. 47. *Packard* v. *Getman,* 4 Wend. 613. *Ross* v. *Johnston,* 5 Bur. 2285. To sustain this action of Trover, the defendant must have been proven to have been an actor and to have made an injurious conversion, or done an actual wrong. Salk. 655. Peake 49. The Judge informed the jury, that, if they were satisfied from the evidence, that the defendant had actually destroyed the canoe, they might find for the plaintiff. The defendant, however, insisted that there was no evidence, that he was an agent in the destruction of the property, and, without some evidence upon this point, the Judge should charge the jury to find for the defendant. The Judge said there was some evidence of a conversion, the weight of which was left entirely with the jury. It seems to us that there was some evidence, from which the jury might infer that the defendant was an agent in the destruction of the property. The defendant had placed the canoe in the dock of the witness, which was a place of safety, and a short time afterwards it was missing, and in two months it was found broken up on the beach. It is not pretended that the canoe was removed from the dock by the winds—no presumption arises that the bailor removed it—the bailee had a right to remove it; and, in the absence of all other proof, the jury might presume that he, who had a right to remove, did remove the canoe, and, the canoe afterwards being found broken up, the jury might presume, in the absence of other evidence, that it was broken up by the agency of him, who had the control and management of the property. The judgment must be affirmed.

PER CURIAM, Judgment affirmed.

[1] *Accord: Keyworth* v. *Hill,* 3 B. & A. 685 (1820), *semble; Olds* v. *Open Board of Trade,* 33 Ill. App. 445 (1889), cancelation of certificate of membership in Board of Trade; *Schreiber* v. *Finan,* 28 Misc. (N. Y.) 560 (1899), payee of a cheque, lost by or stolen from him, liable to a *bona fide* holder for value, if, when the cheque is presented to him for examination, he tears it up. So any change in the nature of the chattel, as the spinning of cotton, Blackburn, J., in *Hollins* v. *Fowler,* 41 L. J. Q. B. 277, or the cutting up by a butcher of the carcass of a deer, *McPheters* v. *Page,* 83 Maine 234 (1891), or any alteration of its quality, as by drawing out part of a vessel of wine and filling it with water, *Richardson* v. *Atkinson,* 1 Strange 576 (1723), or in any way adulterating it, *Dench* v. *Walker,* 14 Mass. 500 (1780); but a mere injury, though depreciating the value of the chattel is not enough, *Byrne* v. *Stout,* 15 Ill. 180 (1853), castration of a hog, if not done under a claim of right, *Simmons* v. *Lillystone,* 8 Exch. 431 (1853), defendant in digging a sawpit on his premises cut through a spar embedded in the soil, leaving the pieces there which were afterwards carried away by the tide. To commingle another's goods with one's own so that they can not be identified was held in *Crane Lumber Co.* v. *Bellows,* 116 Mich. 304 (1898), to be a conversion; but see *Burnham* v. *Marshall,* 56 Vt. 365 (1883). It is not necessary that the defendant intended to destroy the goods, it is enough if he do any positive act the obvious consequence of which will be their destruction, *Aschermann* v. *Philip*

Best Brewing Co., 45 Wis. 262 (1878), defendant opened the door of a room in a building purchased by him in which plaintiff's ice was stored, so admitting warm air which melted the ice. But the bottling of wine, done to preserve it, is no conversion, *Philpot* v. *Kelley*, 3 A. & E. 106 (1835).

(e) Misfeasance by bailees, servants and agents.

POWELL *v.* SADLER.

At Nisi Prius, 1806. *Paley on Principal and Agent*, 80 *Note (e).*

Trover for three horses. Plaintiff had sent the horses to defendant to be sold the next day; defendant's clerk told him the next day would not be so good a time to sell them as the following sale day; in consequence of which the plaintiff said he would send them back again, which he did the next evening, but they had been sold.[1] In a conversation concerning the sale, the defendant said, "it was a mistake of his clerk for which he was not answerable." *Garrow*, for the defendant, insisted that there was no evidence of a conversion. LORD ELLENBOROUGH, C. J. I am of opinion that a conversion has been proved; the horses were entrusted to the defendant for a qualified purpose, which he has admitted was not conformed to. Where goods are committed to one for a qualified purpose, any deviation from it in the disposition of them is a conversion; "as if a man borrow a horse to ride, and leave him at an inn, it has been held to be a conversion."[2]

[1] A sale by an agent at any time other than that directed, though at same price, is wrongful, *Clark & Nunnally* v. *Cumming & Co.*, 77 Ga. 64 (1886), an action on an open account.

[2] *Accord: Etter* v. *Bailey*, 8 Pa. St. 442 (1848), unauthorized sale by bailee; *Haas* v. *Damon*, 9 Iowa 589 (1859), an agent, authorized to sell goods, exchanged them for others: *Atkinson* v. *Jones*, 72 Ala. 248 (1882), one hiring a chattel exchanged it for another; *Hotchkiss* v. *Hunt*, 49 Maine 213 (1860); *Thrall* v. *Lathrop*, 30 Vt. 307 (1858), bailees for specific purposes pledged the goods for their own debts, *Schermer* v. *Neurath*, 54 Md. 491 (1880), similar conduct by gratuitous bailee of bond for safe keeping; *Loeschman* v. *Machin*, 2 Stark. 311 (1818), hirer of piano sending it to an auctioneer for sale, *semble; Murray* v. *Burling*, 10 Johns. 172 (N. Y. 1813), one entrusted with a note to negotiate, in order to raise money for the maker's purposes, after negotiating it appropriated the proceeds; *Decker* v. *Mathews*, 12 N. Y. 313 (1855); *Kidder* v. *Biddle*, 13 Ind. App. 653 (1895), similar facts; *Security Bank* v. *Fogg*, 148 Mass. 273 (1889), defendants to whom a note was sent to place in a special account subject to draft by X, refused to so credit it but though its return was demanded, negotiated it and credited it to the plaintiff's general account upon which the plaintiff was largely indebted to the defendants; *Winner* v. *Penniman*, 35 Md. 163 (1872), a joint owner of a note entrusted it to the other for collection, he, however, surrendered it to the maker for cancelation; *Covell* v. *Hill*, 6 N. Y. 374 (1852), one to whom plaintiff consigned goods for sale, sold them as goods of a third person: *McNear* v. *Atwood*, 17 Maine 434 (1840), defendant, sent to receive a note for a balance due the plaintiff, induced the debtor to draw the note to his order and sold it; *Cotton* v. *Sharpstein*, 14 Wis. 226 (1861), attorney for plaintiff in ex-

MARSHALL & MICHEL GRAIN CO. *v.* KANSAS CITY, FT. S. & M. R. CO.

Supreme Court of Missouri, 1903. 176 *Mo.* 480.

BURGESS, J.[1] On August 5, 1895, Marshall & Antles, of whom plaintiffs are successors, delivered to the defendant a car of corn for shipment over its railroad from Joplin to Little Rock, Arkansas, with instructions on the bill of lading to notify the Little Rock Grain Company; Little Rock was not on the line of the defendant's road, but the agent of the defendant at Joplin, having authority to so do, contracted with the shippers to transport said car of corn to Little Rock, and received therefor the entire freight charge and rate between Joplin and Little Rock, and delivered to the shippers a bill of lading for said car of corn. The bill of lading showed the receipt by defendant from Marshall & Antlers of one car of corn said to weigh 33,375 pounds, "to be transferred over the line of this (defendant's) railway to ..... and delivered after payment of freight and advance charges in like good order to the consignee, or a connecting carrier if the same are to be forwarded beyond the line of this company's road, to be carried to the place of destination;

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ecution bid in debtor's property for him at sale, took certificate in his own name and sold it; *Fitchett* v. *Canary,* 59 N. Y. Super. (27 Jones & S.) 383 (1890), somewhat similar facts; *Laverty* v. *Snethen,* 68 N. Y. 522 (1877), an agent to whom a note was given to negotiate, with instructions not to let it get out of his possession, entrusted it to another who discounted it and appropriated the proceeds, see *Ross* v. *Chambers,* 1 Baily 548 (S. Car. 1830). So it was held in *Bell* v. *Cummings,* 3 Sneed 275 (Tenn. 1855), to be a conversion for a lessee of a chattel to sub-lease it.

So a vendee of personal property under a conditional sale is guilty of conversion if he sell it before payment of the price, *Rodney Hunt Mach. Co.* v. *Stewart,* 57 Hun 545 (N. Y. 1890).

Any abuse of a limited title is a conversion, as a sale of goods upon which the seller has a lien, *Mulliner* v. *Florence,* L. R. 3 Q. B. Div. 484 (1878). In America it is generally held that trover lies against a pledgee, who sells the goods pledged before the loan is due, *Berg* v. *Foster,* 42 L. I. 313 (1885), or without notice to the pledgor; *Mullen* v. *Quinlan & Co.,* 195 N. Y. 109 (1909); *Learock* v. *Paxson,* 208 Pa. 602 (1904), or for a debt other than that for which it was pledged, *Blood* v. *Erie Dime Savings Bank,* 164 Pa. 95 (1894); so rehypothication of stock pledged as collateral is a conversion, *Van Voorhis* v. *Rea,* 153 Pa. 19 (1893); and no tender of the debt due is necessary to the maintenance of the action in either case; *Mullen* v. *Quinlan,* 195 N. Y. 109; *Learock* v. *Paxson,* 208 Pa. 602, and see *Amer. & Eng. Ency. of Law,* 2nd Ed., vol. 28, p. 686, for collection of cases. See, however, *Donald* v. *Suckling,* L. R. 1 Q. B. 585 (1866), repledge, and *Halliday* v. *Holgate,* L. R. 3 Ex. 299 (1868), sale by pledgee, *contra.*

"There must be an entire departure from his (the agent's) authority before an action for the conversion of the goods can be maintained," Bronson, J., in *McMorris* v. *Simpson,* 21 Wend. 610 (N. Y. 1839), p. 614, so an agent authorized to sell is not guilty of conversion if he sell for a lower price than that set by his principal, *Sarjeant* v. *Blunt,* 16 Johns. 74 (N. Y. 1819), or sells on credit when directed to sell for cash, *Loveless* v. *Fowler,* 79 Ga. 134 (1887), the proper remedy being an action on the case.

[1] Only so much of the opinion is given as relates to the question of conversion.

it being expressly agreed that the responsibility of this company shall not extend beyond its own line."

It is said that there was no conversion of the corn by defendant's connecting carrier and that the verdict should have been for defendant.

The evidence, however, showed that Marshall & Antles had sold the corn to the Little Rock Grain Company, and not having been paid for it, and not wishing the corn delivered without receiving pay, attached a sight draft to the bill of lading, and sent said draft with the bill of lading attached to a bank in Little Rock for collection from the Little Rock Grain Company, so that the grain company could not get the car of corn without paying the draft.

But when the car of corn arrived at Little Rock, the agent of the Cotton Belt Line, which line of road the defendant selected as its connecting carrier to Little Rock, delivered the car of corn to the Little Rock Company, when the Little Rock Company did not hold the bill of lading for the same, said bill of lading having been attached to the sight draft which had not been taken up by the Little Rock Grain Company, the Little Rock Grain Company having refused to pay the draft.

The Cotton Belt Road was protected by a bond of the Little Rock Grain Company, so that if it became liable on account of delivery without the bill of lading it would be indemnified.

After inquiries had been made of defendant railroad company, plaintiff was notified by the local agent of the defendant company that the corn had been delivered to the Little Rock Grain Company. They refused then to have anything further to do with the corn, which was afterwards redelivered by the Little Rock Grain Company to the Cotton Belt Railroad Company, which company stored it in a public warehouse.

There can be no question but that the shipper of the goods has the right to designate the consignee, or in other words, the person to whom they are to be delivered, and that the carrier is bound to obey the direction of the shipper, or to comply with the terms of his contract of shipment in this respect, and if he disobeys them he is liable as for a conversion. (*Wiggins Ferry Co.* v. *Railroad*, 128 Mo. 224; *Railroad* v. *White*, 6 Bush 251.) A misdelivery by a carrier of an article intrusted to him to be carried is a conversion. (*Claflin* v. *Railroad*, 7 Allen 341; Bishop on Non-Contract Law, § 405.) Nor does the fact that the railroad company offered to return the corn after it had been redelivered back again into the cars furnish any justification for the conversion, though it might be considered in mitigation of damages. (*Sparks* v. *Purdy*, 11 Mo. 219.)[2]

[2] So it is a conversion where a carrier delivers goods to a person not designated by the consignor or authorized by him to receive them; *Youl* v. *Harbottle*, 1 Peake 68 (1791); *Louisville & N. R. Co.* v. *Barkhouse*, 100 Ala. 543; (1892); *Little Rock, M. R. & T. R.* v. *Glidewell*, 39 Ark. 487 (1882); *Cavallaro* v. *Texas Pac. R. Co.*, 110 Cal. 348 (1895); *Sou. Ex. Co.* v. *Van Meter*, 17 Fla. 783 (1880); *Pac. Exp. Co.* v. *Shearer*, 160 Ill. 215 (1896); *McCulloch* v. *McDonald*, 91 Ind. 240 (1883); *Claflin* v. *Boston & L. R. Co.*, 7 Allen 341 (Mass. 1863); *Guillaume* v. *Hamburgh American Packet Co.*, 42 N. Y. 212

SYEDS *v.* HAY.

Court of King's Bench, 1791. 4 *Term Rep.* 260.

Trover for certain goods. The action was brought by the owner against the captain of the vessel in which they had been shipped; and the only question was whether there was evidence of a conversion to maintain this action. The goods were left by the defendant in the hands of one Hawley, a wharfinger, for the plaintiff's use; and he might have had them at any time by sending there and paying the wharfage. But, previous to their being landed on the wharf, the plaintiff, intending to convey them from the vessel himself, expressly directed the defendant not to land them there, which the latter promised not to do, but nevertheless he did so. The defendant, by way of justification for this breach of orders and promise, attempted to set up a usage that every wharfinger, against whose wharf a vessel was moored for the purpose of unloading, as in the present case, was entitled to the wharfage fees for all goods unloaded therefrom, whether landed on the wharf or not; and that therefore the wharfinger had a lien thereon, of which it was not lawful to divest him * * * Lord Kenyon was of opinion, on an objection taken at the trial, that there was no evidence of a conversion; for, without laying stress on the supposed usage, the goods have been delivered to the wharfinger for the use of the defendant;

(1870); *Viner* v. *New York &c. Steamship Co.,* 50 N. Y. 23 (1872); *Security Trust Co.* v. *Wells Fargo Co.,* 81 App. Div. (N. Y.) 426 (1903); *Oskamp* v. *Southern Exp. Co.,* 61 Ohio St. 341 (1899); *Sword* v. *Young,* 89 Tenn. 126 (1890); *Houston & T. C. R. Co.* v. *Adams,* 49 Tex. 748 (1878); *Winslow, Ward & Co.* v. *Vermont R. R.,* 42 Vt. 700 (1870); but see *Ryder & Mitchell* v. *Burlington, C. R. & N. R. Co.,* 51 Iowa 460 (1879). Such misdelivery is a conversion if made by a warehouseman, *Devereux* v. *Barclay,* 2 B. & Ald. 702 (1819); *Bruhl* v. *Coleman,* 113 Ga. 1102 (1901), the defendant, a railroad, had become a mere warehouseman, the goods having been tendered to the consignee and refused by him. *Security Trust Co.* v. *Wells Fargo Co.,* 81 App. Div. (N. Y.) 426 (1903), *semble,* or by any other voluntary bailee—as in *Kowing* v. *Manly,* 49 N. Y. 192 (1872), a broker who delivered bonds deposited with him to his customer's wife—gratuitous or for hire, *Coykendall* v. *Eaton,* 55 Barb. 188 (N. Y. 1869); or by an involuntary bailee, as a person to whom goods have been mistakenly consigned and who, in good faith and with the intent to expedite their return to the consignor, delivers them to a third party on his assurance that he will forward them to the consignor, *Hiort* v. *Bott,* L. R. 9 Ex. 86 (1874)—(see also, *Louisville & N. R. Co.* v. *Fort Wayne Electric Co.,* 108 Ky. 113 (1900), *aliter* where such involuntary bailee in good faith delivers them to one who exhibits apparently valid authority from the consignor).

So it is held a conversion for a carrier receiving goods for shipment by connecting lines, to vary the designated route, *Wiggins Ferry Co.* v. *Chicago & A. R. Co.,* 128 Mo. 224 (1895), or the designated method of transportation, at least of live stock, *McKahan* v. *American Exp. Co.,* 209 Mass. 270 (1911), or to carry fire-arms and ammunition, to another destination in order to prevent the consignee from getting possession of them, thinking that they would be used in mob violence during a strike, *Baltimore & O. R. Co.* v. *O'Donnell,* 49 Ohio St. 489 (1892); so one volunteering to receive money for another and carry it to him and entrusting it to third party who stole it was held guilty of a conversion in *Colyar* v. *Taylor,* 1 Cold. 372 [Tenn. 1860], and in *Fitzgerald* v. *Burrill,* 106 Mass. 446 (1871), it was held conversion for

and that the proper remedy against a carrier for not delivering goods pursuant to orders was by action on the case; but he nevertheless permitted the cause to proceed; reserving this point for the consideration of the Court. The verdict was given for the plaintiff. And a rule having been obtained to shew cause why the verdict should not be set aside, and a non-suit entered.

Bowen and *Kidd* now showed cause.

Erskine, Mingay, and *Lawes, contra,* admitted, that demand and refusal were *prima facie* evidence of a conversion, till explained, but no more; for if conversion be not actually found on a special verdict in trover, judgment must be for the defendant. Now here the refusal was satisfactorily explained; for the goods were delivered to the wharfinger expressly for the use of the plaintiff; and therefore his right to them, so far from being denied, was recognized. The delivery to the wharfinger was in the usual course of trade. There was no evidence of its being done collusively; and if done *bona fide* under an idea, whether well or ill founded, of a right in the wharfinger, trover, which is founded on a *tort,* will not lie; but the plaintiff has his remedy by an action on the case against the carrier for a misdelivery. The wharfinger may even be considered as the agent for the plaintiff; and all the cases of this kind, where trover has been maintained, such as *Perkins* v. *Smith,* and *Cooper* v. *Chitty,* have been either where the *property* has been altered by an actual sale, or the denial has been grounded on an assertion of

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a post-office clerk told to register a letter containing money, to send it unregistered; but to permit an unauthorized inspection by an intending purchaser during the carriage is not a conversion though a sale is thereby prevented, *Dudley* v. *Chicago, M. & St. P. R. Co.,* 58 W. Va. 604 (1906).

Where the carrier carries out the consignor's order and delivers to the person intended by the consignor, though the goods have been ordered and consigned to him by a fictitious name, it is no conversion, *The Drew,* 15 Fed. 826 (1883); *Wilson & Co.* v. *Adams Exp. Co.,* 27 Mo. App. 360 (1887); *Edmunds* v. *Merchants' Despatch Co.,* 135 Mass. 283 (1883), here the order was given by the swindler in person; *Samuel* v. *Cheney,* 135 Mass. 278 (1883), order given by letter; *M'Kean* v. *M'Iver,* L. R. 6 Ex. 36 (1870); *contra: Pacific Exp. Co.* v. *Shearer,* 160 Ill. 215 (1896); *Winslow, Ward & Co.* v. *Vermont R. Co.,* 42 Vt. 700 (1870); *American Exp. Co.* v. *Stack,* 29 Ind. 27 (1867). In some cases it is held that where the person named as consignee is well known it is a conversion to deliver it to another personating him both in the ordering and getting possession of the goods, without requiring satisfactory identification. *Pacific Exp. Co.* v. *Critzer,* 42 S. W. 1017 (Tex. Ct. of App. 1897); *Pacific Exp. Co.* v. *Hertzberg,* 17 Tex. Civ. App. 100 (1897); *Oskamp* v. *Ex. Co.,* 61 Ohio St. 341 (1899).

A carrier or other bailee is not guilty of conversion in not resisting the taking of his bailor's goods from his possession by the police, *Baltimore & O. R. Co.* v. *O'Donnell,* 49 Ohio St. 489 (1892), or by the health authorities. *Niagara Fire Insurance Co.* v. *Campbell Stores,* 101 App. Div. (N. Y.) 400 (1905), affirmed 184 N. Y. 582 (1906), hides removed from burnt building by order of Board of Health or by superior force, *Abraham* v. *Nunn,* 42 Ala. 51 (1868), cotton taken from warehouse by armed men sent by United States Treasury Officer, or by officers acting under apparently valid legal process, *Traylor* v. *Hughes,* 88 Ala. 617 (1889), or even in opening the doors of building or room in which the goods are stored, *Clegg* v. *Boston Storage Co.,* 149 Mass. 454 (1889), if the seizure be not by its procurement or connivance, *Baltimore & O. R. Co.* v. *O'Donnell,* 49 Ohio St. 489 (1892).

property in some other person. But they are not applicable to the present case.

Lord Kenyon, Ch. J.—It is clear that the plaintiff is entitled to recover either against the defendant or the wharfinger; and if no wharfage be due, of which there was no satisfactory evidence, I think that this action may be maintained against the defendant.

Ashhurst, J.—If the wharfage duty be not due, it is clear that trover will lie against the defendant. Or even if the defendant landed the goods on the wharf with the view of sheltering himself from the payment of the moorage-duty, that also would subject him to this action.

Buller, J.—I am of opinion that the objection to the form of the action is not well founded. For the plaintiff gave express orders to the defendant not to land the goods on the wharf, to which the latter agreed at the time, but afterwards disobeyed those orders and delivered the goods into the possession of the wharfinger; now on these facts I think that trover will lie. I cannot go on the ground that the wharfinger was the plaintiff's agent; for, so far from it, the plaintiff expressly dissented to the goods being sent there. And if one man, who is entrusted with the goods of another, put them into the hands of a third person contrary to orders, it is a conversion. If a person take my horse to ride, and leave him at an inn, that is a conversion; for though I may have the horse on sending for him and paying for the keeping of him, yet it brings a charge on me. So here the defendant by putting these goods into the custody of the wharfinger brought a charge on the plaintiff. And this is a deliberate act, it being done contrary to the orders of the owner, and therefore distinguishable from the case put at the bar of a misdelivery of goods, merely owing to a mistake. So stands the case independently of the evidence respecting the wharfage; but that is very material to be considered; because if the wharfage-duty be due, that will be an answer to the present action. The usage set up at the trial does not appear to be uniform; for, though several of the witnesses said that in their opinion it was due, yet opinion is no evidence, and in point of fact the duty has not always been paid in cases where the goods were not landed. The case in Bl. Rep. goes a great way to prove that no such payment can be exacted.

Grose, J. of the same opinion.

On a subsequent day Lord *Kenyon* said, that the Court had fully considered this case, and were of opinion that no trial ought to be granted, and that the rule should be discharged.

Per Curiam. *Rule discharged.*

DISBROW *v.* TENBROECK.

Court of Common Pleas of City of New York, 1855. 4 *Smith* 397.

DALY, J. The justice has found that the defendant hired the horse to go to Harlem, and his finding upon the question of fact is conclusive. The defendant rode the horse, not only to Harlem, but

to Kingsbridge, which is six miles farther. This was a violation of his contract. It was a conversion of the property, and he became liable therefor to the plaintiff.

The case is, in this respect, the same as *Wheelock* v. *Wheelright,* 5 Mass. 104, where the defendant hired a horse to go on an equal distance, and to return at a time mentioned by defendant; but he went beyond that distance, and the horse died, without being rode immoderately or other neglect of the defendant. In that case, Chief Justice Parson said, "the defendant, by riding the horse beyond the place for which he had liberty, is answerable to the plaintiff in terms. For thus riding the horse is an unlawful conversion." He further remarked that, had the horse been returned, it might have been shown in mitigation of damages, but not having been returned, the plaintiff was entitled to recover the value of the horse as damages.

The principle recognized in this case is as old as the law. The engagement, says Domat, Book 1, tit. 4, § 2, art. 1, of the person who takes anything to hire, is to put the thing to no other use than that for which it is hired. A borrower and a hirer are answerable in all events, says Sir William Jones, if they use the thing differently from their agreement. (Jones on Bailment, 121.) And this case is put by Lord Holt, in *Cogg* v. *Bernard,* 2 Lord Ray. 915. If a man should lend another a horse to go westward, or for a month, and the bailee go northward, or keep the horse above a month, and any accident happen to the horse on the northern journey, or after the expiration of the month, the bailee will be chargeable; because he has made use of the horse contrary to the trust he was lent to him under, and it may be if the horse was used no otherwise than he was lent, the accident would not have befallen him.[1] He is speaking of gratuitous bailees, but in this respect there is no distinction between a borrower and a hirer. Either would be liable upon violating the condition upon which the horse was loaned or hired. (Jones on Bailment, &c., 121; Story on Bailment, §§ 232, 233, 413.)

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[1] But see *Lee* v. *Atkinson,* Croke Jac 236 (1610), where it was held that a bailor was not justified in seizing a horse which his bailee had hired for two days to ride from Gravesend to Nettlebed and had ridden it to London, for during the time for which he had hired it, the bailee "had a special property in him against all men, and in case the plaintiff (the bailee) had misused the said horse, the defendant, Atkinson (the bailor), might have brought his action in the case against him."

A variety of other reasons are given: 1st, "The invasion of the plaintiff's right is as complete, when the bailee goes beyond his license and duty, as if the control over the chattel were usurped without any bailment," Perley, J., in *Woodman* v. *Hubbard,* 25 N. H. 67 (1852), p. 71; Green, J., in *Horsely* v. *Branch,* 1 Humph. 199 (Tenn. 1839), p. 208; (but the mere use of a chattel by one who has possession unlawfully and without authority of the owner is not ordinarily a conversion) *Frome* v. *Dennis,* 45 N. J. L. 515 (1883); *Fifield* v. *Maine Central R. R.,* 62 Maine 77 (1873); and see *Alvord* v. *Davenport,* 43 Vt. 30 (1870). 2nd. "The owner may rescind the contract, or treat it as never existing and bring trover," Goldthwaite, J., *Mosely* v. *Wilkinson,* 24 Ala. 411 (1854), p. 416; but see the able and vigorous opinion of Gibson, C. J., in *Wilt* v. *Welsh,* 6 Watts 9 (Pa. 1837); and Moncure, J., in *Harvey* v. *Epes,* 12 Grat. 153 (Va. 1855).

The defendant, in this case, having used the horse to an extent not permitted by the contract of hiring, and the horse having sickened and died before he could be brought back to the plaintiff, the plaintiff was entitled to recover the full value of the animal, which appears, by the evidence, to be the amount for which the justice rendered judgment.[2]

To entitle the plaintiff to maintain the action; it was not necessary that he should have tendered back to the plaintiff the amount received for the hire of the horse. Where contracts of sale are repudiated upon the ground that a fraud has been practised upon the seller, and the seller seeks the restoration of the property he has parted with, or its value, he is bound to restore, or at least to offer to restore, upon the trial, whatever he has received from the party fraudulently contracting with him. But this is a very differ-

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[2] *Accord: Ledbetter* v. *Thomas,* 130 Ala. 299 (1900), mule hired to plow in two-mule team, used in three-mule team and on day after bailment was over; *Welch* v. *Mohr,* 93 Cal. 371 (1892), facts similar to those in principal case; *Malone* v. *Robinson,* 77 Ga. 719 (1886), under Sections 2089-2090 of the Georgia Code; *Morton* v. *Gloster,* 46 Maine 520 (1859); *Perham* v. *Coney,* 117 Mass. 102 (1875); *Fisher* v. *Kyle,* 27 Mich. 454 (1873); *Woodman* v. *Hubbard,* 25 N. H. 67 (1852); *Hart* v. *Skinner,* 16 Vt. 138 (1844); *De Voin* v. *Mich. Lumber Co.,* 64 Wis. 616 (1885); *Brown* v. *Baker,* 15 W. N. C. 60 (C. P. Mercer Co. Pa. 1884), but see *Wilt* v. *Welsh,* ante n. 1, and *Penrose* v. *Curren,* 3 Rawle 351 (1832).

In the following cases trover was held to lie for slaves hired for one use, generally house servants, and put to another, generally field labor; *Hooks* v. *Smith,* 18 Ala. 338 (1850); *Moseley* v. *Wilkinson,* 24 Ala. 411 (1854); *Horsely* v. *Branch,* 1 Humph. 199 (Tenn. 1839); *Vanleer* v. *Fain,* 6 Humph. 104 (Tenn. 1845), violation of condition that slave must not be taken out of the county; *Spencer* v. *Pilcher,* 8 Leigh 565 (Va. 1837), a slave hired as a farm hand employed upon a water journey in the course of which drowned; but see *Harvey* v. *Epes,* 12 Grat. 153 (Va. 1855), p. 178, in which it is held that "the act of misuser, to be a conversion must occasion the loss of the property or be done with the actual intent to convert it," that is, to injure the bailor's reversionary interest. But the deviation must be wilful and not by mere mistake, *Hart* v. *Skinner,* 16 Vt. 138 (1844); *Spooner* v. *Manchester,* 133 Mass. 270 (1882), the defendant lost his way and then, instead of returning to his starting point, took what he thought the best way to his destination. Mere neglect, or abuse, though it injures or destroys the property, *Swift* v. *Moseley,* 10 Vt. 208 (1838), p. 210: *Rotch* v. *Hawes,* 12 Pick. 136 (Mass. 1831); *Keith* v. *DeBussigney,* 179 Mass. 255 (1901); but see *contra Frost* v. *Plumb,* 40 Conn. 111 (1873); or a mere delay in a journey, to be made without stopping, though it increase the duration of the bailment, *Evans* v. *Mason,* 64 N. H. 98 (1886), is not a conversion unless so extreme as to obviously tend to injure or destroy the chattel; *Wentworth* v. *McDuffie,* 48 N. H. 402 (1869), horse immoderately driven on proscribed route. There must be a clear and material departure from the use contemplated by the bailment, and the tendency of later cases is to allow the hirer considerable latitude in the use of the article unless the specific use is expressly prohibited, or the precise nature and extent of the use clearly agreed upon, *Weller & Co* v. *Camp,* 169 Ala. 275 (1910); *Keith* v. *DeBussigney,* 179 Mass. 255 (1901).

It is conversion for the bailee to make a sublease of the chattel, *Bell* v. *Cummings,* 3 Sneed 275 (Tenn. 1855); *Crocker* v. *Gullifer,* 44 Maine 491 (1858).

If the deviation be a conversion, the defendant should be liable for the value of the chattel at that time and it is immaterial whether its subsequent destruction or impairment was due to his misconduct or to inevitable accident,

ent case. Here the plaintiff was entitled to the amount received for the hire of the horse, and to a return of the horse. He brings his action against the plaintiff for converting his property—for not returning it; and he may recover for the injury sustained by the conversion, and also keep what was agreed upon between the parties, and received as an equivalent for the use of the horse.[8]

WOODRUFF, J.—I concur with Judge DALY in the general rule stated by him, that the unauthorized use of the horse by the defendant for a purpose not warranted by the contract of hiring, was, in judgment of law, a conversion—the horse not having been in fact returned and accepted by the plaintiff. If there is nothing more proved, the defendant was liable for the value of the horse in the condition in which he was when the defendant received him.

But I am not satisfied that a subsequent acceptance of an additional compensation for the hire of the horse, with knowledge that the defendant had rode him a farther distance, would not amount to a waiver of the tort. If one hire a horse to go ten miles, and rides or drives him twenty, and the owner, with knowledge thereof, accepts an extra compensation for the additional use, he assents

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or its bad qualities or condition, *Perham* v. *Coney*, 117 Mass. 102 (1875), *Lucas* v. *Turnbull*, 15 Gray 306 (Mass. 1860); *contra, Harvey* v. *Epes*, 12 Grat. 153 (Va. 1855); *King* v. *Shanks*, 12 B. Mon. 410 (Ky. 1851), one employing hired slave in business not permitted by bailment, is liable for a casualty incident to the nature of the service, but not for injuries from any other source while so engaged; *Johnson* v. *Weedman*, 5 Ill. 495 (1843), held that at most nominal damages could be recovered when the loss of the chattel was not due to its misuse; and see opinion of Simons, J., in *Farkas* v. *Powell*, 86 Ga. 800 (1891). Nor need the injury be caused by the deviation, or occur during the continuance; *Horsely* v. *Branch*, 1 Humph. 199 (Tenn. 1839), though in some cases the bailee's liability for the injury or destruction of the chattel, is stated as existing only during such misuse, *De Voin* v. *Michigan Lumber Co.*, 64 Wis. 616; and see Lord Holt in *Coggs* v. *Bernard*, quoted in principal case; *contra, Farkas* v. *Powell*, 86 Ga. 800 (1891), where it was held that, while the defendant was guilty of a technical conversion by driving the horse three miles beyond his permitted terminus, he was not liable, for injuries occurring without his fault after he had returned to the prescribed route, *Harvey* v. *Epes*, 12 Grat. 153 (Va. 1855), and *Carney* v. *Rease*, 60 W. Va. 676 (1906).

The deviation is none the less a conversion though the contract of bailment be illegal, as where it is made on Sunday, *Morton* v. *Gloster*, 46 Maine 520 (1859); *Hall* v. *Corcoran*, 107 Mass. 251 (1871); *Fisher* v. *Kyle*, 27 Mich. 454 (1875); *Woodman* v. *Hubbard*, 25 N. H. 67 (1852), or is unenforcible, as when the bailee is an infant, *Homer* v. *Thwing*, 3 Pick. 492 (Mass. 1826); *Towne* v. *Wiley*, 23 Vt. 355 (1851); *contra, Wilt* v. *Welsh*, 6 Watts 9 (Pa. 1837), *ante* note 1.

[8] *Contra: Moseley* v. *Wilkinson*, 24 Ala. 411 (1854), p. 416; "As property may be changed by a recovery in trover, to give the party, who has recovered in trover, the hire accruing after the conversion, would be the same as to give him hire which accrued after he had sold the property to the plaintiff; . . . he cannot treat the contract as a bailment and a sale and if, with full knowledge of the conversion before the time for hire has terminated, he receives pay for the entire term, he asserts his right to the hire which has accrued after the conversion and is estopped from maintaining any action inconsistent with the right thus asserted." In *Rotch* v. *Hawes*, 12 Pick. 136 (Mass. 1831), it was held that a receipt of payment on the basis of the use actually made of the chattel, with full knowledge of the deviation from the original bailment is "a subsequent assent equivalent to a previous agreement."

thereto as fully and with the same legal effect as if the hiring had been originally for twenty miles; and although he might, if the fact so appeared, have an action, on the case it may be, for any improper treatment of the horse on the journey, whereby the horse was injured or killed, he could not, after such assent, proceed for a conversion.

In the present case, however, the proof in relation to the receipt of the additional compensation is very loose and imperfect. It does not distinctly appear that the additional compensation was received, with knowledge that the horses had been rode beyond Harlem. And the words of the witness may possibly be deemed to import that those only who brought back their horses paid the extra price charged. On this question of fact, I cannot say that the finding of the justice may not have been that those who returned with their horses paid the extra charge, and that it was received without any knowledge that any of the horses had been taken to Westchester county. And though the evidence is by no means satisfactory to my own mind, I do not feel warranted in reversing the judgment. Had the defendant shown that the horse was diseased when he was hired, that should have been taken in mitigation of damages; but the proof does not appear to have satisfied the court below of that fact.

INGRAHAM, FIRST J., concurred in affirming the judgment.

Judgment affirmed.

DOOLITTLE & SHERMAN *v.* SHAW.

Appeal from Delaware District Court, 1894. 92 *Ia.* 348.

Action for the recovery of the value of a horse. Verdict for plaintiffs. Defendant appeals.—*Reversed.*

KINNE, J.—Plaintiff's cause of action is stated in two counts. The first charges that on September 1st, 1892, defendant had and received from the plaintiff a pair of horses and buggy, of the value of two hundred and fifty dollars, to drive from Delhi, Iowa, to Manchester, Iowa; that defendant drove said horses so immoderately, and so neglected their care, that one of them became sick, and defendant, knowing said fact, continued to drive and abuse said horse until his death; that plaintiffs were damaged in the sum of one hundred dollars. In a second count, plaintiffs aver that they paid two dollars, at defendant's instance, to have the horse buried. In an amendment it is averred that the team and buggy were loaned to defendant to go from Delhi to Manchester and return, and that defendant, after driving to Manchester, converted said team and buggy to his own use, and failed to return said team as received, and still fails to return one of said horses, which horse was worth one hundred dollars, for which they pray judgment. Defendant denied all of the allegations of the original petition. Afterward, in an amendment, he pleaded that the contract of letting and hiring

set out in the petition, and the damage growing out of the same, and all matters set out in the amendment, occurred on Sunday, and no right of action can be maintained thereon. There was a trial to a jury, and a verdict for plaintiffs.

II. On Sunday, September 4th, 1892, defendant hired of plaintiffs a team of horses and a buggy to drive from Delhi to Manchester and return. After arriving at Manchester he drove six or seven miles into the country. He then returned to Manchester, where he let one Luke Connelly drive the team to the fair ground and back, after which defendant and Connelly started on the return trip to Delhi, and, when about midway between the two places, one of the horses was taken sick and died. At the close of plaintiff's testimony, defendant moved for a verdict, which motion was overruled. The grounds of the motion were, *first,* that the testimony showed a letting of the team on Sunday, and plaintiffs did not bring themselves within the exceptions of the statute prohibiting work on that day; *second,* that it was not shown that the death of the horse was caused by driving to a place other or different from the place where it is alleged the horses were let to be driven; and, *third,* no negligence or misconduct of the defendant is shown in the management or driving of said horse. We need not consider the ruling on this motion, as the questions therein presented are also raised in the further progress of the trial. In the seventh and eighth instructions given by the court to the jury, they were told, in substance, that if defendant hired the team, and drove them so immoderately, and was so negligent in caring for them, that one of them became sick, and defendant, with knowledge of such sickness, continued to drive and abuse the horse until it died, and if such treatment was such as an ordinarily prudent man would not give such horse under like circumstances, and if the contract of hiring was made on Sunday, they should find for the defendant. No complaint is made of these instructions, and, whether right or wrong, they are to be treated as the law of the case, so far as the cause of action stated in the first count is concerned. The case, then, is to be considered, so far as legal errors are concerned, with reference to the cause of action for the conversion of the horse.

III. The court gave the jury the following instruction: "(9) If you find from the evidence that the team was hired or given to defendant only for the purpose of driving from Delhi to Manchester, and that, being so hired, defendant, without the consent of plaintiffs, drove some miles away from the line of travel between said towns, to a place not contemplated by the contract of hire, then such use of the team would be a conversion of the same by the defendant, and the plaintiffs might elect to recover the value of any part of such team and buggy as was not returned to and accepted by them after knowledge of such conversion; and plaintiffs would have a right to recover, if you find such to be the fact, even though the evidence disclosed that the contract of hire by which defendant secured possession of the property was laid down on Sunday." The instruction lays down the broad rule that a mere diversion from the line

of travel, or going beyond the point for which the horse was hired, will, without more, amount to a conversion of the animal, for which an action will lie. What will amount to a conversion in such cases is the question we must determine.

In *Spooner* v. *Manchester,* 133 Mass. 270, the court defined a conversion as follows: "Conversion is based upon the idea of an assumption by the defendant of a right of property, or a right of dominion over the thing converted, which casts upon him all the risks of an owner; and it is, therefore, not every wrongful intermeddling with, or wrongful asportation, or wrongful detention of, personal property, that amounts to a conversion. Acts which themselves imply an assertion of title or of a right of dominion over personal property, such as a sale, letting, or destruction of it, amount to a conversion, even though the defendant may have honestly mistaken his rights; but acts which do not themselves imply an assertion of title, or of a right of dominion over such property, will not sustain an action of trover unless done with the intention to deprive the owner of it permanently or temporarily, or unless there has been a demand for the property, and a neglect or refusal to deliver it, which are evidence of a conversion." *Evans* v. *Mason,* 54 N. H. 98, 5 Atl. Rep. 766. In Story on Bailments (§ 413a), after stating the rule as to what is a conversion in such cases, it is said: "But, although this is the general rule, a question may arise how far the misconduct or negligence or deviation from duty of the hirer will affect him with responsibility for a loss which would and must have occurred, even if he had not been guilty of any such misconduct, negligence, or deviation from duty." He also, in the same connection, says: "The question, therefore, in the present state of the authorities, must still be deemed open to controversy. Wherever it is discussed it will deserve consideration, whether there is, or ought to be, any difference between cases where the misconduct of the hirer amounts to a technical or an actual conversion of the property to his own use, and cases where there is merely some negligence or omission or violation of duty in regard to it, not conducing the loss." Schouler, Bailments, page 137, referring to this same matter, says: "It is not difficult to conceive that the technical misuse might occur without an actual abuse of the terms of hire, and where it would be harsh to visit deviation with such disastrous penalties."

We are not willing to give our sanction to the broad, and, when applied to a case like that at bar, harsh rule of the instruction. It must be borne in mind that, in almost every case where that strict rule has been applied, the facts have shown that the hirer, in addition to departing from the contract line of travel, was guilty of negligence or of wilful misconduct, or that he injured or destroyed the property while outside of the limits of the contract of hiring. Schouler, Bailm., p. 137; *Farkas* v. *Powell,* 13 S. E. (Ga.) 200. In the case last cited the action was for the value of a horse which had died, and which it was alleged defendant had ridden beyond the place he had hired him to go, and that by negligence or cruelty the horse had been so injured as to cause his death. The horse was

hired to ride from Albany to the Whitehead place, in the country, a distance of five miles, and was to be returned by 11 o'clock at night. When defendant arrived at the Whitehead place he learned that the person he wished to see was at the Bryant place, three or four miles farther on, and he rode on to that place. He remained there two hours and a half, and left about 9:30 P. M. for Albany. On the return, and between the Whitehead place and Albany, the horse fell in the road. He got the horse up on his feet, and led him three miles, when he again fell. After getting him on his feet again, he put him in a lot nearby, and went into town, and notified the plaintiff where the horse was, and of his condition. The horse died. It appeared that, when defendant got the horse to go upon his journey, he was sound and in good condition, and showed no signs of disease. The defendant showed that he rode the animal moderately. It was held that there was a technical conversion of the horse, and, if the horse had been injured while beyond the point to which he was hired to go, defendant would have been liable, whether the injury was caused by his own negligence, or by the negligence of others, or even by accident, unless he was forced to go beyond that point by reason of circumstances he could not control.

The court said: "But the main question in this case is, would Powell, after having been guilty of a technical conversion or violation of his duty, and having returned within the limits of the original hiring, and the horses then sustained an injury without other fault on his part, be liable? That would depend, in our opinion, upon whether the extra ride of six or eight miles to the Bryant place and back caused or materially contributed to the accident. If it did, we think he would be liable to the owner. * * * If, however, the extra ride did not cause or materially contribute to the injury, we do not think Powell would be liable, if guilty of no other fault." In *Harvey* v. *Epes,* 12 Grat. (Va.) 153, the contract was one for the hire of slaves for a year, to work in a certain county. They were taken by the hirer, without the owner's consent, to another county and employed in the same kind of work, and, while there, died. The court, after elaborately discussing the question and fully considering the authorities, held that the removal of the slaves to a county other than that for which they were hired to work in was not of itself a conversion, regardless of whether their death was caused by such wrongful act or not. It said: "Upon the whole, I am of opinion that, in the case of a bailment for hire for a certain term, * * * the use of the property by the hirer, during the term, for a different purpose, or in a different manner, from that which was intended by the parties, will not amount to a conversion for which trover will lie, unless the destruction of the property be thereby occasioned, or at least unless the act be done with intent to convert the property, and thus to destroy or defeat the interest of the bailor therein. * * * A bailment upon hire is not conditional in its nature, any more than any other contract; and, in the absence of an express provision to that effect, the bailee will not, in general, forfeit his estate by a violation of any of the terms

of the bailment. * * * If he merely uses the property in a manner, or for a purpose, not authorized by the contract, and without destroying it, or without intending to injure or impair the reversionary interest of the bailor therein, such misuse does not determine the bailment, and, therefore, is not a conversion for which trover will lie." See, also, 2 Pars. Cont., p. 128. In *Cullen* v. *Lord*, 39 Iowa, 302, the action was for the recovery of the value of a horse loaned to defendant, and which it was averred was killed by the defendant's overdriving and ill treatment. It was held that the jury should have been instructed that, in the absence of a contract to the contrary, the law implied an agreement to pay for the use of the horse. The evidence tended to show that plaintiff gave defendant certain instructions and directions respecting the time of starting, and the manner for caring for the horse. An instruction of the lower court to the effect that, if plaintiff gave instructions and directions, and did not afterwards waive them, and defendant did not follow them, he would be liable, without inquiry as to whether the injury resulted from a failure to obey the instructions or from some other cause, was held erroneous as applied to a case of letting for a reward. While the facts in that case, so far as they appear, are not like those in the case at bar, still we think there is a clear recognition of the doctrine that, in cases of letting for reward, a mere violation of the contract, without more, will not fix a liability as for a conversion. To constitute a conversion in a case like that at bar, there must be some exercise of dominion over the thing hired, in repudiation of, or inconsistent with, the owner's rights. We hold that the mere act of deviating from the line of travel which the hiring covered, or going beyond the point for which the horse was hired, are acts which, in and of themselves, do not necessarily imply an assertion of title or right of dominion over the property, inconsistent with, or in defiance of, the bailor's interest therein.

As there was nothing to show that the defendant, in violating the terms of the contract, intended to appropriate the property temporarily or permanently to his own use, or that he did in fact so appropriate it, or exercise acts of dominion over it inconsistent with plaintiff's rights, he should not be held liable for its value from the mere fact that he drove the horse beyond or outside of the journey for which he was hired. Nor do we see that the rule we have stated is fraught with danger in its application to other cases that may arise. We are not called upon to determine as to whether or not the defendant would have been liable if, under proper issues and evidence, it had been shown that the extra driving caused or contributed to the death of the horse, as no such case is presented. As to the fact that the contract was entered into on Sunday, we do not think it is at all controlling. The action is not based upon the contract, but upon the theory that defendant converted the property to his own use. If he did so, he was not acting under the contract, but independent of it. We discover no error in the eleventh instruction. For the reasons given, the case is REVERSED.

SECTION 5.

Demand and Refusal.

SINGER MANUFACTURING CO. *v.* KING.

Supreme Court of Rhode Island, 1884. 14 *R. I. Rep.* 511.

June 2, 1884. DURFEE, C. J. This is trover for the conversion of a sewing machine belonging to the plaintiff company. The case was tried in the Court of Common Pleas and comes here on exceptions. The testimony given at the trial for the plaintiff went to show that the machine was demanded of the defendant by direction of Charles H. Harris, agent for the plaintiff, and that the defendant, who was agent for the American Sewing Machine Company, though he had the machine, refused to deliver it until storage was paid for it or until another machine belonging to the American Sewing Machine Company which the plaintiff had was returned. The defendant testified that the machine was brought to him by one Conner, an employé of the American Sewing Machine Company; that he was instructed to hold it for storage, and that, though he did not announce it when the demand was made, the plaintiff knew that he was agent for the American Sewing Machine Company. It further appeared that the machine had been leased to a Mrs. Lynch by the plaintiff company; that Company had received it from her, leaving a machine of the American Company in place of it; that he had carried it to Harris, and that Harris refused to receive it, saying that his Company had no machines out which were then due; that he then carried it to the American Sewing Machine Company and told Harris that he had done it. Harris testified in reply that he did not see the machine when Conner brought it and that he had not authorized any one to store it with the American Company.

The Court instructed the jury that if the defendant, when demand was made upon him, was the agent of the American Sewing Machine Company, and was holding the machine under their orders and not for himself or under his own control, then the defendant would be guilty. The plaintiff excepted.

Ordinarily, when one person has the chattel of another, it is his duty to deliver it to the owner or his agent on demand, and if he refuses to do so, his refusal is an evidence of a conversion. It is, however, only *prima facie* evidence and may be explained.[1]

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[1] A demand and refusal, made when the defendant has possession of the property, is conclusive evidence of a conversion, unless rebutted or explained by sufficient evidence, *Dietus* v. *Fuss,* 8 Md. 148 (1855); *Magee* v. *Scott,* 9 Cush. 148 (Mass. 1851); *Wyckoff* v. *Stevenson,* 46 N. J. L. 326 (1884); *Irish* v. *Cloyes & Moss,* 8 Vt. 30 (1836).

A mere letter demanding the goods is not enough, the claimant must be on the ground ready to remove them, *Miller* v. *Smith,* 1 Phila. 173 (Pa. 1851);

Magee v. *Scott,* 9 Cush. 148; *Robinson* v. *Burleigh,* 5 N. H. 225; *Dietus* v. *Fuss,* 8 Md. 148; *Green* v. *Dunn,* 3 Camp. 215; *Solomons* v. *Dawes,* 1 Esp. 83. Thus it is no conversion for the bailee of a chattel, who has received it in good faith from some person other than the owner, to refuse to deliver it to the owner making demand for it until he has had time to satisfy himself in regard to the ownership.[2] *Carroll* v. *Mix,* 51 Barb. S. C. 212; *Leo* v. *Bayes,* 18 C. B. 599, 607; *Sheridan* v. *The New Quay Company,* 4 C. B. (N. S.) 618; *Coles* v. *Wright,* 4 Taunt. 198. In the case of a servant who has received the chattel from his master, it has been held that he ought not to give it up without first consulting his master in regard to it. *Mires* v. *Solebay,* 2 Mod. 242, 245; *Alexander* v. *Southey,* 5 B. & A. 247; *Berry* v. *Vantries,* 12 Serg. & R. 89. But if, after having had an opportunity to confer with his master, he relies on his master's title and absolutely refuses to comply with the demand, he will be liable for a conversion.[3] *Lee* v. *Robinson,* 25 L. J. C. P.

Breese v. *Bange,* 2 E. D. Smith 474 (N. Y. 1854), unless the defendant falsely denies possession of the goods, *Pattee* v. *Gilmore,* 18 N. H. 460 (1846), or he, in answer to the demand, though at a distance from the goods unconditionally refuse to give them up, *Clark* v. *Hale,* 34 Conn. 398 (1867).

A refusal to give up the goods save upon a condition which the defendant has no right to impose is a conversion, *Jonsson* v. *Lindstrom,* 114 Ind. 152 (1888), defendant, who allowed a wrongdoer to put the plaintiff's house on his lot, refused to return it until rent due by the wrongdoer was paid; *Richmond* v. *Soportos,* 18 N. Y. S. 433 (1892).

[2] *Accord: Zachary* v. *Pace,* 9 Ark. 212 (1848), defendant was an arbitrator who had custody of the goods till the dispute as to ownership was decided; *Witherspoon* v. *Blewett,* 47 Miss. 570 (1873), defendant was *agister* of the cattle demanded; *Pillot* v. *Wilkinson,* 3 H. & C. 345 (1864), the defendant had the custody of the goods as a wharfinger; *Hett* v. *Boston & M. R. Co.,* 69 N. H. 139 (1897), the defendant, a railroad, was sued by a shipper because its station master refused to deliver freight without consulting his superiors as to demurrage claimed upon the cars. *Flannery* v. *Brewer,* 66 Mich. 509 (1887); and *Robinson* v. *Burleigh,* 5 N. H. 225 (1830), the defendants held the goods as administrators; *Buffington* v. *Clarke,* 15 R. I. 437 (1887), a brother of a decedent holding property for her estate pending probate of her will; *Mills* v. *Britton,* 64 Conn. 4 (1894), somewhat similar facts; and see *Bolling* v. *Kirby,* 90 Ala. 215 (1890), father in whose house his daughter kept the sewing machine in dispute; *Carroll* v. *Mix,* 51 Barb. 212 (N. Y. 1868), defendant had the goods for storage.

In *Clark* v. *Chamberlain,* 2 M. & W. 78 (1836), an anchor and cable were detained by a Vice Admiral for salvage improperly claimed for the person who had brought the anchor ashore.

Where, however, the servant or bailee refuses to deliver without orders from his master or bailor and takes no steps to consult him, trover will lie, *Wilson* v. *Anderton,* 1 B. & Ad. 450 (1830); so where the servant is the manager or *locum teneus* of the master, whose business is not to take orders but to direct the business, his refusal is a conversion unless he shows that the property came into the master's possession before he was employed, *Berry* v. *Vantries,* 12 S. & R. 89 (Pa. 1824).

[3] Not only must the defendant have a good excuse for detaining the goods demanded but he must assert it as the reason for refusing to deliver them, so a refusal denying the plaintiff's title, whether under claim of title in the defendant, *Boardman* v. *Sill,* 1 Camp. 410n (1808), or in his bailor, *Williams* v. *Smith,* 153 Pa. 462 (1893), is a conversion though he had a right to detain them under a lien for storage or otherwise, or under a mortgage, *Clark* v. *Rideout,* 39 N. H. 238 (1859), or to refuse delivery until assured of the au-

249, 18 C. B. 599; 1 Addison on Torts, § 475; *Greenway* v. *Fisher*, 1 Car. & P. 190; *Stephens* v. *Elwell*, 4 M. & S. 259; *Perkins* v. *Smith*, 1 Wils. 328; *Gage* v. *Whittier*, 17 N. H. 312. The mere fact that he refuses for the benefit of his principal will not protect him. *Kimball* v. *Billings*, 55 Maine 147.

In the case at bar the defence is that the defendant, acting as agent of the American Sewing Machine Company, refused to deliver the machine in obedience to instructions not to deliver it until storage was paid for it. The defendant did not refuse for the purpose of consulting his principal, but it would seem that he had received his instructions before the demand in anticipation of it. He was not a mere servant but an agent, and he may have been, for anything that appears, a general agent. The machine came to him, not from his master or principal, as in *Mires* v. *Solebay*, but from a fellow employé, and he may have known, indeed the evidence carries the impression that he did know, all the circumstances in regard to it, and nevertheless cooperated with his principal in withholding it from its owner by insisting on a condition which neither he nor his principal had any right to impose. If such was the fact, we think he was guilty; and yet, if such was the fact, the jury might have found him not guilty under the instructions given by the court which are the ground of the first exception. The first exception must therefore be sustained. We do not find any error in the instructions which are the ground of the second exception, except in so far as they involve a repetition of instructions before given. The case will be remitted for new trial.

Exceptions sustained.

SPEAR *v.* ALEXANDER.

District Court of Philadelphia, 1856. 2 *Phila.* 89, 13 *L. Int.* 109.

SHARSWOOD, J. This was an action of trover. The defendant was a constable, and under an execution in his hands he had sold a piano, and piano stool to the plaintiff, who paid the money on the spot and received a bill of sale. The constable said to the plaintiff these are your goods take them away "I have other business, and cannot stay." He remained, however, some twenty minutes, leaving

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thority of him making the demand to receive them, *Briggs* v. *Haycock*, 63 Cal. 343 (1883); *Ingalls* v. *Bulkley*, 15 Ill. 224 (1853); *Holbrook* v. *Wright*, 24 Wend. 169 (N. Y. 1840); *Robertson* v. *Crane*, 27 Miss. 362 (1854); Storey, J., in *Watt* v. *Potter*, 2 Mason 77 (Cir. Ct. U. S. 1820).

It is a good excuse that the goods have been attached in the defendant's hands, at least if attached as the goods of his bailor or master, *Fletcher* v. *Fletcher*, 7 N. H. 452 (1835); *Verrall* v. *Robinson*, 2 C. M. & R. 495 (1835); but see *contra*, *Rogers* v. *Weir*, 34 N. Y. 463 (1866), though here the goods were attached in the bailee's hands as the goods of a third person and the bailee refused to deliver them to his bailor.

A demand of a third person claiming adversely to the bailor will not justify the bailee in refusing the goods upon his bailor's demand, *Atkinson* v. *Marshall*, 12 L. J. (N. S.) Ex. 117 (1842).

the plaintiff in the house with the goods. After the lapse of some three-quarters of an hour, the plaintiff and other purchasers went for a furniture car. When the car came they were enticed out of the house, and the door locked upon them. The constable was sent for and came, but he did not force an entrance, and the plaintiff never got his goods. A demand was made upon the constable the next day, to which his reply was that the goods were not in his possession.

It is unnecessary to decide whether the officer was liable for neglect of duty in not forcing an entrance and taking the goods, because we are clearly of the opinion that there was no evidence of conversion and that the nonsuit was right.

Demand and refusal are not conversion but only evidence of it. If the refusal is so—qualified as in itself to rebut the presumption it is of no avail. Where a deed was demanded from the defendant, who said he would not deliver it up, but that it was then in the hands of his attorney who had a lien upon it, this refusal was held not to be sufficient evidence of a conversion; and Lord Ellenborough said that the defendant would have been guilty of a conversion, if the deed had been in his power, but that the intention was not enough. *Smith* v. *Young,* 1 Camp. 489. The widow and administratrix of an insolvent, being applied to by his assignees for some papers that had been in his possession at the time of his decease, answered that they were in the hands of her attorney, it was held not sufficient evidence of a conversion to maintain an action of trover. *Cavat* v. *Hughes,* 2 Bingh. N. C. 449. When there has been no actual conversion of property, a demand and refusal cannot lay a foundation for the action of trover, unless at the time of the refusal, the party has the property demanded in his possession, so that he can comply with the demand. *Kelsey* v. *Griswold,* 6 Barb. Sup. Ct. 436.

Accord: Anon. 2 Salk. 655 (1704); *Canot* v. *Hughes,* 2 Bing. N. C. 448 (1839); *Robinson* v. *Hartridge,* 13 Fla. 501 (1871); *Hill* v. *Belasco,* 17 Ill. App. 194 (1885); *Davis* v. *Buffum,* 51 Maine 160 (1863); *Marshall & Michael Grain Co.* v. *Kansas City, Ft. S. & M. R. Co.,* 176 Mo. 480 (1903); *Johnson* v. *Couillard,* 4 Allen 446 (Mass. 1862); *Carr* v. *Clough,* 26 N. H. 280 (1853); *Whitney* v. *Slauson,* 30 Barb. 276 (N. Y. 1859); *Morris* v. *Thompson,* 1 Rich. Law. 65 (S. Car. 1844); *Rice* v. *Clark,* 8 Vt. 109 (1836); *Knapp* v. *Winchester,* 11 Vt. 351 (1839).

It is immaterial that the defendant, out of possession, has denied the plaintiff's right to the goods and has stated that he would not give them up even if he had them, *Smith* v. *Young,* 1 Camp. 439 (1808), one to whom a bankrupt had assigned a lease, when it was demanded by the assignee said, 'he would not deliver it up, but it was then in the hands of his attorney, who had a small lien upon it for money due him. The defendant would have been guilty of a conversion if it had been in his power; but the intention is not enough.' In *McDonald* v. *McKinnon,* 104 Mich. 428 (1895), it was held that a refusal to deliver a certificate of stock by one who, though actually having it in his possession, thought it had been burned, did not constitute a conversion.

McENTEE *v.* THE NEW JERSEY STEAMBOAT CO.

Court of Appeals of New York, 1871. 45 *N. Y.* 34.

Appeal from the General Term of the Supreme Court in the second district.

The action was brought against the defendants for the conversion of chattels claimed by the plaintiff. The defendants, as common carriers between Albany and New York, received from Mr. Guyer, at Albany, and carried to New York, in 1868, several bundles of sash and blinds addressed to "McEntee," New York. After these arrived at New York, the plaintiff claimed them, and gave evidence tending to prove that he demanded the goods and tendered the charges, and that the agents of the defendants refused to deliver them.

The defendants gave evidence somewhat in conflict with the plaintiff's statement, and also gave evidence to show that other property of a like character had on former occasions been received by Mr. Guyer in New York, and that the goods were first inquired for as the goods of Guyer, and that the defendant supposed that they might belong to him, and that they offered to deliver them to the cartman of the plaintiff and to the plaintiff upon the production of any paper showing ownership or authority to receive them, and that the defendants were at all times ready to deliver the goods to the plaintiff upon the production of any reasonable evidence identifying him as the consignee and owner. The judge ruled and decided that the only question for the jury was whether the freight money was tendered, and restricted the counsel in summing up to that question only, and charged the jury, 1st. That when the defendants receive goods, the consignor putting them on a steamboat to be carried to New York without consigning them to any particular individual, the steamboat company was authorized to deliver them to any person who calls for them; and, 2d. That common carriers have no right to insist on any person proving ownership, for they are not restricted as to the delivery, and incur no liability whatever in that respect.

To these several rulings the defendants excepted. The counsel for the defendants also made several requests to the judge to charge, which were refused, and exceptions taken to the refusal.

A verdict was rendered at the Kings Circuit in favor of the plaintiff for the value of the property, upon which the judgment was entered and affirmed on appeal by the Supreme Court, and from the latter judgment the defendants have appealed to this court.

ALLEN, J. The defendants were charged for a conversion of the goods upon evidence of a demand and a refusal to deliver them. If the demand was by the person entitled to receive them, and the refusal to deliver them was absolute and unqualified, the conversion was sufficiently proved, for such refusal is ordinarily conclusive evidence of a conversion; but if the refusal was qualified, the question

was whether the qualification was reasonable; and if reasonable and made in good faith, it was no evidence of a conversion. (*Alexander* v. *Southey*, 5 B. and Ald., 247; *Holbrook* v. *Wright*, 24 W. R., 169; *Rogers* v. *Weir*, 34 N. Y., 463; *Mount* v. *Derick*, 5 Hill 455.) If, at the time of the demand, a reasonable excuse be made in good faith for the non-delivery, the goods being evidently kept with a view to deliver them to the true owner, there is no conversion.

This action is not upon the contract of the carriers, but for a tortious conversion of the property; but the rights and duties of the defendants as carriers are, nevertheless, involved.

The defendants were bailees of the property, under an obligation to deliver it to the rightful owner. They would have been liable had they delivered the goods to a wrong person. Common carriers deliver property at their peril, and must take care that it is delivered to the right person, for if the delivery be to the wrong person, either by an innocent mistake or through fraud of third persons, as upon a forged order, they will be responsible, and the wrongful delivery will be treated as a conversion. (*Hawkins* v. *Hoffman*, 6 Hill, 586; *Powell* v. *Myers*, 26 Wend. R., 290; *Devereux* v. *Barclay*, 2 B. and Ald., 702; *Guillaume* v. *Hamburgh and Am. Packet Co.*, [3 Hand] 42 N. Y., 212; *Duff* v. *Budd*, 3 Brod. and Bing., 177.) The duties of carriers may be varied by the differing circumstances of cases as they arise; but it is their duty in all cases to be diligent in their efforts to secure a delivery of the property to the person entitled, and they will be protected in refusing delivery until reasonable evidence is furnished them that the party claiming is the party entitled, so long as they act in good faith and solely with a view to a proper delivery. The circumstances of this case, the very defective address of the parcels, and the omission of the plaintiff to produce any evidence of title to the property or identifying him as the consignee, justified the defendants in exercising caution in the delivery, and it should have been submitted to the jury whether the refusal was qualified, as alleged by the defendants; and if so, whether the qualification was reasonable, and was the true reason for not delivering the goods. The judge also erred in his instructions to the jury as to the duty of the defendants, as common carriers, in the delivery of goods. They may not properly, or without incurring liability to the true owner, deliver goods to any person who calls for them, other than the rightful owner. The judgment must be reversed and a new trial granted, costs to abide event.

All the judges concurring, judgment reversed and new trial ordered.[1]

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[1] *Accord: Solomon* v. *Dawes*, 1 Esp. 83 (1797); *Green* v. *Dunn*, 3 Camp. 215n (1811); *Watt* v. *Potter*, 2 Mason 77 (Circ. Ct. U. S. 1820), per Story, J.; *St. John* v. *O'Connell*, 7 Port. 466 (Ala. 1838); *Ingalls* v. *Bulkley*, 15 Ill. 224 (1853); *Tingley* v. *Parshall*, 11 Nebr. 443 (1881); *Blankenship* v. *Berry*, 28 Tex. 448 (1866); *Sanford* v. *Wilson*, 2 Willson (Civ. Ct. of App.) § 247 (Tex. 1884), a refusal, due to an honest doubt as to identity of party making demand held to be no conversion; and see *Kewaunee Co.* v. *Decker*, 30 Wis. 624 (1872); *Jacoby* v. *Laussatt*, 6 S. & R. 300 (Pa. 1820), *semble*, "so if one, who calls himself the agent of the owner, demands the goods, and the posses-

SECTION 6.

Effect of Offer to Return the Chattel Converted.

BALTIMORE & OHIO R. CO. *v.* O'DONNELL.

Supreme Court of Ohio, 1892. 49 *Ohio St.* 489.

WILLIAMS, J. "It is claimed that the trial court erred in its refusal to instruct the jury that, if the goods described in the petition were tendered to the plaintiff, on the 4th day of May, 1885, and the same day the plaintiff saw them there, but did not take them away. The next day, notice of the arrival of the goods was received by the plaintiff, through the mail, and the night following they were stolen from the depot where they had been placed by the defendant; none of them were recovered, and the perpetrators of the crime are unknown."

After holding that the defendant who had received the goods to be carried to the plaintiff at Shawnee, and had on January 5th, shipped them to its agent in Baltimore, in order to prevent the plaintiff from getting possession of them, he being believed to have ordered them for sale or distribution to miners, engaged in a strike accompanied by acts of lawlessness.

"A common carrier, who, having received goods to be carried to a designated place, transports them to another place, for the purpose of preventing their coming to the possession of the consignee, and depriving him of their use and disposition, is liable for the conversion of the goods. After the conversion has taken place, the

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sor answers that he cannot deliver them until he receives proof that he is really the agent, no conversion can be inferred, because the answer shows nothing like an intent to *convert,* but only a design to preserve the goods for the owner," per Tilghman, C. J., p. 305; but see *Sherman* v. *Commercial Printing Co.,* 29 Mo. App. 31 (1888), where it is held that one merely *permitting* goods to be stored on his premises is not even a gratuitous bailee and owes no duty to the true owner to ascertain the title of a claimant.

A finder of goods is entitled to reasonable proof of the title of one demanding them, *Wood* v. *Pierson,* 45 Mich. 313 (1881), one of the defendants found a diamond pin which he left with a jeweler to return to the owner, who had advertised and offered a reward for its recovery, the question whether the claimant's identification of his property was reasonably satisfactory was held for the jury; Lord Coke in *Isaack* v. *Clark,* 2 Bulstr. 306. "If the owner comes to him (one who finds goods) and demands them, and he answers him, that it is not known to him whether he be the true owner of the goods or not, and for this cause he refuseth to deliver them, the refusal is no conversion, if he do keep them for him;" *Jacoby* v. *Laussatt,* 6 S. & R. 300 (Pa. 1820), *semble,* "If he is in possession of goods which he has found and does not claim, and a demand being made by the owner, the possessor answers that he is not satisfied of that person being the owner, but he is ready to deliver the goods on reasonable proof of ownership, this is not such a denial as will warrant an inference of a conversion. On the contrary it is such an answer as a prudent man, consulting the interest of the *true owner,* has a right to give," Tilghman, C. J., p. 305.

owner is under no obligation to receive the property. *Brewster* v. *Silliman,* 38 N. Y. 423. So that, if there was a conversion of the plaintiff's goods by the defendant, prior to the 5th of May, when he was notified they had reached Shawnee, his right of action for their value was complete; and any loss of the goods occurring after the conversion, nor refusal to accept them, could cast the loss upon the plaintiff, because he was not then obliged to receive them. It would have been error, therefore, in view of the evidence tending to establish the conversion, to give the instruction requested, which would have required the jury to find for the defendant, if the goods were stolen without its negligence, notwithstanding they should also find such prior conversion of them by the defendant."

Accord: Carpenter v. *Manhattan Life Insurance Co.,* 22 Hun 47 (N. Y. 1880); *Colby* v. *W. W. Kimball & Co.,* 99 Iowa 321 (1896), the wrongful vendor of mortgaged goods recovered possession of them and tendered them to the plaintiff; *Livermore* v. *Northrup,* 44 N. Y. 107 (1870), defendant, having wrongfully levied upon the plaintiff's goods, offered to relinquish his levy; *Whitaker* v. *Houghton,* 86 Pa. 48 (1878), *semble.* Nor is the plaintiff's right of action barred by an agreement made without consideration, to receive the goods, *Norman* v. *Rogers,* 29 Ark. 365 (1874).

The same rule applies in actions of trespass *de bonis asporatis, Commercial Bank* v. *Hughes,* 17 Wend. 94 (N. Y. 1837); *Gibbs* v. *Chase,* 10 Mass. 125 (1813); *Kelly* v. *McDonald,* 39 Ark. 387 (1882). Nor will the fact that the defendant levied upon the goods after conversion for a debt lawfully due him by the plaintiff relieve him from liability, *Otis* v. *Jones,* 21 Wend. 394 (N. Y. 1839), *aliter,* if the goods are sold as the goods of the plaintiff on an execution under a judgment in favor of a third person, *Higgins* v. *Whitney,* 24 Wend. 379 (N. Y. 1840).

Such an offer, if unaccepted, does not mitigate the damages. See cases cited *ante.*

In *Hart* v. *Skinner,* 16 Vt. 138 (1844), it was held following the late English cases, *Fisher* v. *Prince,* 3 Burrows 1363 (1862); *Gibson* v. *Humphrey,* 1 Cr. & M. 544 (1833); (the earlier English cases were accord with the principal case, *Wilcock's Case,* 2 Salk. 597 (1703); *Bowington* v. *Parry,* 2 Stra. 822 (1728)), that where the conversion is not wilful and the property has not deteriorated and its value is not in dispute, the court may order the acceptance of the goods in mitigation of damages; *Rutland & W. R. Co.* v. *Bank of Middlebury,* 32 Vt. 639 (1860); *Ward* v. *Moffett,* 38 Mo. App. 395 (1889).

Even acceptance of the goods tendered back does not destroy the convertor's liability, but only goes in mitigation of damages, *Murphy* v. *Hobbs,* 8 Colo. 17 (1884): *Bodega* v. *Perkerson,* 60 Ga. 516 (1878); *Barrelett* v. *Bellgard,* 71 Ill. 280 (1874); *Arnold* v. *Kelly,* 4 W. Va. 642 (1871); *Whitaker* v. *Houghton,* 86 Pa. 48 (1878); *Harger* v. *McMains,* 4 Watts. 418 (Pa. 1835). So where the plaintiff has regained possession of the goods, *Coburn* v. *Watson,* 48 Nebr. 257 (1896); *Reynolds* v. *Shuler,* 5 Cowen 323 (N. Y. 1826); *Murray* v. *Burling,* 10 Johns. 172 (N. Y. 1813); *Pinckney* v. *Darling,* 3 App. Div. (N. Y.) 553 (1896), affirmed 158 N. Y. 728 (1899), plaintiff obtained his goods by replevin; *Western Land & Cattle Co.* v. *Hall,* 33 Fed. 236 (1887), cattle reclaimed by suit, or where a mortgagee has received and retained part of the proceeds of an illegal sale of the goods covered by a chattel mortgage, *Farmer, Thompson & Helsell* v. *Bank of Graettinger,* 130 Iowa 469 (1906).

BOOK II.

THE DEVELOPMENT OF TORT LIABILITY BY THE ACTION OF TRESPASS ON THE CASE.

Part 1.

Active Misconduct.

CHAPTER I.

Intentional Interference With Personal and Property Rights.

ASHBY *v.* WHITE.

In the King's Bench, 1703. 2 *Ld. Raym.* 938.

GOULD, J.[1] I am of opinion, that judgment ought to be given in this case for the defendants, and I cannot by any means be reconciled to give my judgment for the plaintiff for there are no footsteps to warrant such an opinion, but only a single case. I am of opinion, that this action is not maintainable for these four reasons: first, because the defendants are judges of the thing, and act herein as judges; secondly, because it is a parliamentary matter, with which we have nothing to do: thirdly, the plaintiff's privilege of voting is not a matter of property or profit, so that the hindrance of it is merely *damnum sine injuria*: fourthly, it relates to the publick, and is a popular offence. * * * It is not any matter of profit, either *in praesenti* or *in futuro*. To raise an action upon the case, both damage and injury must concur, as in the case of 19 *Hen.* 6. 44. cited *Hob.* 267. If a man forge a bond in another's name, no action upon the case lies, till the bond be put in suit against the party: so here, it may be this refusal of the plaintiff's vote may be no injury to him, according as the parliament shall decide the matter; for they may adjudge, that he had no right to vote, whereby it will appear, the plaintiff was mistaken in his opinion as to his right of election, and consequently has sustained no injury by the defendant's denying to take his vote. * * *

POWYS, J.[2] But it is objected, that by the law of *England* every one who suffers a wrong has a remedy; and here is a privilege lost, and shall not the plaintiff have a remedy? To that I answer,

[1] For the circumstances leading to and attending this action see Campbell's, "Lives of the Chief Justices", Vol. III, p. 45. The facts sufficiently appear in the opinion of Lord Holt.

[2] *Powys, J.*, gives the two following reasons in addition to those given by Gould, J. (1) that the statute of 7 and 8 W. 3., c. 7, is an exclusive remedy against the officer, and to allow, in addition, every elector to have a private action would give rise to intolerable and ruinous multiplicity of suits; (2) that the case action is novel, *primae impressionis*.

first, it is not an injury, properly speaking; it is not *damnum,* for the plaintiff does not lose his privilege by this refusal, for when the matter comes before the committee of elections, the plaintiff's vote will be allowed as a good vote; and so in an action upon the case by one of the candidates for a false return, this tender of his vote by the plaintiff shall be allowed as much as if it had been given actually and received. And if this refusal of the plaintiff's vote be an injury, it is of so small and little consideration in the law, that no action will lie for it; it is one of those things within the maxim, *de minimis non curat lex.* * * *

POWELL, J.[3] Besides in this case, here is not a damage upon which this action is maintainable; for to maintain an action upon the case, there must be either a real damage, or a possibility of a real damage, and not merely a damage in opinion or consequence of law. * * * If the plaintiff gives his vote for a candidate, that is as effectual as if the officer writ it down, for it is his vote by the giving of it, and the officer cannot himder him of it, and on a poll it will be a good vote, and must be allowed, and so there is no wrong done to the plaintiff; for his vote was a good vote notwithstanding what the defendant did. Besides the plaintiff can make no profit of his vote; and it is like the case of a *quare impedit,* in which the plaintiff at common law recovered no damages, because he ought not to sell the presentation, and so could make no profit of it. So here, for it would be criminal for the plaintiff to sell his vote. Perhaps the putting the plaintiff to trouble and charge, to maintain and vindicate his right of voting, might be sufficient damage to maintain an action on the case; but as our case is, I cannot see that the plaintiff has received any damage.

HOLT, C. J. The single question in this case is, Whether, if a free burgess of a corporation, who has an undoubted right to give his vote in the election of a burgess to serve in parliament, be refused and hindered to give it by the officer, if an action on the case will lie against such officer.

[He then expresses his agreement with the opinion of Powell, J., that the defendant is neither a judge nor quasi a judge, but an officer to execute the precept.]

But to proceed, I will do these two things: First, I will maintain that the plaintiff has a right and privilege to give his vote: Secondly, in consequence thereof, that if he be hindered in the enjoyment or exercise of that right, the law gives him an action against the disturber, and that this is the proper action given by the law.

I did not at first think it would be any difficulty, to prove that the plaintiff has a right to vote, nor necessary to maintain it, but from what my brothers have said in their arguments I find it will be necessary to prove it.[4]

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[3] *Powell, J.,* holds that this novelty of the action is no argument against it and that the officer is not acting judicially but purely as a minister to execute the precept, but agrees that for the other reasons given no action lies.

[4] The very interesting discussion of the right to vote is omitted.

The right of voting at the election of burgesses is a thing of the highest importance, and so great a privilege, that it is a great injury to deprive the plaintiff of it. These reasons have satisfied me as to the first point.

2. If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal.[5] * * * Where a man has but one remedy to come to his right, if he loses that he loses his right. It would look very strange, when the commons of *England* are so fond of their right of sending representatives to parliament, that it should be in the power of the sheriff, or other officer, to deprive them of that right, and yet that they should have no remedy; it is a thing to be admired at by all mankind. Supposing then that the plaintiff had a right of voting, and so it appears on the record, and the defendant has excluded him from it, no body can say, that the defendant has done well; then he must have done ill, for he has deprived the plaintiff of his right; so that the plaintiff having a right to vote, and the defendant having hindered him of it, it is an injury to the plaintiff. Where a new act of parliament is made for the benefit of the subject, if a man be hindered from the enjoyment of it, he shall have an action against such person who so obstructed him. * * * And I am of opinion, that this action on the case is a proper action. My brother Powell indeed thinks, that an action upon the case is not maintainable, because here is no hurt or damage to the plaintiff; but surely every injury imports a damage, though it does not cost the party one farthing, and it is impossible to prove the contrary; for a damage is not merely pecuniary, but an injury imports a damage, when a man is thereby hindered of his right. As in an action for slanderous words, though a man does not lose a penny by reason of the speaking them, yet he shall have an action. So if a man gives another a cuff on the ear, though it cost him nothing, no, not so much as a little *diachylon*, yet he shall have his action, for it is a personal injury. So a man shall have an action against another for riding over his ground, though it do him no damage; for it is an invasion of his property, and the other has no right to come there. And in these

[5] So per Willes, C. J., *Winsmore* v. *Greenbank*, Willes 577 (1745), p. 581 (an action for enticing away plaintiff's wife). "A special action on the case was introduced for the reason that the law will never suffer an injury and a damage without a remedy." While the husband's right to his wife's consortium was recognized in this case as worthy of legal protection, no correlative right has been as yet recognized in England as belonging to the wife. *Lynch* v. *Knight*, 9 H. L. C. 577 (1861); *Lellis* v. *Lambert*, 24 Ont. Ap. 653 1897), see Osler, J., p. 661, and it is only within recent years that such a right in the wife has been recognized in the United States—*Westlake* v. *Westlake*, 34 Ohio St. 621 (1878); *Seaver* v. *Adams*, 66 N. H. 142 (1889); *Bennett* v. *Bennett*, 116 N. Y. 584 (1889); *Gernerd* v. *Gernerd*, 185 Pa. 233 (1898), and cases (decided between 1890 and 1900) cited in Burdick, Law of Torts, 277 n. 16. *contra Houghton* v. *Rice*, 174 Mass. 366 (1899); *Duffies* v. *Duffies*, 76 Wis. 374 (1890), and *Doe* v. *Roe*, 82 Me. 503 (1890).

cases the action is brought *vi et armis*. But for invasion of another's franchise, trespass *vi et armis* does not lie, but an action of trespass on the case; as where a man has *retorna brevium*, he shall have an action against any one who enters and invades his franchise, though he lose nothing by it. So here in the principal case, the plaintiff is obstructed of his right, and shall therefore have his action. And it is no objection to say, that it will occasion multiplicity of actions; for if men will multiply injuries, actions must be multiplied too; for every man that is injured ought to have his recompense. Suppose the defendant had beat forty or fifty men, the damage done to each one is peculiar to himself, and he shall have his action. * * * But it would be otherwise if a man dig a pit in a highway, every passenger shall not bring his action, but the party shall be punished by indictment; because the injury is general and common to all that pass. But when the injury is particular and peculiar to every man, each man shall have his action.[6]

But in the principal case my brother says, we cannot judge of this matter, because it is a parliamentary thing. O! by all means be very tender of that. Besides it is intricate, and there may be contrariety of opinions. But this matter can never come in question in parliament; for it is agreed that the persons for whom the plaintiff voted were elected; so that the action is brought for being deprived of his vote: and if it were carried for the other candidates against whom he voted, his damage would be less. To allow this action will make public officers more careful to observe the constitution of cities and boroughs, and not to be so partial as they commonly are in all elections, which is indeed a great and growing mischief, and tends to the prejudice of the peace of the nation. But they say, that this is a matter out of our jurisdiction, and we ought not to inlarge it. I agree we ought not to incroach or inlarge our jurisdiction; by so doing we usurp both on the right of the queen and the people: but sure we may determine on a charter granted by the king, or on a matter of custom or prescription, when it comes before us without incroaching on the parliament. And if it be a matter within our jurisdiction, we are bound by our oaths to judge of it. This is a matter of property determinable before us. Was ever such a petition heard of in parliament, as that a man was hindered of giving his vote, and praying them to give him remedy? The parliament undoubtedly would say, take your remedy at law. It is not like the case of determining the right of election between the candidates.

My brother *Powell* says, that the plaintiff's right of voting ought first to have been determined in parliament.[7] * * * Let us

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[6] Citing two cases, *Turner* v. *Stirling*—action by unsuccessful candidate against an officer for refusing to take a poll, and *Hunt* v. *Dowman*, 2 Cro. 478—action by reversioner against lessee, who had denied him entry for purpose of seeing whether any waste had been committed. In both, action on the case was held to lie though no damage was shown other than the denial of a right.

[7] As to Powell, J.'s suggestion that no action lay till Parliament had ad-

consider wherein the law consists, and we shall find it to be, not in particular instances and precedents, but on the reason of the law, and *ubi eadem ratio, ibi idem jus.* This privilege of voting does not differ from any other franchise whatsoever. If the house of commons do determine this matter, it is not that they have an original right, but as incident to elections. But we do not deny them their right of examining elections, but we must not be frighted when a matter of property comes before us, by saying it belongs to the parliament; we must exert the queen's jurisdiction. * * *

Therefore my opinion is, that the plaintiff ought to have judgment.

Friday, the 14th of *January,* 1703, this judgment was reversed in the house of lords, and judgment given for the plaintiff by fifty lords against sixteen. *Trevor* chief justice and baron *Price* were of opinion with the three judges of the king's bench. *Ward C. B.* and *Bury* and *Smith* barons were of opinion with the lord chief justice *Holt, Tracy dubitante, Nevill* and *Blencowe* absent.

Upon the arguments of this case *Holt* chief justice said, the plaintiff has a particular right vested in him to vote. Is it not then a wrong and an injury to that right, to refuse to receive his vote? So if a borough has a right of common, and the freemen are hindered from enjoying it by enclosure or the like, every freeman may maintain his action. This action is brought by the plaintiff for the infringement of his franchise. You would have nothing to be a damage, but what is pecuniary, and a damage to property. If a man has *retorna brevium,* although no fees were due to him at common law, yet if the sheriff enters within his liberty, and executes process there, it is an invasion of his franchise, and he may bring his action; and there is the same reason in this case. Although this matter relates to the parliament, yet it is an injury precedaneous to the parliament, as my lord *Hale* said in the case of *Bernardiston* v. *Soame, 2 Lev.* 114, 116. The parliament cannot judge of this injury, nor give damage to the plaintiff for it: they cannot make him a recompense. Let all people come in, and vote fairly; it is to support one or the other party, to deny any man's vote. By my consent if such an action comes to be tried before me, I will direct the jury to make him pay well for it; it is denying him his *English* right, and if this action be not allowed, a man may be forever deprived of it.[8] It is a great privilege to choose such

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judged plaintiff's right to vote, he holds that the plaintiff has no opportunity to have remedy elsewhere—so he is not in like case with a patron (*Elvis* v. *Archbishop of York,* Hobart 318, cited by Powell, J.), who having neglected to bring *quare impedit* and so having lost his statutory remedy, may not bring an action on the case.

[8] *Cf. Huckle* v. *Money,* 2 Wils. 205 (1763), where as in *Ashby* v. *White,* the plaintiff's constitutional rights as a subject were violated by the arbitrary acts of the Government in power or by those acting in its interest. Compare the language of Pratt, L. C. J. (afterwards Lord Camden) with that of Lord Holt; and see for recent instances in which punitive damages have been given in actions in the case as a deterrent to the violation by public service corporations of the rights of the traveling public—*Laird* v. *Pittsburg Trac-*

persons, as are to bind a man's life and property by the laws they make.[9]

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tion Co., 166 Pa. 4 (1895), to give merely compensatory damages "would tend to encourage rather than prevent the commission of indignities to which no well behaved passenger in a public conveyance should be subjected." Sterrett, C. J., p. 7 and *Georgia Ry. Co.* v. *Baker*, 125 Ga. 562 (1907).

[9] One of the first uses to which the writ of trespass on the case was put was to redress intentional violations of property rights of a kind which did not fall within the precise terms of any formed writ of trespass, but where the infringement was direct and intended and such that had the right violated been the possession of real property, it would have been a trespass. Improperly taking tolls for use of mill against plaintiff's customary right to have his corn ground without charge Statham's Abr. (1470 *circa*), *Accions sur le cas*, 1 pl. 3, 41 Ed. 3; Fitzherbert de Naturae Brevium (1547, Dublin, 1793)—*Trespass sur le case* 94 F. 7 Hy. 4, 44, Acc.; interference with Lord of Manor's rights of justice, *ibid.* 94 G., interference with the taking a plaintiff's customary tolls; Statham, *Action sur le case* 1 pl. 8, 43 Ed. 3. Hil., disturbing a ferry; 22 Ass. 17, 22 Hy. 6. 14, lessor, ousting the executors of the lessee of their term (trespass *quare classum fugit* would not lie—a term of years being only a chattel interest, the lessor having the freehold). Fitzherbert 92 G.

New social conditions and new ethical and economic conceptions have led to a gradual but constant widening of the horizon of judicial perception of the extent of individual rights worthy of legal protection. How slow the process may be is shown by the length of time required for the recognition of a wife's right to her husband's support (see n. 5, *supra*). So while in *Garret* v. *Taylor*, Croke, Jac. 567 (1620) the loss of the beneficial commercial use of the plaintiff's property, a quarry, was recognized as sufficient damage to support case where the defendant's conduct consisted of threats against his workmen and customers of acts illegal in themselves, it was not till 1893 that the English Courts in *Temperton* v. *Russell*, L. R., 1893 1 Q. B. 715 recognized a legal right of general freedom of contract without outside interference, the defendant's acts being wrongful only because they violated the plaintiff's contractual freedom. Here, too, the process was gradual. In *Tarleton* v. *McGawley*, 1 Peake, N. P. 270 (1794), the defendant's acts were wrongful as to the negroes driven from the plaintiff's trading station. In *Lumley* v. *Gye*, 2 E. and B. 216 (1853), it was held that an existing contract gave not merely a right of action against the promisor for its breach but a right worthy of protection from intentional interference by third persons, and while it has been doubted (Peters, J., *Heywood* v. *Tillson*, 75 Me. 225 (1883), p. 241), whether this applied to any contract save that of employment (in *Lumley* v. *Gye*—the contract broken was one between an opera singer and manager) merely extending to an employer by contract the recognized rights of a master of menial servants and journeymen, it was followed in *Bowen* v. *Hall*, L. R. 6, Q. B. D. 333 (1881), where the contract was for the exclusive output of the defendant's bricks.

Nor is it probable that this expansion of the conception of legal rights has reached its final limit. See *Edison* v. *Edison Co.*, 67 Atl. 392 (N. J. Ch. 1907); *Pavesich* v. *Ins. Co.*, 122 Ga. 190 (1904), in which the right to privacy was protected by injunction; *contra. Roberson* v. *Rochester Box Co.*, 171 N. Y. 538 (1902); and see the tendency in the United States to assimilate the rights of those under whose land there exists subterranean liquids or gases to those rights early recognized as inherent in riparian owners of surface streams. *Stillwater Water Co.* v. *Farmer*, 89 Minn. 58 (1903); *Barclay* v. *Abraham*, 121 Iowa 619 (1903); *Louisville Gas Co.* v. *Kentucky Heating Co.*, 117 Ky. 71 (1903).

WALKER *v.* CRONIN.

Supreme Judicial Court of Massachusetts, 1871. 107 *Mass.* 555.

TORT, brought in the superior court. The declaration was as follows:

"*First count.* And the plaintiffs say that before and at the time of the committing of the several grievances by the defendant, as hereinafter mentioned, they were, and from thence hitherto have been, engaged in the manufacture and sale of boots and shoes in the town of Milford in the county of Worcester, and have heretofore made, and ought and would have continued to make, large profits in their said business but for the said several grievances committed by the defendant; and they further say that in the prosecution of their said business it was necessary for them to employ, and they did employ, a large number of persons as makers of boots and shoes so manufactured by them, all which the defendant well knowing did on or about the 1st day of January, 1869, and at divers times thereafter, and till the date of the plaintiffs' writ, with divers other persons whose names are unknown to the plaintiffs, unlawfully and without justifiable cause molest, obstruct and hinder the plaintiffs from carrying on said business, with the unlawful purpose of preventing the plaintiffs from carrying on their said business, and wilfully persuaded and induced a large number of persons, who were in the employment of the plaintiffs as bottomers of boots and shoes as aforesaid, and others who were about to enter into the employment of the plaintiffs, and who were skilled in the art of bottoming boots and shoes, to leave and abandon the employment of the plaintiffs, without their consent and against their will; whereby the plaintiffs lost the services of said persons so as aforesaid employed and about to be employed, and all the advantages and profits that they would otherwise have made and received from the service and employment of said persons; and the plaintiffs incurred large expenses to procure other suitable workmen to take the places of those so induced to leave and abandon their employment, and were compelled to pay much larger prices for said work and labor of bottoming boots and shoes than they would otherwise have done but for the committing of said several grievances by the defendant and others, whose names are to the plaintiffs unknown, although said work and labor were of no greater value to them, and the enhanced prices they were compelled to pay as aforesaid were much greater than the usual market price for such work and labor; and the plaintiffs have been compelled, by reason of the acts aforesaid of the defendant and the other persons aforesaid whose names are to the plaintiffs unknown, to pay much more for the manufacture of boots and shoes in other branches of said manufacture, and have been hindered in their business to a large extent, and prevented from manufacturing the quantity of boots and shoes that they would otherwise have manufac-

tured, and in the manufacture of which they would otherwise have realized large profits, all of which the defendant well knew.[1]

The defendant demurred, and specified the following causes of demurrer:

"* * * 3. That it is not actionable, for the purpose alleged in the first count, for the defendant to persuade and induce, as alleged, the persons alleged to leave and abandon the plaintiffs' employment. * * *

"6. That there is no such relation shown between the plaintiffs and the persons alleged in the several counts to have been in their employment or about to enter their employment, as to make the alleged acts and conduct of the defendant in the premises unlawful."

The superior court sustained the demurrer, and the plaintiffs appealed.

WELLS, J. The declaration, in its first count, alleges that the defendant did, "unlawfully and without justifiable cause, molest, obstruct and hinder the plaintiffs from carrying on" their business of manufacture and sale of boots and shoes, "with the unlawful purpose of preventing the plaintiffs from carrying on their said business, and wilfully persuaded and induced a large number of persons who were in the employment of the plaintiffs," and others "who were about to enter into" their employment, "to leave and abandon the employment of the plaintiffs, without their consent and against their will;" whereby the plaintiffs lost the services of said persons, and the profits and advantages they would otherwise have made and received therefrom, and were put to large expenses to procure other suitable workmen, and suffered losses in their said business.

This sets forth sufficiently (1) intentional and wilful acts (2) calculated to cause damage to the plaintiffs in their lawful business, (3) done with the unlawful purpose to cause such damage and loss, without right or justifiable cause on the part of the defendant, (which constitutes malice,) and (4) actual damage and loss resulting.

The general principle is announced in Com. Dig. Action on the Case, A.: "In all cases where a man has a temporal loss or damage by the wrong of another, he may have an action upon the case to be repaired in damages." The intentional causing of such loss to another, without justifiable cause, and with the malicious purpose to inflict it, is of itself a wrong.[2] This proposition seems to be fully

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[1] The second and third counts, the demurrers thereto, and the argument for defendant are omitted. Only a part of the opinion is printed.

[2] The German Civil Code, enacted in 1896 and taking effect in 1900, contains the following provisions:

Section 226. The exercise of a right is not permitted, when its sole object is to injure another.

Section 826. Whoever intentionally inflicts damage upon another in a morally reprehensible manner in bound to compensate the other for the damage.

See also for Roman and Scotch law and that of Germany before the Code, Ames' cases on Torts, p. 750, n. 1.

sustained by the references in the case of *Carew* v. *Rutherford*, 106 Mass. 1, 10, 11. * * *

There are indeed many authorities which appear to hold that to constitute an actionable wrong there must be a violation of some definite legal right of the plaintiff. But those are cases, for the most part at least, where the defendants were themselves acting in the lawful exercise of some distinct right, which furnished the defence of a justifiable cause for their acts, except so far as they were in violation of a superior right in another. * * *

Every one has a right to enjoy the fruits and advantages of his own enterprise, industry, skill and credit. He has no right to be protected against competition; but he has a right to be free from malicious and wanton interference, disturbance or annoyance. If disturbance or loss come as a result of competition, or the exercise of like rights by others, it is *damnum absque injuria*, unless some superior right by contract or otherwise is interfered with. But if it come from the merely wanton or malicious acts of others, without the justification of competition or the service of any interest or lawful purpose, it then stands upon a different footing, and falls within the principle of the authorities first referred to.

Demurrer overruled.[a]

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[a] *Accord*: Bowen, L. J., *Skinner* v. *Shew*, L. R. 1893, 1 Ch. 413, p. 422; Ames, 18 Harv. L. R. 412; Pollock, Torts 7th Ed., 319, and 22 L. Q. R. 118; Dicey, 18 L. Q. R. 4; Smith, 20 H. L. R. 262-263; *London Guarantee, Etc. Co.* v. *Horn*, 206 Ill. 493 (1903); *Graham* v. *St. Charles*, 47 La Ann 214 (1895); *Plant* v. *Woods*, 176 Mass. 492 (1900); *Martell* v. *White*, 185 Mass. 255 (1904); *Barr* v. *Essex Trade Council*, 53 N. J. Eq. 101 (1894); *cf. Erdman* v. *Mitchell*, 207 Pa. 79 (1903), and see *contra semble Parker, C. J. Nat. Assn.* v. *Cummings*, 170 N. Y. 315 (1902), and see Wm. Draper Lewis, 18 Harv. L. R. 444 *et seq.*

Compare: Lord Macnaghten, *Quinn* v. *Leatham*, L. R. 1901, A. C. 498, p. 510. "A violation of a legal right committed knowingly is a cause of action * * * and it is a violation of a legal right to interfere with contractual relations (in the case in hand the contracts interfered with were principally merely *in posse*) recognized by law if there be no sufficient justification" and Lord Lindley, *ibid.* p. 535, "all wrongful acts done intentionally to damage a particular individual and actually damaging him"—see also, *ibid.*, p. 534.

The real difficulty, is to ascertain, *first*, what is "temporal damage?" (Wells, J., *Walker* v. *Cronin*, compare Nelson, C. J., in *Hutchins* v. *Hutchins*, 7 Hill 104, p. 109-110 (N. Y. 1845), and Hawkins, J., *Allen* v. *Flood*, 1898, A. C., p. 16), or what is a "legal right" (Lord Macnaghten in *Quinn* v. *Leatham supra*. See as to development of the judicial view of the extent of legal rights—*Ashby* v. *White*, note 5 *supra*, p. 3.); and *secondly*, what constitutes a justification? The justifications and excuse for trespasses to the person and property and those violations of cognate legal rights, which were at an early period redressed in the action on the case, have themselves become crystallized into fairly definite form; as, for instance, the defense of oneself and property in Assault and Battery; necessity, public and private, in trespass to property, real or personal (see note in 22 Harv. L. R. 296); and privileged communications in Slander and Libel.

The justifications for the intentional violation of the newly recognized right to complete economic freedom and to immunity from intentionally inflicted temporal harm are as yet in the process of ascertainment and definition. Broadly it may be said that there must be "an equal or superior right" in those interfering therewith. (Darling, J., L. R. 1902, 2 K. B. 88, p. 96). But this still leaves undetermined when the defendant's right is equal or

McNARY *v.* CHAMBERLAIN.

Supreme Court of Errors of Connecticut, 1867. 34 Conn. 384.

The declaration alleged that the plaintiff had contracted with the town of Haddam to keep a certain highway in repair for three years, and that the defendant, intending to injure the plaintiff, deposited a quantity of stone and rubbish on the road and obstructed a drain so that the water ran over and injured the road, by means of which the plaintiff was subjected to greater expense in keeping the road in repair.[1]

To this declaration the defendant demurred, and the questions arising on the demurrer were reserved by the superior court for the advice of this court.

PARK, J. A majority of the court are of the opinion that the plaintiff has set forth a good cause of action in his declaration.

We all hold that a privity must exist betwen the act of a wrongdoer and the injury complained of, in order to lay the foundation for a recovery. *Connecticut Mutual Life Ins. Co.* v. *N. York & N. Haven R. R. Co.*, 25 Conn., 265; *Miller* v. *East School District*, 29 id., 529; *Lamb* v. *Stone*, 11 Pick., 527; *Anthony* v. *Slaid*, 11 Met., 290; *Rockingham Mutual Life Ins. Co.* v. *Bosher*, 39 Maine, 253. The court are not divided as to the law, but are divided as to the nature and character of the case itself.

The declaration alleges that the defendant intended to injure the plaintiff in doing the act complained of, and we all agree that

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superior to the plaintiff's. (See Wills, J., *Allen* v. *Flood*, L. R. 1898, A. C. p. 45, and for a full discussion of the whole question, as presented in trade and labor cases—see Wm. Draper Lewis, 44 Am. L. Reg. N. S. 465, and Jeremiah Smith, 20 Harv. L. R. 357 *et seq.*

It may be said, however, that as new social and economic conditions and changing public thought, ethical, social and political, have led to the recognition of new rights as worthy of legal protection, the same causes have led to a similar change in the boundaries set to the exercise of even the most ancient legal rights and privileges where two or more mutually conflict.

The problem of fixing the proper limits to the exercise of this new right of economic freedom, when it conflicts with similar rights of others, would appear to be less one of law than of social and political economics and the line will probably be drawn at varying points, not only in various jurisdictions but also at different periods of time in the same jurisdiction, in accordance with the settled public opinion as to business convenience and social and political economics then prevalent therein, which will, it is submitted, inevitably dictate public policy as judicially declared. Nor in cases involving the inevitable economic warfare between competing classes, as those dealing with the respective rights of Capital and Labor, is it possible to ignore the influence, not only on legislation but also on judicial opinion, of the political predominance of the one class or the other if long continued. See the gradual curtailment of the land owners' extreme privileges as political supremacy passed from them to the commercial classes and see the same process going on in England to-day, where the duties of those engaged in the conduct of business are being constantly increased for the fuller protection of their workmen and of the mass of the public to whom the franchise has comparatively recently been extended.

[1] The statement of facts is as given in the head note.

if the allegation means in fact what it purports to mean, such relation did exist and the declaration is sufficient. In the case of *Connecticut Mutual Life Ins. Co.* v. *N. York & N. Haven R. R. Co.*, Judge Storrs says:—"Had the life of Dr. Beach been taken with intent to injure the plaintiffs through their contract liability, a different question would arise, inasmuch as every man owes a duty to every other not intentionally to injure him."

In actions of assumpsit the allegation that the defendant intended to injure the plaintiff by breaking his promise can be of no importance whatsoever. It does not enhance the damages, neither does it tend to establish a natural relation between the breach of the contract and the injury to the plaintiff. Such relation must exist without the aid of an allegation of this kind, and of course in such cases the allegation is made for no purpose but form. But how can this be said in the case at bar, where a grave question is made whether the plaintiff can recover for the mischief done him without the aid of this allegation?

A majority of the court are of the opinion that nothing appears in the declaration going to show that the allegation was inserted as mere matter of form, but on the contrary that it appears to have been deemed substantial and important by the pleader. The demurrer admits that it is true, and we think therefore that the declaration shows upon its face a privity between the act done by the defendant and the injury to the plaintiff.

The defendant contends that although he intended to injure the plaintiff, still the injury is too remote to sustain an action; and we are referred to the case of *McCune* v. *Norwich City Gas Co.*, 30 Conn., 521, in support of his claim. But that case furnishes no aid to the defendant. The plaintiff there sought to recover damages of the defendants for discontinuing their supply of gas to the plaintiff. The declaration set forth that it was the duty of the defendants to continue to supply the plaintiff with gas, but no facts were stated going to show the existence of any duty or obligation on the part of the defendants to continue the supply, and the court held that, so far as the declaration showed to the contrary, the defendants had a right to discontinue the supply of gas at their pleasure, and that in such case the allegation that the act of shutting off the gas was done willfully and maliciously was of no avail to the plaintiff. Here the claim is that the injury is too remote; that the plaintiff is only affected through his contract liability with the town. But it is easy to see that if the defendant intended to injure the plaintiff, as the declaration alleges, he knew that the plaintiff had made such a contract, and took advantage of its existence to injure him in the manner described. He made use of the contract as an instrument to accomplish his purpose.[2] As well may it be claimed that where one beats another with a bludgeon, the injury is too re-

[2] *Cf.*: Lord Lindley in *Quinn* v. *Leatham*, L. R. 1901, A. C. 495, p. 537, "the intention to injure the plaintiff * * * disposes of any question of remoteness of damage."

mote because the damage was done by the bludgeon. We see no ground for the claim.

We advise the superior court that the declaration is sufficient.

In this opinion the other judges concurred; except HINMAN, C. J., who dissented.[8]

CHAPTER II.

Acts Wrongful Because Probably Injurious to Others.

MITCHIL *v.* ALESTREE.

In the King's Bench, 28 Car. II (1676). *Ventris, 295.*

In an action upon the case brought against the defendant, for that he did ride an horse into a place called Lincoln's Inn Fields (a place much frequented by the King's subjects, and unapt for such purpose), for the breaking and taming of him, and that the horse was so unruly, that he broke from the defendant, and ran over the plaintiff, and grievously hurt him, to his damage, etc.

Upon not guilty pleaded, and a verdict for the plaintiff, it was moved by Simpson in arrest of judgment, that here is no cause of action: for it appears by the declaration, that the mischief which happened was against the defendant's will, and so *damnum absque injuria;* and then not shewn what right the King's subjects had to walk there; and if a man digs a pit in a common into which one that has no right to come there, falls in, no action lies in such case.

Curia contra, It was the defendant's fault, to bring a wild horse into such a place where mischief might probably be done, by reason of the concourse of people. Lately, in this court, an action was brought against a butcher, who had made an ox run from his stall and gored the plaintiff; and this was alleged in the declaration to be in default of penning of him.

WYLDE said: If a man hath an unruly horse in his stable, and leaves open the stable-door, whereby the horse goes forth and does mischief, an action lies against the master.

TWISDEN. If one hath kept a tame fox which gets loose and grows wild, he that kept him before shall not answer for the damage the fox doth after he lost him, and he hath resumed his wild nature. *Vide* Hobart's Reports, 134. The case of Weaver and Ward. Judgment for plaintiff. 2 Lev. 172.

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[8] *Accord*: *Gregory* v. *Brooks,* 35 Conn. 437 (1868), one, who purporting to act as superintendent of wharves orders a vessel lying at plaintiff's wharf to remove therefrom is liable if, and only if, he does so with intent to injure the plaintiff and deprive him of profit from the use of his dock; *Hughes* v. *Leonard,* 43 N. J. L. 459 (1881),defendant loosened the shoes on the horse of one of the customers of the plaintiff, a blacksmith, in order to injure his trade reputation; *St. T. & L. C. R. R.* v. *Hunt,* 55 Vt. 570 (1882), defendant, with intent to delay plaintiff's train, illegally caused the arrest of its engineer.

Same case, sub nomine MICHELL *v.* ALLESTRY.

3 *Keble*, 650.[1]

Simson excepted in arrest of judgment, in Act. upon the Case for bringing horses wild to tame in little Lincoln-fields, being an open public place where people are all the day passing and repassing, because it's not said to be any highway, nor said that the defendant knew them to be wild, nor was there negligence in the coachman, who was thrown out and hurt; but by Saunders an action upon the case well lay, as by Smith of Westminster, for not pinning an ox, but setting a dog on him, whereby he ran into Pallas-yard and hurt him; so where a monkey escaped and did hurt, by default of the owner; & *per curiam*, it's at peril of the owner to take strength enough to order them, and the master is as liable as the servant if he gave order for it, and the action is generally for bringing them thither, which is intended personal, and judgment for the plaintiff.[2]

HEAVEN *v.* PENDER.

In the Queen's Bench Division, 1883. *L. R.* 11 *Q. B. D.* 503.

BRETT, M. R. [afterwards Lord Esher]. The questions which we have to solve in this case are—what is the proper definition of the relation between two persons other than the relation established by contract, or fraud, which imposes on the one of them a duty towards the other to observe, with regard to the person or property of such other, such ordinary care or skill as may be necessary to prevent injury to his person or property. * * *

[After citing a number of relations out of which admittedly a duty to take care arises at common law.]

It follows, as it seems to me, that there must be some larger

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[1] Also reported in 2 Lev. 172.

[2] One of the earliest uses, to which the writ of trespass on the case was put, was to give compensation for harm indirectly caused by conduct which had it been directly injurious would have fallen within some form of the writ of trespass *vi et armis*. See writ cited by Fitzherbert de Natura Brevium (1547). *Trespass sur le case*, 92 F, "Wherefore in the water of Plim, along which there is a common passage for ships and boats, he loosed piles across the water, whereby a certain ship, with thirty quarters of malt of him the said W was sunk under water, and twenty quarters of malt of the price of one hundred shillings perished"—see *ibid.* 93 H., a prior detained on business journey by illegal distress of his palfrey, and *ibid.* 95 A., defendant making gulph to the injury of plaintiff's adjacent gulph.

The following cases are cited in the margin of the report of this case in Ventris: *Weaver* v. *Ward*, Hobart 134 (1616); *Gilbert* v. *Stone*—Style 72 (1647); *Bessy* v. *Olliot* and *Lambert*, T. Raym., 467, 1682; *Dickinson* v. *Watson*, T. Jones, 205 (1681), and note that these are the cases in which the originally absolute liability for all personal injuries directly resulting from defendant's voluntary action was modified so as to let in the defense that the harm had happened notwithstanding the defendant's exercise of every possible precaution in the doing of an act in itself lawful. See *Stanley* v. *Powell*, L. R. (1891), 1 Q. B. 86.

proposition which involves and covers both sets of circumstances. The logic of inductive reasoning requires that where two major propositions lead to exactly similar minor premises there must be a more and larger premise which embraces both of the major propositions. That, in the present consideration, is, as it seems to me, the same proposition which will cover the similar legal liability inferred in the cases of collision and carriage. The proposition which these recognized cases suggest, and which is, therefore, to be deduced from them, is that whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.

LE LIEVRE *v.* GOULD.

In the Queen's Bench Division, 1893. *L. R.* (1893). 1 *Q. B.* 491.

Appeal by the plaintiffs against the refusal of a Divisional Court (Wills and Collins, JJ.) to set aside the judgment of one of the official referees in favor of the defendant.

Mortgagees of the interest of a builder under a building agreement advanced money to him from time to time on the faith of certificates given by a surveyor that certain specified stages in the progress of the buildings had been reached. The surveyor was not appointed by the mortgagees, and there was no contractual relation between him and them. In consequence of the negligence of the surveyor the certificates contained untrue statements as to the progress of the buildings, but there was no fraud on his part.[1]

LORD ESHER, M.R.

Then it is said that, even if there was no contract between the plaintiff Dennes and the defendant, nevertheless the defendant is liable to the plaintiffs for having given certificates which contained untrue statements; for, it is said, the defendant owed a duty to the plaintiffs to exercise care in giving the certificates, because he knew that the plaintiffs would or might act upon them by advancing money to Lovering. No doubt the defendant did give untrue certificates; it was negligent on his part to do so, and it may even be called gross negligence. But can the plaintiffs rely upon negligence in the absense of fraud? The question of liability for negligence cannot arise at all until it is established that the man who has been negligent owed some duty to the person who seeks to make him liable for his negligence. What duty is there when there is no relation between the parties by contract? A man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them. The case of *Heaven* v. *Pender,* 11 Q. B. D. 503, has no bearing upon the present question. That case established that, under

[1] The facts are restated, and the opinion of Bowen, L. J., is omitted.

certain circumstances, one man may owe a duty to another, even though there is no contract between them. If one man is near to another, or is near to the property of another, a duty lies upon him not to do that which may cause a personal injury to that other, or may injure his property. For instance, if a man is driving along a road, it is his duty not to do that which may injure another person whom he meets on the road, or to his horse or his carriage. In the same way it is the duty of a man not to do that which will injure the house of another to which he is near. If a man is driving on Salisbury Plain, and no other person is near him, he is at liberty to drive as fast and as recklessly as he pleases. But if he sees another carriage coming near to him, immediately a duty arises not to drive in such a way as is likely to cause an injury to that other carriage. So, too, if a man is driving along a street in a town, a similar duty not to drive carelessly arises out of contiguity or neighborhood. That is the effect of the decision in *Heaven* v. *Pender,* 11 Q. B. D. 503, but it has no application to the present case. * * * A charge of fraud is such a terrible thing to bring against a man that it cannot be maintained in any Court unless it is shown that he had a wicked mind. That is the effect of *Derry* v. *Peek,* 14 App. Cas. 337. What is meant by a wicked mind? If a man tells a wilful falsehood, with the intention that it shall be acted upon by the person to whom he tells it, his mind is plainly wicked, and he must be said to be acting fraudulently. Again, a man must also be said to have a fraudulent mind if he recklessly makes a statement intending it to be acted upon, and not caring whether it be true or false. I do not hesitate to say that a man who thus acts must have a wicked mind. But negligence, however great, does not of itself constitute fraud. The official referee who tried this case and heard the evidence came to the conclusion that the defendant, though he had acted negligently, had not wilfully made any false statement, or been guilty of any fraud. All that he had done was to give untrue certificates negligently. Such negligence, in the absence of contract with the plaintiffs, can give no right of action at law or in equity. All the grounds urged on behalf of the plaintiffs fail, and the appeal must be dismissed.[2]

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[2] *Accord*: *Bank* v. *Ward,* 100 U. S. 195 (1879), purchase of property misled by certificate of attorney employed by vendor to examine the title; *Houseman* v. *Girard Building Assn.,* 81 Pa. 256 (1876), intending lender on mortgage misled by false certificate of searches; *Gordon* v. *Livingston,* 12 Mo. App. 267 (1882), false certificate given by grain inspector; *Kahl* v. *Love,* 37 N. J. L. 5 (1874), false receipt given by collector of taxes; see also *Moore* v. *Lancaster,* 212 Pa. 642 (1905), suit by purchaser of house built on erroneous grade line given by city official. In *Fish* v. *Kelly,* 17 C. B. N. S. 194 (1864), information in regard to a client's deeds was given to an outsider by an attorney not employed by the client to investigate and report.

ANTHONY *v.* SLAID.

Supreme Judicial Court of Massachusetts, 1846. 52 *Mass.* 290.

SHAW, C. J. The case stated in the plaintiff's declaration is this: He was a contractor for the support of all the poor of the town of Adams, at a fixed sum per annum, and undertook to support them, in sickness and health, at his own risk: The defendant's wife committed an assault and battery upon one of the town paupers, by means of which he was hurt, and the plaintiff was put to increased expense for his cure and support.

The court of common pleas decided that this action, if the facts alleged in the declaration were proved, could not be maintained; and exceptions were alleged by the plaintiff. We are of the opinion that this decision was right. It is not by means of any natural or legal relation between the plaintiff and the party injured, that the plaintiff sustains any loss by the act of the defendant's wife, but by means of the special contract by which he had undertaken to support the town paupers. The damage is too remote and indirect. If such a principle be admitted, we do not see why the consequence would not follow, as stated in the argument for the defendants, that in a case where an assault is committed, or other injury is done to the person or property of a town pauper, or of an indigent person who becomes a pauper, the town might maintain an action, with a *per quod,* for damages. That there is no precedent for such an action, where there must have been many occasions for bringing it, if maintainable, is a strong argument against it. *Lamb* v. *Stone,* 11 Pick. 527. *Exceptions overruled.*[1]

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[1] *Accord*: *Taylor* v. *Neri,* 1 Esp. 386 (1795), opera singer beaten and prevented from appearing at plaintiff's theatre; *Ins. Co.* v. *Bosher,* 39 Me. 253 (1855), a building insured by plaintiff wilfully burned by defendant; *Conn. Mutual Life Ins. Co.* v. *R. R.,* 25 Conn. 265 (1856), policy holder killed by defendant's negligence. See Storrs, J., p. 275; *Ins. Co.* v. *Brame,* 95 U. S. 754 (1877), same facts; *Dale* v. *Grant,* 34 N. J. L. 142 (1869), defendant wrongfully stopped the motive power of a mill to whose whole output plaintiff was by contract entitled; *Cattle* v. *Stockton Water Works Co.,* L. R. 10 Q. B. 453 (1875); *La Societè de Remorguage de Hélice* v. *Bennetts,* L. R. 1911, 1 K. B. 243, the defendant by whose negligence a boat towed by the plaintiff's tug was destroyed held not liable for the latter's loss on his partly performed contract of towage; *Tarleton* v. *McGawley,* 1 Peake N. P. 270 (1794), per Lord Kenyon, p. 273; *aliter* where there exists "some natural or legal relation," such as father and son, husband and wife or master and servant, by virtue of which the plaintiff is entitled to the services of the person injured; *Jones* v. *Brown,* 1 Esp. 217 (1795); *Cf. Taylor* v. *Neri, supra.* See, however, Bowen, L. J., *Mogul S. S. Co.* v. *McGregor,* L. R. 23, Q. B. D. 598 (1889), p. 613. "Now, intentionally to do that which is calculated in the ordinary course of events to damage and which does, in fact, damage another in that other person's property, or trade is actionable, if done without just cause and excuse," and Holmes, J., "when a responsible agent seeks to escape from liability for an act, which he had notice was likely to cause damage to another and which has caused such damage in fact, he must show a justification," and *cf.* 20 Harv. L. R. 262, n. 3; see also Lord Lumley, *Quinn* v. *Leatham,* L. R. 1901, A. C. 495, top of p. 535.

Compare: Martin B. in *Francis* v. *Cockrell,* L. R. 5, Q. B. 501 (1870), "The law of England looks at proximate liabilities as far as is possible, and endeavors to confine liabilities to the persons immediately concerned (p. 510).

PALMER *v.* NORTHERN PACIFIC RAILROAD CO.

Supreme Court of Minnesota, 1887. 37 Minnesota, 223.

GILFILLAN, C. J. Action for running upon and killing plaintiff's horse. The horse was at large in a public highway, grazing near the crossing of defendant's road, when, a train of cars coming along at its usual speed, the horse ran upon the track, in front of the train, and the train ran upon and killed it. It does not appear that the electors of the town had determined where cattle, horses, etc., should be permitted to go at large. The horse was therefore wrongfully in the highway. It is doubtful that the evidence as to the defendant's negligence, and also as to contributory negligence on the part of plaintiff, was such as to justify submitting the case to the jury. Conceding, however, that it was, still there must be a new trial for refusal of the Court to instruct the jury as requested by defendant.

There were several requests on its behalf, presenting, in various forms, practically the same proposition, which the Court refused to give. We need specify only two of them, as they express the gist of all: "If the jury believe from the evidence that the plaintiff's horse, at the time of the injury complained of, was running at large, it is instructed that the verdict must be for defendant, unless it further believes that, after the discovery of the peril of the horse, the defendant's servants were guilty of negligence," and that if the horse was running at large, plaintiff, in order to recover, must prove two facts, viz.: "That, prior to actually striking the horse, the defendant's servants discovered its peril;" and "that, after the discovery of the horse's peril, defendant's servants failed to do something which they ought to have done to avoid striking it, and which, if done, would have been effectual to prevent the collision."

These propositions, or, rather, this proposition twice stated, is in exact accord with what was decided by this Court in *Locke* v. *First Div., etc., R. Co.*, 15 Minn. 283 (350,) and reiterated in *Witherell* v. *Milwaukee & St. Paul Ry. Co.*, 24 Minn. 410. It is true those were cases where the animals were wrongfully upon the lands of the railroad company, while in this it was wrongfully upon the highway, at the place where the trains had a right to cross—there through the fault of the plaintiff, and not of defendant. This difference makes no difference in the principle. In either case those in charge of the train were not bound to presume that the animal would be where it was. They "had a right to presume that the plaintiff would keep her at home, where alone she belonged; consequently they owed no duty to plaintiff to look ahead, and see where the animal was." *Locke* v. *First Div., etc., R. Co., supra.* Their duty to persons or animals rightfully on the highway would have required them to be on the lookout to ascertain if there was any chance of injury to such persons or animals; but with that duty, and its extent and its observance, the plaintiff, whose animal, through his own fault, was

wrongfully there, had no concern. Defendant is [in] no way answerable to plaintiff for any neglect in its duty towards others.[1]

Without any duty to anticipate that the horse might be in danger, or to exercise care to ascertain if it was in danger, the duty of those in charge of the train of cars in respect to the horse arose from the time they discovered it was in danger.

Order reversed.

VAUGHAN *v.* MENLOVE.

Court of Common Pleas, 1837. 3 Bingham's New Cases, 468.

At the trial it appeared that the rick in question had been made by the Defendant near the boundary of his own premises; that the hay was in such a state when put together, as to give rise to discussions on the probability of fire: that though there were conflicting opinions on the subject, yet during a period of five weeks, the Defendant was repeatedly warned of his peril; that his stock was insured; and that upon one occasion, being advised to take the rick down to avoid all danger, he said "he would chance it." He made an aperture or chimney through the rick; but in spite, or perhaps in consequence of this precaution, the rick at length burst into flames from the spontaneous heating of its materials; the flames communicated to the Defendant's barn and stables, and thence to the plaintiff's cottages, which were entirely destroyed.

Patteson J., before whom the cause was tried, told the jury that the question for them to consider, was, whether the fire had been occasioned by gross negligence on the part of the Defendant; adding, that he was bound to proceed with such reasonable caution as a prudent man would have exercised under such circumstances.

A verdict having been found for the Plaintiff, a rule *nisi* for a new trial was obtained, on the ground that the jury should have been directed to consider, not, whether the Defendant had been guilty of gross negligence with reference to the standard of ordinary prudence, a standard too uncertain to afford any criterion; but whether he had acted *bona fide* to the best of his judgment; if he had, he ought not to be responsible for the misfortune of not possessing the highest order of intelligence. The action under such circumstances, was of the first impression.

[1] *Accord: Leighton* v. *Wheeler,* 106 Maine 450 (1911). "Even if the defendant owes a duty to some one else, but does not owe it to the person injured, no action will lie. The duty must be due the person injured. These principles are elementary and are equally applicable whether the duty is imposed by positive statute" (see cases collected in note 4 to *Bott* v. *Pratt, post*) "or is founded on general common-law principles;" Mitchell, C. J., in *Akers* v. *Chicago, etc., R. Co.,* 58 Minn. 540 (1894), p. 544.

"The duty must be one owed by the defendants to the plaintiffs in respect to the very matter or act charged as negligence"; Parsons, C. J., *Pittsfield Mfg. Co.* v. *Pittsfield Shoe Co.,* 71 N. H. 522 (1902), p. 531; *cf. Gray & Bell* v. *Scott,* 66 Pa. St. 345 (1870), and cases cited in Note 1 to *Bott* v. *Pratt, post.*

So one coming upon land for his own pleasure or convenience cannot complain of a condition therein clearly wrongful as to other visitors, who come thereon for purposes in which the occupier has an interest. *Converse* v. *Walker,* 30 Hun, 596 (N. Y. 1883), plaintiff seeking shelter from storm in hotel porch; *Thiele* v. *McManus,* 3 Ind. App. 132 (1891), plaintiff not a

TINDAL C. J.[1] I agree that this is a case *primae impressionis;* but I feel no difficulty in applying to it the principles of law as laid down in other cases of a similar kind. Undoubtedly this is not a case of contract, such as a bailment or the like where the bailee is responsible in consequence of the remuneration he is to receive: but there is a rule of law which says you must so enjoy your own property as not to injure that of another; and according to that rule the Defendant is liable for the consequence of his own neglect: and though the Defendant did not himself light the fire, yet mediately, he is as much the cause of it as if he had himself put a candle to the rick; for it is well known that hay will ferment and take fire if it be not carefully stacked. It has been decided that if an occupier burns weeds so near the boundary of his own land that damage ensues to the property of his neighbor, he is liable to an action for the amount of injury done, unless the accident were occasioned by a sudden blast which he could not foresee: *Turbervill* v. *Stamp,* 1 Salk. 13. But put the case of a chemist making experiments with ingredients, singly innocent, but when combined, liable to ignite; if he leaves them together, and injury is thereby occasioned to the property of his neighbor, can any one doubt that an action on the case would lie?

It is contended, however, that the learned Judge was wrong in leaving this to the jury as a case of gross negligence, and that the question of negligence was so mixed up with reference to what would be the conduct of a man of ordinary prudence that the jury might have thought the latter the rule by which they were to decide; that such a rule would be too uncertain to act upon; and that the question ought to have been whether the Defendant had acted *honestly* and *bona fide* to the best of his own judgment. That, however, would leave so vague a line as to afford no rule at all, the degree of judgment belonging to each individual being infinitely various: and though it has been urged that the care which a prudent man would take, is not an intelligible proposition as a rule of law, yet such has always been the rule adopted in cases of bailment, as laid down in *Coggs* v. *Bernard,* 2 Ld. Raym. 909. Though in some cases a greater degree of care is exacted than in others, yet in "the second sort of bailment, viz., *commodatum* or lending *gratis,* the borrower is bound to the strictest care and diligence to keep the goods so as to restore them back again to the lender; because the bailee has a benefit by the use of them, so as if the bailee be guilty of the least neglect he will be answerable; as if a man should lend another a horse to go westward, or for a month; if the bailee put this horse in his stable, and he were stolen from thence, the bailee shall not be answerable for him: but if he or his servant leave the house or stable doors open, and the thieves take the opportunity of that, and steal the horse, he will be chargeable, because the neglect gave the thieves the occasion to steal the horse." The care taken by a prudent man has always been the rule laid down; and as to the

customer injured in a shop; *Burchell* v. *Hickisson,* 50 L. J. Q. B. 101 (1880); *Johnson* v. *R. R.,* 125 Mass. 75 (1878). *Contra, Pickett* v. *R. R.,* 117 N. C. 616 (1895), p. 634, *et seq.*

[1] The concurring opinion of Park, J., and the greater part of that of Vaughan, J., are omitted. Gaselee, J., concurred without giving an opinion.

supposed difficulty of applying it, a jury has always been able to say, whether, taking that rule as their guide, there has been negligence on the occasion in question.

Instead, therefore, of saying that the liability for negligence should be co-extensive with the judgment of each individual, which would be as variable as the length of the foot of each individual, we ought rather to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe. That was in substance the criterion presented to the jury in this case, and therefore the present rule must be discharged.

VAUGHAN J. The principle on which this action proceeds, is by no means new. It has been urged that the Defendant in such a case takes no duty on himself; but I do not agree in that position: every one takes upon himself the duty of so dealing with his own property as not to injure the property of others.

Rule discharged.

BEATTY *v.* CENTRAL IOWA R. CO.

Supreme Court of Iowa, 1882. 58 *Iowa*, 242.

DAY, J.[1] The jury have found specially that the crossing and its immediate approaches were in a suitable and safe condition. They have not found that there was anything negligent or improper in the manner in which the highway was prepared for the public travel, between the point of impingement between the railway and the highway, and the actual crossing. The jury have found that the cause of the accident was the proximity of the two roads north of the immediate crossing. Now the defendant cannot be held liable for the injury unless it was guilty of some act of negligence. The mere constructing of a railway in close proximity to a highway, is not, in itself, an act of negligence. Railways, if constructed at all, must of necessity, cross over highways. The statute confers this right. Railways cannot always approach highways at right angles; if they approach at very acute angles, as they sometimes do, it is apparent that they must, of necessity, run for some distance in close proximity to, and almost parallel with them. The mere fact that they so run, although it may render the use of the highway less safe, does not of itself constitute negligence upon the part of the railway company. Such increase of danger is necessarily incident to, and attendant upon, this improved mode of transportation. All persons must accept the advantages of this mode of intercommunication with the danger and inconveniences which necessarily attend it; the price of progress cannot be withheld. The appellant has argued this case as though the statute required the railway company should make the highway as safe as before the alteration; the statute does not so require. Such a requirement, could not, in the nature of things, be complied with. It is not possible that a highway crossed by a railroad, shall be as safe as before the rail-

[1] A portion of the opinion is omitted.

road was constructed; there will, and always must be, some danger from collision, and from fright to animals, which did not exist before; the statute simply requires that the highway shall be placed in as good repair and condition as before the alteration. It is true the jury have found that the railway company could reasonably have graded a track for wagons farther to the west of the highway, and that if the track of the highway had been graded or pushed to the west line of the highway, the accident would not have happened. But, it is not found that the failure to grade the highway to the west line of the highway was negligence on the part of the company, under the circumstances proved, and we cannot say, as a matter of law that such failure was negligence. If the railway had approached the highway at right angles, and been plainly visible for half a mile before reaching the crossing, it may fairly be assumed that the accident would not have happened. And yet we cannot say, as a matter of law, that the railway company was guilty of negligence in not constructing its road in that manner. If deceased had ridden an old, gentle and well trained horse, instead of a young, spirited and not thoroughly trained one, it may well be assumed that the accident would not have happened; yet it would scarcely do to hold that deceased was guilty of contributory negligence because he rode a young and spirited horse; and yet, there would be as much propriety in so holding, as in declaring, as a matter of law, that the defendant was guilty of negligence because it did not grade the track for the travel of the west line of the highway. After an accident has occurred it is generally easy to see how it might have been avoided. The proper inquiry is not whether the accident might have been avoided, if the company had anticipated its occurrence in the manner that it happened, but whether, in the light of all the existing circumstances the company exercised reasonable care and diligence to guard against danger. * * * No facts have been found from which we are authorized to declare that the company has, as a matter of law, been negligent. It follows that the court did not err in rendering judgment for the defendant, and overruling the plaintiff's motion for judgment upon the special findings.

Affirmed.[2]

BLYTH *v.* BIRMINGHAM WATERWORKS CO.

In the Court of Exchequer, 1856. 11 *Exchequer,* 781.

This was an appeal by the defendants against the decision of the judge of the County Court of Birmingham. The case was tried before a jury, and a verdict found for the plaintiff for the amount claimed by the particulars. The particulars of the claim alleged,

[2] See *Libby* v. *R. R.*, 85 Me. 34 (1892), p. 44, and Bramwell, B., *Cornman* v. *Ry.*, 4 H. & N. 781 (1859), 786, "nothing is so easy as to be wise after the event."

So evidence that the defendant after the accident took precautions to prevent its repetition, is not admissible to prove his original conduct negligent. *Baran* v. *Reading Iron Co.*, 202 Pa. 274 (1902), and cases cited therein.

that the plaintiff sought to recover for damage sustained by the plaintiff by reason of the negligence of the defendants in not keeping their water-pipes and the apparatus connected therewith in proper order.

The case stated that the defendants were incorporated by stat. 7, Geo. iv, c. cix, for the purpose of supplying Birmingham with water.

[Certain sections of the act required them upon laying down a pipe in any street to fix a sufficient fire-plug in each street; to lay their pipes at least eighteen inches underground; and to keep their mains charged with water. All of these provisions had been complied with. The company was not paid for maintaining the plugs, but the exercise of their privilege under the act was conditional upon such maintenance.]

The apparatus connected with the fire-plug was as follows:—

The lower part of a wooden plug was inserted in a neck, which projected above and formed part of the main. About the neck there was a bed of brickwork puddled in with clay. The plug was also enclosed in a cast iron tube, which was placed upon and fixed to the brickwork. The tube was closed at the top by a movable iron stopper having a hole in it for the insertion of the key, by which the plug was loosened when occasion required it.

The plug did not fit tight to the tube, but room was left for it to move freely. This space was necessarily left for the purpose of easily and quickly removing the wooden plug to allow the water to flow. On the removal of the wooden plug the pressure upon the main forced the water up through the neck and cap to the surface of the street.

On the 24th of February, a large quantity of water, escaping from the neck of the main, forced its way through the ground into the plaintiff's house. The apparatus had been laid down 25 years, and had worked well during that time. The defendants' engineer stated, that the water might have forced its way through the brickwork round the neck of the main, and that the accident might have been caused by the frost, inasmuch as the expansion of the water would force up the plug out of the neck, and the stopper being incrusted with ice would not suffer the plug to ascend. One of the severest frosts on record set in on the 15th of January, 1855, and continued until after the accident in question. An incrustation of ice and snow had gathered about the stopper, and in the street all round, and also for some inches between the stopper and the plug. The ice had been observed on the surface of the ground for a considerable time before the accident. A short time after the accident, the company's turncock removed the ice from the stopper, took out the plug, and replaced it.

The judge left it to the jury to consider whether the company had used proper care to prevent the accident. He thought, that, if the defendants had taken out the ice adhering to the plug, the accident would not have happened, and left it to the jury to say whether

they ought to have removed the ice. The jury found a verdict for the plaintiff for the sum claimed.[1]

ALDERSON, B. I am of opinion that there was no evidence to be left to the jury. The case turns upon the question, whether the facts proved show that the defendants were guilty of negligence. Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. The defendants might have been liable for negligence, if unintentionally, they omitted to do that which a reasonable person would have done, or did that which a person taking reasonable precautions would not have done. A reasonable man would act with reference to the average circumstances of the temperature in ordinary years. The defendants had provided against such frosts as experience would have led men, acting prudently, to provide against; and they are not guilty of negligence, because their precautions proved insufficient against the effects of the extreme severity of the frost of 1855, which penetrated to a greater depth than any which ordinarily occurs south of the polar regions. Such a state of circumstances constitutes a contingency against which no reasonable man can provide. The result was an accident, for which the defendants cannot be held liable.

MARTIN, B. I think that the direction was not correct, and that there was no evidence for the jury. The defendants are not responsible unless there was negligence on their part. To hold otherwise would be to make the company responsible as insurers.

BRAMWELL, B. The Act of Parliament directed the defendants to lay down pipes, with plugs in them, as safety-valves, to prevent the bursting of the pipes. The plugs were properly made, and of proper material; but there was an accumulation of ice about this plug, which prevented it from acting properly. The defendants were not bound to keep the plugs clear. It appears to me that the plaintiff was under quite as much obligation to remove the ice and snow which had accumulated, as the defendants. However that may be, it appears to me that it would be monstrous to hold the defendants responsible because they did not foresee and prevent an accident, the cause of which was so obscure, that it was not discovered until many months after the accident had happened.

Verdict to be entered for the defendants.[2]

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[1] The arguments of counsel are omitted.

[2] *No one is bound to anticipate or provide against extraordinary natural forces—Sutphen* v. *Hedden*, 67 N. J. L. 324 (1901), fence near highway strong enough to stand ordinary winds, but thrown down by storm; *M. P. R. R.* v. *Columbia*, 65 Kans. 390 (1902), grain doors piled twenty feet from track blown by gale on to it and derailing train; *McCauley* v. *Logan*, 152 Pa. 202 (1892), boat, moored with lashings sufficient to stand any normal current, swept away in flood. "Legal duty does not require precautions against unusual and extraordinary events"—Green, J., p. 217; *Allegheny* v. *Zimmerman*, 95 Pa. 287 (1880), Liberty pole falling on boy standing in street, question for jury whether pole strong enough to stand ordinary winds; *McGrew* v. *Stone*,

McDOWALL *v.* GREAT WESTERN RAILWAY COMPANY.

In the King's Bench Division, 1903. *L. R.* (1902) 1 *K. B.*, 618; L. R. (1903) 2 K. B., 331.

The jury found as answers to the first three questions put to them by the Court, that the van was in a safe place and no accident would have happened unless it had been interfered with by negligent trespassers; they found also, fourth, that the danger of such interference was known to the defendants, and, fifth, that the van should have been placed beyond the catch "points," or switches, and assessed damages at £175, and the case was adjourned for further consideration.[1]

KENNEDY, J. For years, according to the defendants' witnesses, they had been troubled by boys playing with and on the trucks and carriages left stationary at this part of the line. This portion of the branch is bounded on the one side by a wire fence, which separated it from some open ground of the defendants, and on the other side by a field, which was separated from the high road by a garden. To the knowledge of the defendants boys used to get into the trucks, and even to unlock the doors of the vans on the siding, for the purpose either of theft or of amusement. If the defendants knew of this systematic, or, at any rate, very frequent interference, it does not appear to me to be otherwise than reasonable for the jury to say that they must be taken to have known, as one of the risks involved, that the trucks and vans kept in position on the down grade only by temporary means, which apparently were easily movable, might, if uncontrolled by the catch-point, cause mischief to the users of the highway. If, as the jury have found, the risk of interference by trespassers with trucks and vans in this locality was a risk known to the defendants, and if the consequent danger of their movement down the incline to the highway was also a known risk, and if, further, this danger might have been guarded against by the exercise by the defendants of reasonable care, as the jury have also found, I can see no legal reasons upon which the

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53 Pa. 436 (1866), question for jury whether boat was moored in proper place.

Compare, as to what constitutes an act of God such as relieves a common carrier from liability for loss of shippers' goods, Brett, J., *Nugent* v. *Smith*, L. R. 1 C. P. D. 19 (1875), p. 34, with Cockburn, C. J., same case on appeal, L. R. 1, C. P. D. 423 (1876), p. 434 to 438, and James, L. J.

"In order that a phenomenon should be regarded as 'an act of God' it is not necessary that it should be unique, that it should happen for the first time; it is enough that it is extraordinary, and such as could not reasonably be anticipated," Fry, J., *Nitro-Phosphate Co.* v. *St. Katherine Docks Co.*, L. R. 9 Ch. Div. 503 (1878), p. 515; *acc. Libby* v. *M. C. R. R.* 85 Me. 34 (1892), and *Siegfried* v. *So. Bethlehem*, 27 Pa. S. C. 456 (1905), p. 463. The previous occurrence, however, may be of such a nature as to "imply the existence of some natural law by which its recurrence may be inferred," Fry, J., *supra*. So the frequent recurrence of so-called extraordinary floods tend to show that they are only usual through severe freshets. *Libby* v. *R. R.*, *supra*.

[1] The facts are restated.

defendants can claim immunity merely because the boys were trespassers.

I give judgment for the plaintiff for the amount found by the jury by their verdict.

Appeal from the decision of KENNEDY, J.

Francis Williams, K. C., and *Denman Benson* for the defendants. The learned judge below relied on *Clark* v. *Chambers* (1878, 3 Q. B. D. 327); but in that case, and in every case there cited in which the defendant has been held liable for an accident caused upon his property by the intervening act of a third party, there has been some wrongful, negligent, or careless act on the part of the defendant: *Daniels* v. *Potter* (1830, 4 C. & P. 262; 34 R. R. 793); *Bird* v. *Holbrook* (1828), 4 Bing. 628; 29 R. R. 657). That is the distinction between the present case and *Clark* v. *Chambers* (*supra*) and other similar cases to be found in the books.

The jury have found in the defendants' favor that, as the van was left, it was in a safe position, and that it only became dangerous upon the intervention of the trespassers. When a railway company is using its property in a way sanctioned by statute and guarding against all lawful risk, it is not bound to apprehend, nor to guard against, the possibility of an unlawful act by a stranger, or against an accident which no one could have foreseen: *Blyth* v. *Birmingham Waterworks Co.* (1856, 11 Ex. 781); *Parker* v. *City of Cohoes* (1878, 10 Hun (N. Y.) 531; 74 N. Y. 610). * * * The trucks and van were properly and sufficiently braked and coupled. It may be said that the defendants did not, as they might have done, leave the trucks and van to the eastward of the catch-point, so that if they got loose they would be diverted from the highway; but it is settled that you are not under any obligation to use a particular contrivance or thing merely because it happens to be upon your property. There was no obligation on the part of the defendants to guard against such an act as caused the accident here. *Engelhart* v. *Farrant* (1897, 1 Q. B. 240), which was referred to by the learned judge, does not support his decision, for there the Court had not to decide, as it had to decide here, whether the defendant was negligent, but only whether his negligence, which was admitted, was the cause of the injury.

Arthur Lewis, and *E. M. Samson,* for the plaintiff.

The defendants had had actual knowledge for years of the mischievous acts committed by boys on this part of their line, and therefore should have taken precautions, especially as this part of their line is, as appears from the evidence, in a populous place.

VAUGHAN WILLIAMS, L. J.[1] Was there really any reasonable evidence to go to the jury, in respect of those findings of the jury, so far as they are findings, which are against the defendants?

The fourth question was, "Was the danger of such interference causing injury to persons using the highway known to the defend-

[1] Only so much of the opinion of Vaughan Williams, L. J., as deals with the jury's fourth finding is given.

ants at the time when the van was left and kept where it was, and might it have been sufficiently guarded against by the exercise of reasonable care and skill on the part of the defendants?" Answer, "Yes; it was known and could have been guarded against by the exercise of reasonable care on the part of the defendants."

Now, let me take that question in two halves. "Was the danger of such interference causing injury to persons using the highway known to the defendants at the time when the van was left and kept where it was?" Let us see what the facts are here. It is quite true that the boys had been in the habit of breaking into the vans or trucks standing on this part of the line and stealing apples and doing one thing and another; but although it is said the boys had been doing this for years, there is no evidence that they ever loosed a van or vehicle before during all that time; and therefore it seems to me there is nothing in the past history of the conduct of those boys, as regards vehicles left on the rails at this point, to lead one to anticipate that they would go and uncouple a vehicle and let it down the incline as they did in the present instance.

Under those circumstances it seems to me that there was no evidence to go to the jury upon which they could properly find that the danger of such interference causing injury to persons using the highway was known to the defendants at the time when the van was left and kept where it was, and might have been sufficiently guarded against by the exercise of reasonable care on the part of the defendants. There, again, I do not understand what the suggestion is. The suggestion made by the learned counsel for the plaintiff seems to be that the defendants might have put the van the other side of the catch-point, and then it could not have gone down the incline. But it is not true to say absolutely that if the defendants had done so it could not have gone down the incline, and it is not true to say that upon the other side of the catch-point it would have been safe. The truth of the matter is that, if it had been placed there, all these boys would have had to do was to open or close, as the case might be, this catch-point and let the van go by, which would have been a very much simpler operation than that they went through when they got into the van, of uncoupling and unbraking the van.

ROMER, L. J. I am of the same opinion. Clearly, as found by the jury when this train was left where it was by the railway company, with the precautions taken by them, it was perfectly safe. It was not left in any condition in which it could be said that there was any negligence on the part of the railway company under the circumstances, unless you can find some evidence of negligence by reason of the evidence relating to the mischievous boys; in other words, unless it is plain that the evidence relating to the mischievous boys turned that act which was otherwise a proper act on the part of the company into a negligent one. Upon that, having considered that evidence, it does not appear to me that upon it the jury could reasonably find that the railway company ought, under the circum-

stances in which they left this train, reasonably to have anticipated that the boys would do or might have done what they in fact did, or that there was at the time, known to the company, any such risk of the particular acts of the boys which caused the accident as called upon the railway company to take further precautions against those particular acts; and that being so, it appears to me that the findings upon which the learned judge below acted cannot be relied upon on behalf of the plaintiff, and that the appeal ought to succeed.

STIRLING, L. J. I am of the same opinion. The real question in this case is whether the findings of the jury in answer to the fourth and fifth questions which were put to them by the learned judge can be supported. In answer to the first three questions the jury have found that the van was in a safe position as and where it was left by the defendants' servants, unless interfered with afterwards, and that the accident would not have happened if the van had not been interfered with, and that the interference was the act of trespassers, who acted negligently. Then what really happened was that some boys got into or on the van and undid the brake and couplings, and that this led to the accident.

Now, was there any evidence to shew that the company ought reasonably to have anticipated such an occurrence? The learned judge, twice in the course of his judgment, states what the facts are. He says that for years the defendants had been troubled by boys trespassing on this part of the line and playing in and about vehicles standing upon it, and later on he says that, to the knowledge of the defendants, the boys used to get into trucks and vans and unlock the doors of the vans on the siding. That is the whole length the evidence went. Nothing further has been called to our attention. That has gone on for years, and no accident of any kind had occurred. In these circumstances it does not seem to me a fair inference to draw that the company ought to have reasonably anticipated any such act as was actually done by the boys in this case or the result which came from it. Upon that ground I think the appeal ought to be allowed. *Appeal allowed.*[2]

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[2] *Accord*: *No duty to foresee or guard against malicious or criminal act of third persons, Deyo* v. *R. R.*, 34 N. Y. 9 (1865); *Fredericks* v. *N. C. R. R.*, 157 Pa. 103 (1893), trains intentionally wrecked. Wanton or mischievous acts of third persons; *Daniels* v. *Potter*, 4 C. & P. 262 (1830), cellar door reasonably secured, disturbed by third party; *Stephenson* v. *Corder*, 71 Kans. 475 (1905), horse struck by passerby broke its halter and ran away; *Mars* v. *R. R.*, 61 N. Y. S. C. (54 Hun) 625 (1889); *Berman* v. *Schults*, 81 N. Y. Supp. 647 (1903), electric truck left unattended in street with power off and brakes on, started by boys, but *cf. Lynch* v. *Nurdin*, 1 Q. B. (A. & E. N. S.) 29 (1841); *Latch* v. *Rumner Ry. Co.*, 3 H. & N. 930 (1858), stone placed in lever of "point" or switch; *Mangan* v. *Atterton*, 4 H. & C. 388 (1866), boy injured by companion turning handle of machine, exposed for sale in market place, but see criticism thereon in *Clark* v. *Chambers*, L. R. 3 Q. B. D. 327 (1878), p. 338; *Parker* v. *Cohoes*, 17 N. Y. S. 531 (1877); *Doherty* v. *Waltham*, 4 Gray 596 (Mass. 1855), barriers, erected to prevent night traffic on streets torn up for repair, removed by third persons.

Accord: *No duty to foresee or guard against negligent acts of third persons*: *Pearson* v. *Cox*, L. R. 2 C. P. D. 369 (1877), tools negligently

MURPHEY *v.* CARALLI.

In the Court of Exchequer, 1864. 3 Hurlstone & Coltman, 461.

The plaintiffs' evidence tended to show that some bales of cotton were insecurely piled in a warehouse by cotton porters acting under the control of the warehouse-keeper but in the employ of the defendant, a cotton merchant, to whom the bales belonged. A few days after the plaintiff, being lawfully in the warehouse to recanvass the bales of cotton of another cotton merchant, was injured by the fall of one of the defendant's bales.

The trial judge directed a nonsuit. Rule for new trial.[1]

BRAMWELL, B. I also think the nonsuit right. I assent, indeed, to Mr. Littler's[2] argument, that the men employed by the defendant, while engaged in piling the bales, were his servants, so as to render him responsible for their acts. And if, while they were so engaged, there had been any negligence on their part with reference to any person lawfully passing by, I think the defendant would be liable. The question may, therefore, be treated as if the defendant had piled the bales himself. But suppose he *had* piled the bales, would he be liable? I think not. For in that alone there would have been nothing dangerous without the subsequent act of the warehouse-keeper in permitting persons to approach the bales. Suppose the

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dropped upon plaintiff, a passerby on the highway, by a plasterer at work on the premises of defendant who had not put a hoarding over the sidewalk; *Daniel* v. *Metropolitan Railway*, L. R. 5 E. & I. App. 45 (1871), a railway held not bound to suspend the running of its trains during the time and at the point where heavy girders are being moved over the tracks, affirming L. R. 3 C. P. 591 the reversal of a contrary decision of Common Pleas, Willes, Keating and Montague Smith, JJ., L. R. 3 C. P. 216, on the ground that "though as reasonable persons they must have known that girders, if negligently handled are likely to fall, they had no reason to suppose that the persons who were doing the work would do it so negligently as to hazard the happening of such an event"—Blackburn, J., p. 594; *Williams Adm.* v. *Woodward Iron Co.*, 106 Ala. 254 (1894), would seem to be a case of this class; the possibility of cars getting beyond control while on a steep siding being recognized, a cut off switch was provided which was open on this occasion; a stranger, seeing the cars out of control, through mistake, closed it and the runaway cars got on the main track and collided with those in which plaintiff was; *Bannon* v. *P. R. R.*, 29 Pa. S. C. 231 (1904), defendant's fence fell with weight of crowd pressing against it to see plaintiff, a police officer, make an arrest; *Grogan* v. *R. R.*, 213 Pa. 340 (1906), similar facts, passerby injured; *Leavitt* v. *Bangor R. R.*, 89 Me. 509 (1897), fire negligently started by workmen of independent contractor while using cars furnished by defendant; *Chaddock* v. *Plummer*, 88 Mich. 225 (1891); *Harris* v. *Cameron*, 81 Wis. 239 (1891), air guns given to young children and carelessly used by them or their friends; *Poland* v. *Earhart*, 70 Iowa 285 (1886), firearms sold to minor in violation of statute; *cf. Hagerty* v. *Powers*, 66 Cal. 368 (1885), loaded revolver given as plaything to boy of eleven—the only point discussed, however, was a father's liability as such for the torts of a son; *Swanson* v. *Crandall*, 2 Pa. S. C. 85 (1896), loaded revolver kept in top drawer of bureau, removed and fired by five-year-old child. *Compare Dixon* v. *Bell*, 5 M. & S. 198 (1816); *Binford* v. *Johnson*, 82 Ind. 426 (1882); and *Sullivan* v. *Creed*, I. R. 1904, 2 K. B. 317.

[1] The facts are restated.

[2] Counsel for plaintiff.

defendant had been present, and had pointed out to the warehouse keeper that the mode in which the bales were piled was dangerous. The warehouse keeper might surely have replied that that was his business, and that he would take the necessary steps to prevent any one coming near the bales. If from his subsequent omission to do so any mischief had occurred, the defendant would not be responsible for that mischief. Take this case. A. delivers at B.'s house goods which, from their nature, cannot at once be taken in. B. says: "Put them down in the highway, I will remove them directly, and will see that in the meantime no one runs against them." A. complies. The goods remain out all night, there is no light, and some one is injured. Who is responsible? B., the owner of the house, and not A., for though A.'s act be wilful, it would not be dangerous without B.'s subsequent negligence. So here the defendant is not responsible for an act which would have produced no mischief without the warehouse keeper's subsequent negligence. If, indeed, the negligence were of a covert kind, so as to be less obvious to the warehouse keeper than to the men engaged in piling the bales, that might be a different case. For the warehouse keeper might then have no notice of the danger, and so the mischief might occur without any subsequent wrongful act on his part. But here the danger was at least as patent to the warehouse keeper as to the men; and the men were acting under his control, and the act in itself would not have caused the mischief. The warehouse keeper is liable, if any one.[3]

Rule discharged.[4]

EXTON *v.* CENTRAL RAILROAD OF NEW JERSEY.

Supreme Court of New Jersey, 1898. *62 N. J. L. 7.*[1]

Rule to show cause why the verdict for the plaintiff should not be set aside.

LIPPINCOTT, J. There was evidence tending to show that on going from the waiting room in defendant's station into a passageway leading to the baggage room plaintiff was knocked down by a hackman who was scuffling with another in the passage. Evidence was admitted, over objection by the defendant, that hackmen, including the two who engaged in this scuffle, had been in the habit

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[3] The opinions of Channell and Pigott, B. B., concurring, are omitted.

[4] *Accord*: *Scheaffer* v. *Iron City Sand Co.*, 31 Pa. S. C. 476 (1906), sand dumped on sidewalk of purchaser as by him directed, and left there unguarded by him.

Where a premises or chattel is transferred by sale, lease or loan to a responsible third person fully aware of its actual character, the transferror is not, normally, bound to contemplate, nor is he liable for, its misuse by the transferee, see editor's Basis of Affirmative Obligation in the Law of Tort, 53 Am. Law Reg. (44 N. S.), p. 273-276; 340 *et seq; aliter* if a defect known to the transferror is concealed or not disclosed to the transferree, *ibid.*, p. 289; 370 *et seq.*

[1] Affirmed in Court of Errors and Appeals, 63 N. J. L. 356 (1889).

of taking their stand in and about the passageway to solicit trade and similar scufflings had been of frequent occurrence and that notice thereof had been given to the defendant's general passenger agent.[2]

This evidence was properly admitted to the jury, first, as tending to show the dangers connected with the use of this way to the baggage-room, of which Mrs. Exton could have no previous notice or knowledge, and of the character of the danger, it being such as that its existence could not be previously observed by any passenger in the use of the walk; and secondly, as tending to show that the servants of the defendant in charge of the station had knowledge of these occurrences and dangers on that walkway, or should have had knowledge of them, in the exercise of reasonable care to guard its passengers against accidents and injury from situations of danger likely to arise whilst under its care. The evidence was admissible for the jury to reach a conclusion whether this scuffling, in short, was a danger to which passengers were subjected, of such frequent and notorious occurrence that a reasonable inference could be drawn that the defendant, through its employes in charge of the depot, did have, or should have had, knowledge of the dangers there existing, or should reasonably have anticipated them, and whether they were such that the defendant should guard against, and whether, in failing to do so, it was guilty of such negligence as rendered it liable to passengers injured thereby. * * *

The walkway, therefore, being provided by the defendant company for the use of the traveling public for the purposes of travel on its ferryboats and railroad trains, the defendant company were bound to use reasonable care to keep it safe for the use of their passengers. It was one of the means which the plaintiff had the right to use for the purpose of getting her baggage checked and obtaining her checks therefor, preparatory to going across the ferry, or for any other lawful purpose connected with her journey, and she had the right to assume it was reasonably safe for her to use for any such purpose, and the company was bound to exercise reasonable care to render it suitably safe for her. *Delaware, Lackawanna and Western Railroad Co.* v. *Trautwein,* 52 N. J. L. 169. The defendant company had the right to eject anyone creating disorders or disturbance there, or annoying the passengers, or engaging in such conduct as might injure them, and to take such measures in these respects as would render it safe. *Kalamazoo H. & B. Co.* v. *Sootsma,* 84 *Mich.* 194; *Ray Negl. Imp. D.,* secs. 32, 46, and cases cited.

It was proper to submit to the jury the question of the dangers of this way, and whether they were habitual, customary dangers which the defendant could reasonably anticipate might exist, and whether they were such as required precautions against accident and injury to passengers therefrom, and whether the defend-

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[2] The statement of the facts and of the evidence admitted are condensed from those given in the opinion.

ant had exercised the required degree of care and caution to protect its passengers from such dangers. If the defendant had notice or knowledge of what might happen in its depot, or could reasonably anticipate what might happen there dangerous to others lawfully there, it was bound to use care to avoid the injury which might be occasioned, and it would matter little whether the danger was habitually existing or might occur only at intervals. Nor can it matter but little whether the dangers arose from the acts of the servants and employes or others, so long as the dangers existing were not observable by the passenger so as to be avoided, and they were known to or ought to have been known to ***the defendant,*** or anticipated by the officers of the defendant company in charge of the station. * * *

The evidence in the case justified the verdict of the jury, and therefore the rule to show cause is discharged, with costs.[8]

SULLIVAN *v.* CREED.

In the King's Bench, Ireland, 1903. *Ir. R.* 1904, *2 K. B.,* 317.

This was an application on behalf of the plaintiff to set aside a verdict and judgment entered for the defendant, and to enter judgment for the plaintiff for £50 damages, or for a new trial.

The action was brought by the plaintiff, a boy of sixteen years of age, by his next friend, for the recovery of damages against the defendant for negligence.

The defendant left a gun loaded and at full cock standing inside a fence on his lands, beside a gap from which a private path led over defendant's lands from the public road to his house. The defendant's son, Daniel, age between fifteen and sixteen, coming from the road through the gap on his way home from Mass, found the gun. He went back with it to the public road, and not knowing that it was loaded, pointed it, in play, at the plaintiff, who was on the road. The gun went off, and the plaintiff was injured.[1]

It was admitted on both sides at the trial that the question was

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[8] *Accord*: *Kuhlen* v. *Boston St. Railway,* 193 Mass. 342 (1907), passenger injured by crowding of fellow-passengers during "rush" hours at Subway station; *Mulhause* v. *R. R.,* 201 Pa. 237 (1901); *Kennedy* v. *P. R. R.,* 32 Pa. S. C. 623 (1907), passenger in station injured by good natured but disorderly crowd of students assembled to welcome a victorious football team—but *cf. Cannon* v. *R. R.,* L. R. 6 Ir. 199 (1879), passenger injured by disorderly crowd of harvesters; *Cobb* v. *R. R.,* L. R. 1894, A. C. 419—and see also as to duty to protect passengers from casual acts of rudeness, bad manners or carelessness of fellow-passengers—*Ellinger v. P. W. & B. R. R.,* 153 Pa. 213 (1893), and *Graeff* v. *R. R.,* 161 Pa. 230 (1894); *Dufur* v. *B. & M. R. R.,* 75 Vt. 165 (1905), train side tracked in line of a rifle range maintained by adjacent owner. See also *Thompson* v. *R. R.,* 170 Mass. 577 (1898); *Thornton* v. *Maine Ag. Soc.,* 97 Me. 108 (1902), injuries received by spectator at public resort, from acts of independent contractors carrying on amusements or giving exhibitions thereon.

[1] The facts are restated.

one of law, and that it was desirable to take the opinion of the jury on the question of damages. The only question left to the jury was, to what damages was the plaintiff entitled, assuming that he was entitled in point of law to succeed. They found £50, and then by direction of Kenny, J., the jury found a verdict for the defendant, and the learned judge gave judgment for the defendant. It was agreed that the Court should be at liberty to draw all proper inferences of fact, and that if the verdict was changed the damages were to be £50.

BOYD, J. As to the first point, I am not satisfied that the defendant was guilty of actionable negligence in leaving his gun where he did. It was left by him on his own lands and not exposed to public view, and where he could not reasonably expect that it would be interfered with by anyone. The stile near to which it was left admitted to a private pass to his own house, and no person had a right to use it except members of his own household. How many persons his household consisted of does not appear, and the only one mentioned in the evidence is his own son, through whose default the unfortunate accident happened. Where his son was on the morning in question does not appear except at the time of the occurrence. Could it be contended that if the defendant had left the gun loaded and cocked in his own room in the house he would be guilty of negligence? The gun, if not interfered with, could do no injury to anyone. Suppose he had locked it up in a press, he clearly would not have been negligent, even had he left the key in the lock. The mere fact that the gun was so left would not, I think, constitute actionable negligence. Had he sent some person to fetch it to him, and omitted to inform the person that it was loaded and cocked, or had he sent a young, inexperienced child for it, I think he would be responsible, though he should have cautioned the child.

As to the second point, Mr. Sullivan contends that even though the defendant was guilty of negligence, it does not follow that he can be held responsible for injuries that have resulted, not from the direct consequence of such negligence, but from circumstances which he could not or should not reasonably anticipate, and which, in all human probability, would not have happened.

There is no evidence in this case that the defendant should reasonably have contemplated that his son would return home by the way he did, or even if he might have so contemplated that he should have reasonably thought that a boy of his age would do what he did when he found the gun.

I am of opinion the decision of Mr. Justice Kenny is correct, and that the defendant is entitled to hold the verdict which was directed for him.

GIBSON, J. Our decision depends on the answer to the question, was the misfortune the direct consequence of a danger which a prudent man ought to have perceived? It is immaterial that the specific mischief was not actually foreseen. The possessor of a dangerous article is bound to exercise diligence for the protection

of those likely to be injured by a probable use of such article. Thus, there is actionable liability where the vendor of a dangerous commodity, without warning, sells it to a purchaser presumably unaware of such danger: *Clarke* v. *Army and Navy Co-operative Society, Limited* ([1903], 1 K. B. 155); where a master entrusts to a young and unfit messenger a gun negligently left loaded which it was his duty to have made safe: *Dixon* v. *Bell* (5 M. & S. 198) (the short and unsatisfactory report of which case must be read in connection with the reports of the trial and charge of the Chief Justice in 1 Starkie, 287, and Holt, 233); where a railway company omits to guard against the known risk arising from boys being in the habit of trespassing on a particular part of their line: *McDowall* v. *Great Western Railway* ([1902] 1 K. B. 618); where a schoolmaster, being in the position of father towards his boys, leaves an explosive in a conservatory to which his pupils have access: *Williams' Case* (10 Times L. R. 41); where a person leaves a dangerous thing in a place where he ought to know it is likely to be set in motion, or used (even without authority) to the injury of anyone: *Lynch* v. *Nurdin* (1 Q. B. D. p. 35); *Clark* v. *Chambers* (3 Q. B. D. p. 339).

The principle of these cases is clear, but "the tendency of a given act to cause harm under given circumstances must be determined by experience" (Holmes on the Common Law, pp. 147, 162). As to the circumstances necessary to be known to make a man liable for the consequences of his act, "they must be such as would have led a prudent man to perceive danger, though not necessarily to see the specific harm"; Holmes, *supra*, p. 147.

The question of liability depends on the particular circumstances, including the nature of the dangerous article, the place, the persons likely to be brought in contact with it, and the time.

A hatchet, a bottle of poison labelled "poison," the same bottle unlabelled, a loaded gun, gunpowder, or dynamite, all represent articles of varying degrees of danger, and the greater the danger the higher is the standard of the diligence which the law exacts. Where the article is known, according to common experience, to exercise an allurement, temptation, or fascination even—particularly over young persons—to meddle with it, the utmost care ought to be taken. Firearms and fireworks would come within this category. So as to place: a loaded gun left on a highway or school playground, or in the hall of a house open to young children, would be dangerous in a way that the same weapon would not be if it was forgotten on a mountain, or was left in a shooting lodge tenanted by sportsmen.

The same considerations apply to the persons likely to be thrown in the way of the dangerous article, and also to the time when the occurrence takes place. Young persons are more likely to be imprudent than those of mature years; and it would be more dangerous to leave perilous articles about in the daytime than at night.

The question before us is whether, under the circumstances proved in the case, having regard to place, time, and persons likely

to see the weapon, a prudent person ought to have foreseen danger to others from the gun being left where it was, exposed on full cock. The evidence is unfortunately meagre, as plaintiff's counsel appear to have treated the question as one of pure law rather than as a question of fact depending on circumstances. The nature of the farm, the locality, distances, the inmates of the defendant's home, of whom I assume the boy was one, and their ages, the exact character and user of the path, the son's movements that day, the character of the weapon, whether muzzle-loader or otherwise, and other matters of fact, are not explained. The defendant himself was not examined.

With much of the argument of defendant's counsel I am quite unable to agree; such as that the gun being deposited on private property, the defendant was under no duty to those who might be injured by it on the high road; or that the son's going back to the road after he took up the gun could not have been in any reasonable man's contemplation. The defendant owed a duty to every one likely to be injured by a negligent use of the weapon, if a prudent person ought to have foreseen some such use; and the danger to be guarded against cannot be confused with the specific form of the negligent handling of the firearm. The master in *Dixon* v. *Bell*, 5 M. & S. 198, never thought for a moment that the girl, after laying aside the gun (which she had been led to believe was safe), would have unexpectedly taken it up again and pointed it at the child. The argument that the handling and use of the gun were trespassory and unauthorized is also inadmissible, as the cases demonstrate.

The circumstances of alleged negligence directly causing the misfortune are these: the gun was left at full cock, beside and in the view of a footpath where it could be seen by anyone using the path. It was in an inviting position to any person, particularly a young person, who noticed it; the day and hour would tend to convey that the gun was unloaded. Defendant's son, of fifteen years of age, took it up in that mistaken belief, and tricking with it caused the injury. The boy was not of tender years, but his age was such (as the decisions on the Employers' Liability Acts show, *e. g. Crocker* v. *Banks*, 4 *Times* L. R. 324), as to make it desirable not to place dangerous articles, such as loaded firearms, in his way, without caution or warning. Boys of fifteen are just as mischievous and likely to play with guns as children of ten or twelve. In *Williams' Case*, 10 Times L. R. 41, Lord Esher, after assimilating the duty of a schoolmaster to that of a father, observes:—"He was bound to take notice of the ordinary nature of young boys, their tendency to do mischievous acts, and their propensity to meddle with anything that came in their way." The same remark applies, according to my experience, to young persons no longer *in statu pupillari*, at least in the case of firearms. If the defendant had left this gun, as it was, on the high road, or entrusted it to his son without warning, he would have been, I have no doubt, responsible. I think also if he knew that

his son would come home by the path at that hour, and left it alluringly in his way, on full cock, he might also have been made answerable for actionable negligence.

In one point of view, no doubt, the occurrence was an accident. It would not have happened if the plaintiff had not been on the road in company with young Creed, or if the boy had gone home another way, or had not seen the gun, or had not been seized with the sudden desire to play with it; or if the defendant had discharged the gun at a rabbit, or if he had not forgotten all about the gun in the distraction of showing the field of potatoes to his neighbours, or if he had not taken up his newspaper to read. The question, however, is whether the circumstances were such as ought to have brought to the mind of a prudent person the knowledge that the gun was left in a dangerous place and condition where it might be meddled with by some one like his son, in ignorance that the gun was loaded. There is no question as to the principle. The difficulty is caused by the looseness and want of particularity of the evidence. My opinion has fluctuated as to whether the circumstances were such as to justify the inference that young Creed's negligent use of the gun was such a danger as defendant, who did not foresee it, ought to have foreseen, so as to connect the injury as a direct and natural consequence with defendant's negligence. The case is near the border line. With some doubt, I think that the evidence justifies the inference of direct causal relation. If so, it would appear that the understanding at the trial was that the verdict should be entered for the plaintiff. The defendant was not called to extenuate or repel any adverse inference, and his conduct is left without any attempted explanation why he could not have apprehended danger.

PALLES, C. B. The possession of a loaded gun imposes upon the person who is in possession of it an obligation to use a much greater amount of care than would the possession of the same gun were it unloaded. Where there is any danger to human life, as there nearly always is in the unguarded use of loaded weapons, it is impossible to exaggerate the amount of care thus imposed. Further, I am of opinion that a prudent person recognizes the necessity of this care, and regulates his conduct accordingly.

Now, the amount of care usually exercised by a person depends, not upon the existing material circumstances, but upon such only of those circumstances as are actually present to his mind. In my opinion, a person who, knowing a gun to be loaded, gives it into the possession of another without telling him that it is loaded, is guilty of a want of due care, because, although a prudent person ought to treat a weapon which he does not know to be unloaded as if it were in fact loaded, it appears to me impossible to say that the actual knowledge that it is loaded might not have, and indeed usually has, an effect upon his conduct different from that which the absence of that knowledge whether it was or was not loaded would have had. We must take mankind as we meet them. One

has no right so to regulate his conduct that injury may result from it to others, unless others act with an *unusual* amount of caution.

I am therefore of the opinion that the verdict should be entered for the plaintiff for the £50 damages assessed at the trial, and that judgment should be entered thereon, with costs.

The defendant appealed to the Court of Appeal.

HOLMES, L. J.[2] In most, if not in all, actions to recover damages for personal injuries caused by the negligence of the defendant, the latter is entitled to have findings of the jury—(1) as to whether he was guilty of any negligence; and (2), if so, as to whether the injuries were caused by such negligence. These questions are not always put in the same form of words. The Judge in the exercise of his discretion adapts them to the circumstances of the case, and uses the language best suited to direct attention to the material points in issue. In this case they would probably have taken some such shape as this—Was the defendant guilty of negligence in leaving his loaded gun at the place and in the position described in the evidence? If so, ought he to have contemplated that, as a result of his negligence, some person might take possession of the gun and use it so negligently as to cause injury to a third person in the neighbourhood? Were the plaintiff's injuries caused by such negligent use of the gun by Daniel Creed? * * *

Returning to the questions I have formulated, I have no doubt that it was evidence of negligence to leave the gun loaded and on full cock beside the pathway leading to defendant's residence, by which people went to and came from the house. It might have been discharged by an accidental touch or push from one of those persons, and serious injury might have resulted to him or some one else. Therefore the first question could not have been withdrawn from the jury. The second question introduces the element of a third party getting possession of the gun. There is no evidence of how the path was used, but the jury were at liberty to infer that it was used to some extent; and their knowledge of the world would tell them that a gun casually laid aside has a great fascination for some people, who seem to have a natural impulse to handle and examine it, and who often do so in so careless and unskilful a way as that it is discharged without intention on their part. I do not attach much importance to the age of the defendant's son. He was old enough to know that it was dangerous to handle the gun on full cock, which had evidently been placed where he found it for some temporary purpose by a person who had been using it; and in my own reading and experience negligence in connexion with firearms is as common in the case of men as of boys. Quite irrespective of the age of the persons who might use the path, I think that there was evidence from which the jury were at liberty to find that the defendant, when placing the gun against the fence, ought to have contemplated that it might fall into negligent

[2] The concurring opinions of Fitz Gibbons and Walker, L. J. J., are omitted.

hands. The third issue I have suggested—whether the plaintiff's injuries were caused by Daniel Creed's negligence—is, in my opinion, attended with greater difficulty than the others. For some time I was unable to account for the accident consistently with the evidence except as a consequence of the boy directing the gun towards his comrades and wilfully discharging it. If he did not actually know that it was loaded, it is difficult to believe that he did not suspect it; and although I am sure he had no intention of hitting the boys, I fear his object was to frighten them. Now I hold that in a case of this kind there is a marked distinction between a negligent act and a wilful act. A man who negligently lays aside a loaded gun ought to contemplate that it may be taken up by a person who will handle or use it negligently. But I think it would not be within reasonable contemplation that the finder of it would wilfully discharge it at another. I have, however, satisfied myself on further consideration that I am not called on to decide this question in the present case, for I am now of opinion that the jury might have inferred from the evidence that the boy desired merely to show the gun to his comrades, and that while doing so it was accidentally discharged. I know not whether the jury would have taken this view or not; but as there is some evidence to support it, I am bound to assume that it would. For those reasons I concur in the judgment of the Court.[8]

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[8] *Accord*: *Dixon* v. *Bell*, 5 M. & S. 198; 1 Starkie 287 (1816), gun, left loaded, fired in play by mulatto girl of thirteen, sent to fetch it; *Williams* v. *Early*, 10 Times, L. R. 41 (1903), bottle of phosphorus kept in conservatory by a schoolmaster exploded by reason of the meddling of a pupil and injured the plaintiff, another pupil; *cf. Swanson* v. *Crandall*, 2 Pa. S. C. 85 (1896), loaded revolver kept in unlocked bureau drawer removed and fired by defendant's five-year-old child.

Dangerous articles furnished to be dealt with by others without notice of their true character: *Farrant* v. *Barnes*, 11 C. B. N. S. 553 (1861), porter injured in handling unlabeled carboy of vitriol; *B. & A. R. R.* v. *Shanley*, 107 Mass. 568 (1871), explosives and detonators shipped by different consignors, without notice of their character, on same car; *cf. Davidson* v. *Nichols*, 93 Mass. 514 (1865). *Articles placed within reach of those who by reason of youth or other known cause, are unable to appreciate their dangerous nature, though obvious to older or more intelligent persons; Carter* v. *Towne*, 98 Mass. 567 (1868); *Binford* v. *Johnson*, 82 Ind. 426 (1882), explosives sold to children; *Akin* v. *Broadley Co.*, 92 Pac. 903 (Wash., 1907), dynamite caps thrown out on vacant lot exploded by finder, a small boy, by means of electric battery; *Makins* v. *Piggott*, 29 Can. S. C. 188 (1898), and *Harriman* v. *R. R.*, 45 Ohio 11 (1887), similar facts; *Harrold* v. *Watney*, L. R. 1898, 2 Q. B. 320, flimsy fence on highway falling with small boy, trying to climb it to reach his comrades, at play in field within; *Jewson* v. *Gatti*, 2 T. L. R. 441 (1886), child leaning on temporary fence to watch work going on within; see *Englehart* v. *Farrant*, L. R. 1897, 1 Q. B. 240, cart left in charge of small boy, who in disobedience to positive orders, drove it and ran into plaintiff's property; but see *Mann* v. *Ward*, 8 T. L. R. 699 (1901) and *Williams* v. *Koehler Co.*, 41 N. Y. App. Div. 426 (1899).

Acts intended or reasonably calculated to cause third persons to trespass on plaintiff's property: *Scott's Trustees* v. *Moss*, 17 Rettie 32 (Scot. 1889), crowd collecting outside defendant's premises to witness balloon ascension thereon; *Guille* v. *Swan*, 19 John. 381 (N. Y., 1822), crowd invade plaintiff's land to assist a balloonist to descend; *Fairbanks* v. *Kerr*, 70 Pa. 86 (1871),

CHAPTER III.

Harms Not Regarded as Legal Injury.

LYNCH *v.* KNIGHT.

In the House of Lords, 1861. 9 *H. L. C.*, 577.

Mrs. Knight brought an action in the Court of Queen's Bench in Ireland (joining her husband as plaintiff for conformity) to recover damages for slanderous words spoken by Lynch, her step-brother, to her husband imputing to her that before her marriage she had been all but seduced by Dr. Casserly, in consequence of which her husband had forced her to leave his house, whereby she lost the *consortium* of her husband. A verdict having been found for the plaintiff upon issues raised by defendant's denial of the uttering, etc., the Court of Queen's Bench overruled the defendant's demurrer to the declaration and entered judgment for the plaintiff on the verdict, which the Exchequer Chamber affirmed. The present proceeding in error was then brought.[1]

Lord *Wensleydale*:

The questions in the case are two:—1st. Whether a wife can maintain an action for the loss of the *consortium* of the husband by a wrongful act of the Defendant (joining, of course, her husband for conformity)? and 2d. Whether the loss of that *consortium* is sufficiently connected with and shown to be the consequence of the Defendant's wrongful act in this case, so as to be actionable?

There is a considerable doubt upon both these questions, but particularly on the first. I have made up my mind that no such action will lie.

To test this, suppose an action brought by the wife for false imprisonment of the husband by the Defendant, for a period of time, by which she lost the *consortium* of the husband during that time. Would such action lie? If it would not, *a fortiori*, no action could be maintained for slander attended with the special damage

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property injured by crowd collected by defendant's street oratory; but *cf. Scholes* v. *Ry.*, 21 L. T. R. n. s. 835 (1870), crowd attracted by railway wreckage.

As to duty to provide against that occasional negligence which is one of the ordinary incidents of human life and so ought to be anticipated (Gibson, J., *Murphy* v. *Ry.*, Ir. R. 1897, 2 K. B., p. 312, *cf.* Pallis, C. B., *Sullivan* v. *Creed, supra*), see *McCauley* v. *Norcross*, 155 Mass. 584 (1892); *Beveridge* v. *Kinnear and Co.*, 11 Rettie 387 (Sessions case, Scots., 1883), the defenders occupied the second story of a warehouse leased in flats, their door being off its hinges was struck by a bale of goods lowered from the flat above and fell upon the pursuer, killing him. *Held*: That "the door must be sufficiently strong not only to stand if left alone, but to meet the ordinary contingencies of danger arising from the purposes for which the building is used", Lord McLaren, p. 390; *Smith* v. *R. R.*, 46 N. J. L. 7 (1884), railway appliance so left that the careless acts of trespassers might make them unsafe.

[1] The facts are restated and the opinions of Lord Brougham, and Lord Cranworth are omitted.

of the loss of the husband's society, caused immediately by his own act.

It is certainly an objection of the greatest weight to such an action that there is no precedent or authority of any kind in favor of it.[2]

It is contended that it may be supported by analogy to the action which the husband may unquestionably maintain for an injury to the wife *per quod consortium amisit.*

I agree with Baron *Fitzgerald,* that the benefit which the husband has in the *consortium* of the wife, is of a different character from that which the wife has in the *consortium* of the husband. The relation of the husband to the wife is in most respects entirely dissimilar from that of the master to the servant, yet in one respect it has a similar character. The assistance of the wife in the conduct of the household of the husband, and in the education of his children, resembles the service of a hired domestic, tutor or governess; is of material value, capable of being estimated in money; and the loss of it may form the proper subject of an action, the amount of compensation varying with the position in society of the parties. This property is wanting in none. It is to the protection of such material interests that the law chiefly attends.

Mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone;[3] though where a material damage occurs, and is connected with it, it is impossible a jury, in estimating it, should altogether overlook the feelings of the party interested.[4] For instance, where

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[2] But *cf.* Willes, J., in *Winsmore* v. *Greenbank,* Willes, 577 (1745), and Holt, C. J., in *Ashby* v. *White, ante,* p. 3.

[3] *Accord*: *Wyman* v. *Leavitt,* 71 Me. 227 (1880); *Canning* v. *Williamstown,* 1 Cush. 451 (1848), "Pleasant emotions are not among the rights which the law safeguards," Goode, J., 91, Mo. App., p. 9. The very material view point of the common law as to what constitutes legal damage is shown also in *Bland* v. *Moseley,* Yelv. 216 (1585), cited in Aldred's case, 5 Co. 57 (1611). "For a prospect, which is a matter only of delight, and not of necessity, no action lies for stopping thereof, and yet it is a great commendation of a house if it has a long and large prospect." Wray, C. J., p. 58. As to wife's right in *consortium* of her husband, see *Ashby* v. *White, ante,* p. 3, n. 5.

[4] When a right of action be shown by proof of an act wrongful and actionable irrespective of the actual harm it causes—invasions of so-called absolute rights—or by proof, when damage is the gist of the action, of some tangible harm sustained—if the act in itself or by reason of the manner in which it is done is reasonably calculated to cause mental distress or loss of personal or family honor, the jury may give damages therefor. These elements of damage have been happily termed "parasitic"; Street, Foundations of Legal Liability, Vol. I, p. 461.

"In truth, the Courts which deny relief for injuries following fright are so impressed with the injustice of the rule that they seize on any pretext to allow a recovery—even the most frivolous legal wrong and, however slight the immediate harm may be." Goode, J., *Hickey* v. *Welch,* 91 Mo. App. 4 (1901). So it has been held that a woman has a right to the quiet and peaceful enjoyment of her home though owned by her husband, from the invasion of which trespass lies; letting in proof of her fright and its effect in aggravation of the damages, *Watson* v. *Dilts,* 116 Iowa, 249 (1902): that trespass lies for indignities to a husband's corpse, *Larson* v. *Chase,* 47 Minn. 307 (1891); and for the intrusion of a house owner into his servant's room, *Newell* v.

a daughter is seduced, however deeply the feelings of the parent may be affected by the wicked act of the seducer, the law gives no redress, unless the daughter is also a servant, the loss of whose service is a material damage which a jury has to estimate; when juries estimate that, they usually cannot avoid considering the injured honor and wounded feelings of the parent.[5]

The loss of such service of the wife, the husband, who alone has all the property of the married parties, may repair by hiring another servant; but the wife sustains only the loss of the comfort of her husband's society and affectionate attention, which the law cannot estimate or remedy. She does not lose her maintenance, which he is bound still to supply; and it cannot be presumed that the wrongful act complained of puts an end to the means of that support without an averment to that effect.

And if there were such an averment, the recovery of a compensation must be by joining the husband in the suit, who himself must receive the money, which would not advance the wife's remedy. The wife is, in fact, without redress by any form of action for an injury to her pecuniary interests.

That the loss of the comfort of the society and attention of friends by a wrongful act does not support an action for slander is fully settled by the case of *Moore* v. *Meagher*, 1 Taunt. 39; and the wife can have no right of action for a loss of the same character,

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Whitcher, 53 Vt. 589 (1880). So on the other hand it has been held that actual injury is shown by proof that plaintiff to avoid a projection from a car was forced to throw herself on the station platform, *Buchanan* v. *R. R.*, 52 N. J. L. 265 (1890); that a man had been forced to jump from a low wagon and so sustain a physical shock, *Berard* v. *R. R.*, 177 Mass. 179 (1900); that the wagon in which plaintiff was seated was carried some distance by colliding car; *Trac. Co.* v. *Lambertson*, 59 N. J. L. 297 (1896). See also *Dumee* v. *Regal*, 65 *Leg. Int.* 607 (1908); *Hess* v. *Pipe Line*, 221 Pa. 67 (1908), and *Cameron* v. *Tel. Co.*, 182 Mass. 211 (1902).

Injury to family honor and feelings is only to be considered in cases of seduction and in cases where the defendant's conduct is consciously directed against the plaintiff in his family relations, *Magee* v. *Holland*, 27 N. J. L. 86 (1858), and not where it, whether intentional or negligent, is an act which, while directed against a member of the plaintiff's family, injures the latter by depriving him of the victim's services to which he is legally entitled, *Cowden* v. *Wright*, 24 Wendell (N. Y.) 429 (1840); *Pa. R. R.* v. *Kelly*, 31 Pa. 372 (1858).

[5] While in theory the parents' right of action for the seduction of a daughter is based on loss of service—it has long been held that the relation of master and servant could be proved by showing the slightest act of service, such as pouring tea, Abbott, C. J., *Carr* v. *Clarke*, 2 Chitty 260 (1818), and in *Maunder* v. *Venn*, Moody & Malkin 323 (1829), Littledale, J., held that "proof of any acts of service was unnecessary. It is sufficient that she was living with her father, forming part of his family and subject to his control and command", and in the United States it is generally held that it is enough that, the girl being a minor, her father has a right to her services, *Gray* v. *Durland*, 51 N. Y. 424 (1873). But while the daughter need not be shown to have ever tendered any actual services, the plaintiff must still show that by reason of defendant's wrong, she has been incapacitated from serving, *Eager* v. *Grimwood*, 1 Ex. 61 (1847); and illness caused by chagrin at her desertion by her seducer is too remote, *Boyle* v. *Brandon*, 13 M. & W. 738 (1844); but see *Abrahams* v. *Kidney*, 104, Mass. 222 (1870).

though of a much higher degree, for the loss of that of her husband. To the same effect is the case of *Medhurst* v. *Balams,* cited in 1 Siderf. 397.

For these reasons, I think the wife has no remedy in the supposed case of the wrongful imprisonment of the husband; and by parity of reasoning, she can have none for being deprived of the society of her husband by the slander of another upon her character, causing him to desert her, especially when we consider that the damage in this case is immediately caused by the husband's own voluntary act.

This view of the case makes it unnecessary to consider whether the slander of the Defendant has been proved to be the cause of the loss—the desertion by the husband—so as to make the words actionable, they not being so unless they have caused a special damage. Upon this question I am much influenced by the able reasoning of Mr. Justice *Christian.* I strongly incline to agree with him, that to make the words actionable, by reason of special damage, the consequence must be such as, taking human nature as it is, with its infirmities, and having regard to the relationship of the parties concerned, might fairly and reasonably have been anticipated and feared would follow from the speaking the words, not what would reasonably follow, or we might think ought to follow.

I agree with the learned Judges, that the husband was not justified in sending his wife away. I think he is to blame; but I think that such deliberate and continued accusations, of such a character, coming from such a quarter, might reasonably be expected so to operate, and to produce the result which they did.[6]

In the case of *Vicars* v. *Wilcocks,* 8 East, 1, I must say that the rules laid down by Lord *Ellenborough* are too restricted. That which I have taken from Mr. Justice *Christian* seems to me, I own, correct. I cannot agree that the special damage must be the natural and legal consequence of the words, if true. Lord *Ellenborough* puts as an absurd case, that a Plaintiff could recover damages for being thrown into a horsepond, as a consequence of words spoken; but I own I can conceive that when the public mind was greatly excited on the subject of some base and disgraceful crime, an accusation of it to an assembled mob might, under particular circumstances, very naturally produce that result, and a compensation might be given for an act occurring as a consequene of an accusation of that crime.

I think the judgment of the Court of Exchequer Chamber should be reversed.

Judgment reversed.

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[6] The majority of the Law Lords held that the declaration showed no cause of action since the loss of the husband's consortium was not the natural result of a normal husband's belief in such an accusation against his wife, but was rather due to some personal "idiosyncrasy," p. 592, in the particular husband which led him to take this unreasonable and unjustifiable step.

BUCKNAM *v.* GREAT NORTHERN RAILWAY CO.

Supreme Court of Minnesota, 1899. 76 Minn. 373.

BUCK, J. This action comes to this court upon an appeal from an order sustaining defendant's demurrer to the complaint. The plaintiff alleges in her complaint: That at Crookston, on the evening of October 10, 1898, she, with her husband and their little child, went to the defendant's railroad station to meet the plaintiff's sister, whose arrival she then expected over one of defendant's roads. At this station the plaintiff and her husband entered one of the defendant's waiting rooms, and while there quietly seated, and properly behaving themselves, the defendant, by and through its agents and servants in charge of said station and waiting rooms, supposing that plaintiff's husband was not in fact her husband, and within the line and scope of their powers and duties, wrongfully and unlawfully charged plaintiff's husband with not being the husband of this plaintiff, and then and there ordered plaintiff's said husband to leave this plaintiff, and not to occupy the same room of said depot building with this plaintiff, and then used harsh, violent, and abusive language, and made threatening and insulting demands of and towards plaintiff's husband, in her presence, in demanding him to leave this plaintiff and said room, whereby she suffered a nervous shock, and became faint, sick, and helpless, which said illness continued for a period of one week, during which time the plaintiff's nervous system was violently agitated and deranged, whereby she suffered great pain and sickness. She further alleges in her complaint that she and her husband were rightfully in said depot building, and were properly conducting themselves, and that by reason of said wrongful acts of defendant she was damaged in the sum of $500.

Of course, the demurrer admits the material facts alleged in the complaint; but the question is, do all the facts stated constitute a cause of action? It is not claimed that the action is one in slander, and we need not discuss that view of the case. Nor does plaintiff allege the acts to have been an assault and battery. She merely alleges that the acts were wrongful and unlawful. It was not an attempt to commit assault and battery either upon her or her husband; for there was not the slightest effort to apply the least actual force to either, directly or indirectly. Nor does it appear that the servant was in close proximity to either husband or wife when he used the language alleged. And threats to commit an injury are not actionable private wrongs, nor do words constitute an assault. Cooley, Torts (2d Ed.) 29. But, if it were otherwise, the threats here alleged were not made against plaintiff, but her husband, and she would have no cause of action thereby.

The question raised is, does abusive, violent, and threatening language used to a licensee by the servant of the railroad company create a cause of action in behalf of the wife of such licensee, who merely hears such language, and thereby becomes nervous and sick?

The language was not addressed to her. It was not alleged that she had induced the person supposed not to be her husband to come into, or remain in, the ladies' waiting room. She was not accused or charged with any wrongdoing, nor were any threats made against her personally. If the plaintiff sustained a nervous shock and became sick by reason of the language used to her husband, she must have been peculiarly sensitive to such language; but, in the practical workings of everyday life, people have a right to assume that others are of ordinary physical and mental strength, and not specially nervous or emotional, and liable to be made sick by language not addressed to them, but to other persons.

Many vexatious, annoying, and humiliating things frequently occur in every community that are not actionable. Such things may affect those peculiarly sensitive, while to others they would seem only a matter of indifference. The latter, unaffected thereby, could not maintain an action for a personal wrong; and, if the former should be permitted to do so, we should have litigated a question of comparative nervousness and sensitiveness as an element of damages, and the courts burdened with vexatious litigation where there was neither slander, physical injury, negligence, nor intent to injure or frighten a third person, and where the defendant might be entirely unaware of the physical condition of the person so alleged to be injured. There may have been cases, in actions of tort, where substantial damages have been recovered for mental suffering,—as cases of assault without battery, false imprisonment where there was no physical contact, breach of promise of marriage, and seduction, where a parent brings the action; but, as was said in *Larson* v. *Chase*, 47 Minn. 307, at page 311:

"For the law to furnish redress, there must be an act which, under the circumstances, is wrongful; and it must take effect upon the person, the property, or some other legal interest of the party complaining. Neither one without the other is sufficient. This is but another way of saying that no action for damages will lie for an act which, though wrongful, infringed no legal right of the plaintiff, although it may have caused him mental suffering."

For the servant in this case to use abusive language to the husband of plaintiff was not any infraction of her legal right, and hence not a legal wrong to her.

Counsel, in his argument, does not make any point that the language used was actionable because it was used towards her husband as such, but assumes the broad ground that, where a railway company is charged with the duty of maintaining a quiet and orderly waiting room, it is actionable for one of its employees to use violent, abusive, and insulting language to a third person in the presence of a female occupant, when such language and threats naturally tend to, and actually do, frighten such occupant, from the effects of which she became ill. This assumes that the threats and abusive language used to other persons were the proximate cause of the sickness and mental suffering. Damages sustained by a wrongful act must be the natural result of that act; that is,

it must be the proximate cause. Within these rules, the language of the defendant's servant to a third person was not the proximate cause of her sickness. She apprehended no danger to herself; at least she could not reasonably do so. She was not in any place of peril. If an action of this kind can be maintained, we do not see why nervous and sensitive persons present at a riot or public disturbance cannot have a cause of action, if thereby they become nervous and sick, or suffer mentally, even if they do not receive bodily injury. It is evident from the plaintiff's complaint that her only injury proceeded from fright and nervous excitement and distress, and, as the injury was not the natural or proximate result of the act complained of, the order appealed from should be affirmed.

There is nothing in the case of Purcell *v.* St. Paul City Ry. Co., 48 Minn. 134, 50 N. W. 1034, cited by the appellant, which contravenes the views herein expressed. There the injured party, plaintiff, was a passenger on a street-railway car, and by its negligence the company placed plaintiff in a place of great peril, and fear of death or great bodily injury, causing such a shock that she was thrown into violent convulsions and subsequent illness. That case is not analogous to this.

Order affirmed.[1]

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[1] *Accord*: *Phillipps* v. *Dickerson*, 85, Ill. 11 (1877), violent assault on third party in ignorance of plaintiff's proximity and advanced pregnancy; *Haas* v. *Metz*, 78, Ill. App. 46 (1898), hysteria caused by angry questions about canning peaches; *Braun* v. *Craven*, 175 Ill. 401 (1898), plaintiff seated with back to door startled by defendant entering noiselessly and speaking to her suddenly and violently—"It could not have been reasonably anticipated that any injury therefrom could reasonably have resulted", Phillips, J., p. 420. *C. C. & St. L. R. R.* v. *Stewart*, 24 Ind. App. 374 (1899), a mother frightened at the peril to which the defendant's negligence exposed her daughter; *Sperier* v. *Ott*, 116 La. 1087 (1906), illness caused by wrongful arrest of young children; *Mahoney* v. *Dankwart*, 108 Iowa, 321 (1899); anxiety for safety of mother exposed to defendant's negligent blasting; *Wyman* v. *Leavitt*, 71 Me. 227 (1880), fright at peril of children, due to defendant's blasting, not recoverable as special damage in action of trespass for invasion of land by stones thrown thereby upon it; *Nelson* v. *Crawford*, 122 Mich. 466 (1899), defendant dressing up as a woman "to have a little fun" frightened pregnant woman and caused miscarriage; *Sanderson* v. *R. R.*, 88 Minn. 162 (1902), injuries due to fright at unlawful attempt to remove plaintiff's children from train; *Renner* v. *Canfield*, 36 Minn. 90 (1886), plaintiff, frightened by shot fired at dog, miscarries; *Fox* v. *Borkey*, 126 Pa. 164 (1889), plaintiff, frightened by blasting; *R. R.* v. *Barry*, 98 Tex. 248 (1904), pregnant woman, frightened by wrongful flooding of husband's premises, miscarries; *Smith* v. *Johnson & Co.* (unreported) citing *Dulieu* v. *White & Sons*, L. R. 1901, 2 K. B. 669, p. 675, man made ill by seeing another killed. See also, Allen, J., & Holmes, C. J., *Spade* v. *R. R.*, 168 Mass. 285, p. 289 and 172 Mass. 488, p. 491. See 41 Am. Law Reg. N. S. p. 168, n. 63—but *cf. Gulf, Etc. R. R.* v. *Coopwood*, 96 S. W. (Tex. Civil App. 1906), 103; 16 Tex. Ct. Rep. 354, where a mother recovered damages for the mental distress and anxiety caused her by the trainmen's failure to render her the assistance necessary to remove her desperately ill daughter from the train; and *Spearman* v. *McCrary*, 58 So. 927 (Ala. 1912), a mother recovered damages for injuries due to fright caused by witnessing the danger to which her children were negligently subjected. In *Yates* v. *So. Kirby Collieries etc.*, L. R. 1910, 2 K. B. 538, a master was held liable for neurasthenia caused by the shock of witnessing the shocking injuries of a fellow workman, under the Workmen's Compensation Act of 1906 which eliminates fault as a basis of liability. In *Gillespie* v. *R. R.*, 178 N. Y. 347, it was held that a railway owes to its passengers a duty to carry them not merely

WILKINSON *v.* DOWNTON.

In the Queen's Bench Division, 1897. *L. R.* 2 *Q. B.,* 57.

Case came up for further consideration before WRIGHT, J., after a trial by jury and verdict for plaintiff: assessing the expense of railway fares at 1*s.* 10½*d.* and damages for the injury caused by the nervous shock at 100*l.*

WRIGHT, J. In this case the defendant, in the execution of what he seems to have regarded as a practical joke, represented to the plaintiff that he was charged by her husband with a message to her to the effect that her husband was smashed up in an accident, and was lying at The Elms at Leytonstone with both legs broken, and that she was to go at once in a cab with two pillows to fetch him home. All this was false. The effect of the statement on the plaintiff was a violent shock to her nervous system, producing vomiting and other more serious and permanent physical consequences at one time threatening her reason, and entailing weeks of suffering and incapacity to her as well as expense to her husband for medical attendance. These consequences were not in any way the result of previous ill-health or weakness of constitution; nor was there any evidence of predisposition to nervous shock or any other idiosyncrasy.* * *

As to this 1*s.* 10½*d.* expended in railway fares on the faith of the defendant's statement, I think the case is clearly within the decision in *Pasley* v. *Freeman* (1789), 3 T. R. 51. The statement was a misrepresentation intended to be acted on to the damage of the plaintiff.

The real question is as to the 100*l.*, the greatest part of which is given as compensation for the female plaintiff's illness and suffering. It was argued for her that she is entitled to recover this as being damage caused by fraud, and therefore within the doctrine established by *Pasley* v. *Freeman* (1789), 3 T. R. 51, and *Langridge* v. *Levy* (1837), 2 M. & W. 519. I am not sure that this would not be an extension of that doctrine, the real ground of which appears to be that a person who makes a false statement intended to be acted on must make good the damage naturally resulting from its being acted on. Here there is no injuria of that kind. I think, however, that the verdict may be supported upon another ground. The defendant has, as I assume for the moment, wilfully done an act calculated to cause physical harm to the plaintiff—that is to say, to infringe her legal right to personal safety, and has in fact thereby caused physical harm to her. That proposition without more appears to me to state a good cause of action, there being no justification alleged for the act. This wilful injuria is in law malicious, although no malicious purpose to cause the harm which was caused nor any motive of spite is imputed to the defendant.

It remains to consider whether the assumptions involved in the proposition are made out. One question is whether the defendant's act was so plainly calculated to produce some effect of the kind which was produced that an intention to produce it ought to be im-

safely but courteously and peacefully and is liable for mental distress caused by rudeness of employees, but see *aliter* as to innkeepers and guests, *De Wolf v. Ford,* 104 N. Y. Supp. 876 (1907).

puted to the defendant, regard being had to the fact that the effect was produced on a person proved to be in an ordinary state of health and mind. I think that it was. It is difficult to imagine that such a statement, made suddenly and with apparent seriousness, could fail to produce grave effects under the circumstances upon any but an exceptionally indifferent person, and therefore an intention to produce such an effect must be imputed, and it is no answer in law to say that more harm was done than was anticipated, for that is commonly the case with all wrongs. The other question is whether the effect was, to use the ordinary phrase, too remote to be in law regarded as a consequence for which the defendant is answerable. Apart from authority, I should give the same answer and on the same ground as the last question, and say that it was not too remote. Whether, as the majority of the House of Lords thought in *Lynch* v. *Knight* (1861), 9 H. L. C. 577, at pp. 592, 596, the criterion is in asking what would be the natural effect on reasonable persons, or whether, as Lord Wensleydale thought, the possible infirmities of human nature ought to be recognized, it seems to me that the connection between the cause and the effect is sufficiently close and complete.

[The court then discusses *Coultas* v. *R. R.*, L. R. 13, A. C., 222,[1] which it holds is not an authority on which this case ought to be decided.]

A more serious difficulty is the decision in *Allsop* v. *Allsop*, 5 H. & N. 534, which was approved by the House of Lords in *Lynch* v. *Knight*, 9 H. L. C. 577. In that case it was held by Pollock, C. B., Martin, Bramwell, and Wilde BB., that illness caused by a slanderous imputation of unchastity in the case of a married woman did not constitute such special damage as would sustain an action for such a slander. That case, however, appears to have been decided on the ground that in all the innumerable actions for slander there were no precedents for alleging illness to be sufficient special damage, and that it would be of evil consequence to treat it as sufficient, because such a rule might lead to an infinity of trumpery or groundless actions. Neither of these reasons is applicable to the present case. Nor could such a rule be adopted as of general application without results which it would be difficult or impossible to defend. Suppose that a person is in a precarious and dangerous condition, and another person tells him that his physician has said that he has but a day to live. In such a case, if death ensued from the shock caused by the false statement, I cannot doubt that at this day the case might be one of criminal homicide, or that if a serious aggravation of illness ensued damages might be recovered. *Judgment for plaintiff.*[2]

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[1] See *Mitchell* v. *R. R.* and *Purcell* v. *R. R.*, *post.*

[2] *Accord*: *Hill* v. *Kimball*, 76 Tex. 210 (1890), a landlord knowing of the pregnancy and proximity of the wife of his tenant made a violent and boisterous attack on some negroes. "Defendant was also aware that any undue excitement to a lady in that condition was likely to produce serious injury to her health." Gaines, J., p. 215.

While invasions of property do not usually involve injury to the owner's

CHAPTER IV.

Proximate and Remote Cause.

SECTION 1.

Concurrent Cause.

WASHINGTON AND GEORGETOWN RAILROAD CO. *v.* HICKEY.

Supreme Court of United States, 1897. 166 *U. S.,* 521.

On the trial evidence was given tending to show that the plaintiff was a passenger on a crowded open car of the defendant horse railroad company; upon its coming to a point where its tracks intersect those of the defendant steam railroad, the steam cars were seen approaching at a rapid rate; the street car stopped, as the railroad safety gates were being lowered; then they were raised and the street car started across, but after it got on the steam railroad tracks the gates were again lowered, shutting in the street car. The steam train was all the time moving quite rapidly toward the crossing and the passengers seeing this, they rushed in commotion to escape from the car, pushing Mrs. Hickey off the car and injuring her. The gates being again raised, the driver whipped up his horses and the car got across before the train came to the crossing.[1]

MR. JUSTICE PECKHAM delivered the opinion of the court.

This action was brought by the defendants in error, who are husband and wife, to recover from the defendants (the one being a horse car company and the other a steam railroad company) damages for personal injuries sustained by the wife on account of the alleged negligence of the servants of the defendants. The facts of the negligence were alleged in the declaration, and each defendant filed a plea of not guilty, upon which issue was joined. A trial was had in the Supreme Court of the District of Columbia, resulting in a verdict for the plaintiffs, the judgment upon which having been affirmed by the Court of Appeals, the defendants have brought the case here for review.

The refusal of the court to charge as requested[2] was excepted to and is now made a ground for the reversal of the judgment by

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feelings—*White* v. *Dresser,* 135 Mass. 150 (1883), if the defendant knows of facts rendering fright or other mental distress likely, it and its effects may be proved in aggravation of damages. So where a landlord wrongfully and noisily tore down the tenant's house, knowing that the latter's wife was dangerously ill within, it was held that the tenant might recover damages for the death caused by the shock and fright so occasioned, *Preiser* v. *Wielandt* and *Roth,* 48 N. Y. App. Div. 569 (1900).

[1] This statement of facts is condensed from that given in the opinion of the Court, p. 522.

[2] The substance of the instructions requested sufficiently appears from the argument of counsel quoted in the opinion of the Court.

this court. In his argument here the counsel for the horse car company said: "The gist of all of which instructions is that no matter whether it was negligence or not for the street car company to drive its car upon the steam car track, yet, if the jury found that it was the lowering of the gates (and not the negligence, if it were such, in going upon the steam track) that caused the injury, then they should find for the street car company. The gist of the instructions is that it was the lowering of the gates that caused the injury."

The vice in all this argument, as we think, consists in the attempted separation into two distinct causes (remote and proximate) of what in reality was one continuous cause. It leaves out of view the action of the driver of the street car as to whether he was or was not negligent, provided the jury should say the accident would not have happened if the gates had not been improperly lowered. That is, although the jury should find that the act of the driver was negligent, and by reason of that negligence his car was placed in such a position that the negligent lowering of the gates concurred with his action in producing the injury, the street car company must be absolved, if the jury should be able to say that but for such negligent lowering of the gates (which the driver of the horse car had no reason to foresee) the accident would not have happened. This is an attempt to separate that which upon the facts in this case ought not to be separated. The so-called two negligent acts were, in fact, united in producing the result, and they made one cause of concurring negligence on the part of both companies. They were in point of time substantially simultaneous acts and parts of one whole transaction, and it would be improper to attempt a separation in the manner asked for by the counsel for the horse car company.

The alleged negligence of the horse car driver consisted in endeavoring to cross at all, under the circumstances, until after the passage of the train on the steam railroad. Upon the evidence the jury would have been justified in finding that he had no right to indulge in any close calculation as to time in attempting to cross the steam car tracks before the train thereon reached the point of intersection; that it was a negligent act in making the attempt under a state of facts where the least interruption or delay in the crossing over by the horse car would probably lead to an accident. In this view of the evidence and finding, it was not material that the driver had no ground to expect the particular negligent act of lowering the gates and the consequent obstruction to his passage across the steam car tracks, or that he would have had time to cross if the delay thus occasioned had not occurred. The jury had the right to find it was negligent to cause his car to be so placed that any delay might bring on a collision. The apparent liability to accident, if any delay should occur from any cause whatever, was plain, and such fact would support a finding of negligence in attempting to cross before the steam car train had passed. In such case it would be no excuse that the particular cause of a possible or probable delay, viz., the lowering of the gates, was not anticipated. The important fact was that there existed a possibility of delay, and, there-

fore, of very great danger, and that danger ought to have been anticipated and avoided. A delay might be occasioned at that time by an almost infinite number of causes; the horses might stumble, the harness might give way, the car might jump the track; a hundred different things might happen which would lead to a delay, and hence to the probability of an accident. It was not necessary that the driver should foresee the very thing itself which did cause the delay. The material thing for him to foresee was the possibility of a delay from any cause, and this he ought naturally to think of, and a failure to do so, and an attempt to cross the tracks, might be found by the jury to be negligence, even though he would have succeeded in getting across safely on the particular occasion if it had not been for the action of the gatekeeper in wrongfully lowering the gates. The act of the driver being a negligent act, and that act being in full force and in the very process of execution at the time the accident occurred, which accident would not have happened but for such negligent act, the fact that another negligent act of a third party contributed to the happening of the accident would not absolve the horse car company. The negligent act of the horse car driver joined with and became a part of the other act in wrongfully lowering the gates, as described, and both acts constituted but one cause for the commotion which naturally resulted therefrom, and on account of both of these acts, as parts of a whole transaction, the injury occurred.[3]

Upon an examination of the whole case, we find no error prejudicial to either company, and the judgment against both must be *Affirmed.*[4]

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[3] A part of the opinion is omitted.

[4] See *accord, Ashborn* v. *Waterbury,* 70 Conn. 551 (1898); *Newcomb* v. *R. R.,* 169 Mo. 409 (1902); *Mahony* v. *R. R.,* 57 Pa. 187 (1868); *Burrell Township* v. *Uncapher,* 117 Pa. 353 (1887); *Sheridan* v. *R. R.,* 36 N. Y. 39 (1867), and Cooley, Law of Torts, 3rd Edition, 1906, p. 90, n. 16.

See as to the existence of any distinction between concurrent and successive causes—*Herr* v. *Lebanon,* 149 Pa. 222 (1892), p. 227—*cf. Burrell Township* v. *Uncapher,* 117 Pa. 353 (1887), p. 363, both *per* Green, J., on very similar facts; and see *Lake* v. *Milliken,* 62 Me. 240 (1873), and *Ricker* v. *Freeman,* 50 N. H. 420 (1870).

The defendant's act is considered an efficient concurring cause if while it is still in operation and force the injury occurs, unless the same result not merely *might* but *must* have happened had the defendant's act not been done—*Davis* v. *Garrett,* 6 Bing. 716 (1830); *B. & P. R. R.* v. *Reaney,* 42 Md. 117 (1874)—Alvey, J., p. 137; see also Fenner, J., in *Reynolds* v. *T. & P. R. R.,* 37 La. Ann. 694 (1885), p. 698: "where the negligence of the defendant greatly multiplies the chances of accident to the plaintiff, and is of a character naturally leading to its occurrence, the mere possibility that it might have happened without the negligence is not sufficient to break the chain of cause and effect between the negligence and the injury" (plaintiff fell down badly lighted stairs; defendant contended that she might have fallen even had they been well lighted), but see *Taylor* v. *Yonkers,* 105 N. Y. 202 (1887) where, citing *Ring* v. *Cohoes,* 77 N. Y. 83-88 (1879) and *Searles* v. *R. R.,* 101 N. Y. 661 (1886, a case not of concurrent but alternative causes), it was held that since plaintiff must show that had it not been for defendant's fault he would not have been injured—he could not recover for injuries received from stepping upon ice upon a pavement negligently built on a slope; *acc. Laidlaw* v. *Sage,* 158 N. Y. 73 (1899), p. 101.

MOORE *v.* INHABITANTS OF ABBOT.

Supreme Judicial Court of Maine, 1850. *32 Maine, 46.*

Case, for an injury sustained by the female plaintiff, through a defect in the highway of the defendant town. She was riding on the highway in a wagon.

Evidence was introduced to the jury by the respective parties, as to the existence of the defect, the happening of the injury by means of it, and as to the care and prudence used by the plaintiffs. Some evidence tended to show the breaking of a ring in the harness, at, or just prior to the accident.

Among other legal positions, SHEPLEY, C. J., presiding, instructed the jury, *that* if they should be satisfied the accident happened by the joint effect of a defect in the way and a defect in the harness rendering it unsuitable or unsafe, although such defect in the harness was not known, and the plaintiffs were not in fault for want of knowledge, the plaintiffs would not be entitled to recover. To these instructions, the plaintiffs excepted.

SHEPLEY, C. J.: The female plaintiff received a bodily injury while traveling on a highway, which the defendants were by law obliged to make safe and convenient. The statute c. 25, §89, provides, if any person shall receive any bodily injury "through any defect or want of repair" of such way, he may recover "the amount of damage sustained thereby."

Persons may be injured while traveling on the highways without being blame-worthy and without the fault of those who are required to make the ways safe and convenient, or of others. In such cases the risk is their own. They must bear their own misfortunes. They cannot call upon others as insurers of their safety.

They may also suffer injury, while traveling upon highways, which are not safe and convenient, and the injury may not be occasioned by the want of repair, or by their own want of ordinary care to avoid it. In such case it would be quite clear, that they could not recover damages of those who were in fault by neglecting to keep the way safe and convenient. The statute was not designed to relieve them from damages thus occasionel by making those responsible, whose duty it was to have repaired the ways.

An injury may also be occasioned by the united effect of a defect in the way and of some other cause, and in such case the party injured cannot recover of those whose duty it was to keep the way in repair, because he does not prove, that the injury was occasioned through or by reason of such want of repair. To enable him to recover he should prove that the injury was thus occasioned, that is, that it was entirely occasioned through such want of repair; for the statute was not intended to impose upon towns the burden of making compensation for injuries not occasioned by their own neglect of duty; was not intended to make them assume any portion of the risk of traveling not occasioned by their neglect. An injury cannot be determined to have been occasioned by a defect in the

way so long as it remains certain, that some other cause contributed to produce that injury. Such is the law, when the injury is alleged to have been occasioned by the negligence of another person. And numerous cases show, that the same rule is applicable, when the action is brought against a town to recover damages for an injury occasioned by a defect in a highway.

In the case of *Knapp* v. *Salsbury,* 2 Camp. 500, Lord Ellenborough instructed the jury, "if what has happened arose from inevitable accident or from the negligence of the plaintiff, to be sure the defendant is not liable."

In the case of *Plushwell* v. *Wilson,* 5 C. & P. 375, the jury were instructed, "that if the plaintiff's negligence in any way concurred in producing the injury, the defendant would be entitled to the verdict."

In the case of *Williams* v. *Holland,* 6 C. & P., the jury were instructed, "if the injury was occasioned partly by the negligence of the defendant and partly by the negligence of the plaintiff's son, the verdict could not be for the plaintiff." * * *

Is the reason for the rule so thoroughly established, that the plaintiff cannot recover when the injury was occasioned by the neglect of the defendant, and by his own want of ordinary care, that he is estopped by his want of ordinary care? By no means; for then he could not recover, if he was not in the exercise of ordinary care although it did not in any degree contribute to cause the injury. The rule deducible from the decided cases is stated in the case of *Kennard* v. *Burton,* 25 Maine, 39; "if the party, by the want of ordinary care, contributed to produce the injury, he will not be entitled to recover. But if he did not exercise ordinary care, and yet did not by the want of it contribute to produce the injury, he will be entitled to recover." The last position is correct, because in such case, the sole cause of the injury is imputable to another, who cannot complain of the negligence of the plaintiff, which occasioned no injury, produced no effect.

And for the like reason, if the sole cause of the injury was not imputable to another, the plaintiff would not be entitled to recover, although it might not be imputable to his own negligence, but to "inevitable accident."[1]

In the case of *Smith* v. *Smith,* 2 Pick. 621, PARKER, C. J. gives the true reason, why one not in the exercise of ordinary care, cannot recover against one guilty of negligence; he says, "and where he has been careless, it cannot be known, whether the injury is wholly imputable to the obstruction, or to the party complaining."

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[1] See *accord,* Shaw, C. J., *Marble* v. *Worcester,* 4 Gray, Mass. 395 (1855) at p. 397, stating, as a rule of general application, that there is no legal liability for any harm of which defendant's act is not the sole or at least greatly preponderating cause, and *Biglow* v. *Reed,* 51 Me. 325 (1863), where this rule is stated as applying to action against a man leaving a sleigh untied in street. In later Maine cases, however, this doctrine is held applicable only where "the action is a statutory one against a town, it is not applicable to a common law action against an individual", Emery, J., *Neal* v. *Rendall,* 100 Me. 574 (1905), collision between vehicles; *Lake* v. *Milliken,* 62 Me. 240 (1873).

The conclusion cannot therefore be avoided, that the plaintiff must prove, that the injury was occasioned by the default of the defendant alone, and not by that default and some other cause, for which the defendant is not responsible, without a disregard of the whole class of cases, which decide that the plaintiff cannot recover, when the injury is occasioned by the default of the plaintiff, and of defendant.

The doctrine, that the plaintiff can only recover when the injury complained of did not happen by inevitable accident, or by the want of ordinary care on the part of the plaintiff, or by a combination of these with the want of repair of a highway, appears to be the only one consistent with sound reasoning, and to have been generally received and acted upon. It is difficult to perceive how any other doctrine can be received, without producing the effect to make towns liable to pay damages for injuries not proved to have been occasioned by their neglect. No proof can establish that fact, so long as it appears that some other cause contributed to produce the result. It was accordingly decided in *Libbey* v. *Greenbush*, 20 Maine, 47, that "the plaintiff had not fully established his right to recover, so long as this question was left in doubt."

Exceptions overruled.[2]

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[2] *Accord*: *Moulton* v. *Sandford*, 51 Me. 127. Similar statutes are similarly construed in Rhode Island, *Ward* v. *Mahogany*, 16 R. I. 479, and Massachusetts, *Marble* v. *Worcester*, 4 Gray, 395 (1855), though the later Massachusetts cases modify its doctrine to this extent, that the township is only relieved from liability where the concurring cause is culpable or abnormal but not if it be innocent and an ordinary incident of travel, *Adams* v. *Carlisle*, 21 Pick. 146 (1838); *Pratt* v. *Weymouth*, 147 Mass. 245 (1888); *Hayes* v. *Hyde Park*, 153 Mass. 514 (1892), and *Block* v. *Worcester*, 186 Mass. 526 (1904); *cf.*, injuries received by plaintiff's act done to avoid peril caused by defective highway, *Flagg* v. *Hudson*, 142 Mass. 280 (1886); *Lund* v. *Tyngsborough*, 11 Cush. 563 (1853). The plaintiff must be in control of his horse, it is no excuse that the horse had become unmanageable through no fault of his, *Fogg* v. *Nahant*, 98 Mass. 578 (1867), 106 Mass. 278, see also *McKelwin* v. *London*, 22 Ont. 70 (1892). But substantially similar statutes are more liberally construed in the other New England States. Connecticut, *Baldwin* v. *Greenwood Turnpike Co.*, 40 Conn. 244 (1873); New Hampshire, *Winship* v. *Enfield*, 42 N. H. 197 (1860); "where the plaintiff is in no fault but the injury is the combined result of accident and of the defendant's neglect to repair the road, the town must be held liable," Sargent, J., p. 217; *Hardy* v. *Keene*, 52 N. H. 370 (1872). Where as is usually the case throughout the United States outside of New England, a municipality is liable at common law for defects in highways, these cases, announcing as they do, a doctrine peculiar to actions on this particular class of statute, [see Emery, J., *Neal* v. *Rendall*, 100 Me. 574 (1905),] have no weight as authority. But while in general the more liberal view of *Winship* v. *Enfield*, *supra*, is followed, [*City of Lacon* v. *Page*, 48 Ill. 499 (1868); *Ring* v. *Cohoes*, 77 N. Y. 83 (1879); *Brennan* v. *St. Louis*, 92 Mo. 482 (1887). So in England, where the liability is statutory—*Bull* v. *Shoreditch*, 19 Times, L. R. 64 (1902)] the New England cases are often cited and discussed as authoritative—*Denver* v. *Utsler*, 38 Col. 300 (1907); *McKelvin* v. *London*, 22 Ont. 70 (1892); and see *Shaffer* v. *Jackson Twp.*, 150 Pa. 145 (1892), decided on authority of *Hayes* v. *Hyde Park*, *supra*, against the current of Pennsylvania decision.

The cases in Pennsylvania are in a state of some confusion due probably to the influence of the Massachusetts decisions. In *Jackson Twp.* v. *Wagner*, 127 Pa. 184 (1889), it was held that if the road was not safe for ordinary

SECTION 2.

Direct Consequences.

WATSON *v.* RINDERKNECHT.

Supreme Court of Minnesota, 1901. 82 *Minnesota*, 235.

COLLINS, J.: Civil action to recover damages alleged to have been sustained by plaintiff by reason of an assault and battery committed by the defendant. The verdict was for the latter, and from an order denying plaintiff a new trial this appeal was taken. * * *

The court also erred in some of its rulings when receiving testimony. The defendant, young and vigorous, received no injuries, while the plaintiff, a feeble man in the neighborhood of sixty years of age, was so injured that he was unable to leave his house for two weeks, and during that time was daily attended by a physician. In 1863, while serving in the army, he had been injured by the explosion of a shell, for which injury he was receiving a pension at the time of the assault and battery. His counsel attempted to show as part of his case the physical condition he was in just prior to the assault, arising from this injury, and how and to what extent his condition had been affected by the acts of the defendant. The court held this evidence inadmissible at that time, and that it was proper in rebuttal only. It subsequently ruled that such testimony was in-

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travel, the fact that the fright of the plaintiff's horse, however caused, contributed to the accident did not relieve the township from liability, *acc. Merkoffer* v. *Macungie*, 71 Pa. 276 (1872); *Hey* v. *Phila.*, 81 Pa. 44 (1876); *Hart* v. *Pittston*, 89 Pa. 389 (1873); *Burrell Twp.* v. *Uncapher*, 117 Pa. 353 (1887); *Yoders* v. *Amwell*, 172 Pa. 447 (1896); *Boone* v. *Township*, 192 Pa. 206 (1899), and *Davis* v. *Snyder*, 196 Pa. 273 (1900). Many of the cases in which the eccentric conduct of a horse out of control, through fright or other causes, contributing to the accident has been held to relieve the township from liability, might well have been decided either on the ground that the plaintiff's own fault had in part at least caused the frght, etc., of his horse, (*Herr* v. *Lebanon, supra* and *Willis* v. *Armstrong*, 183 Pa. 184 (1897) are so explained by Green, J., in *Boone* v. *Twp.*, 192 Pa. 206 *supra*) or on the point held decisive by Williams, J., in *Jackson* v. *Wagner, supra*, p. 197, that the road was "on that day and place in a condition that made it a suitable and sufficient road for travel conducted in an ordinary manner." If safe for all normal incidents of travel, the defendants are not negligent in failing to anticipate extraordinary accidents of traffic, and in failing to make a road so perfect that no harm could result therefrom. *Herr* v. *Lebanon*, 149 Pa. 222 (1891); *Kiefer* v. *Hummelstown*, 151 Pa. 304 (1892); *Heister* v. *Fawn*, 189 Pa. 253 (1899); *Habecker* v. *Lancaster*, 9 Pa. S. C. 553 (1899); *cf. La Londe* v. *Peake*, 82 Minn. 124 (1901). In determining the extent of the duty of the municipality the nature and location of the road, the amount of travel on it and (probably) the financial resources of the municipality must be considered—*Davis* v. *Snyder*, 196 Pa. 273 (1900).

Many cases, however, are susceptible of neither explanation and seem to be flatly *contra* to *Jackson* v. *Wagner, supra*; *Shaeffer* v. *Jackson*, 150 Pa. 145 (1892), largely based on *Hayes* v. *Hyde Park*, 153 Mass. 514 *supra* and other cases dealing with the purely statutory liability of Massachusetts towns; *Card* v. *Columbia*, 191 Pa. 254 (1899), and *Cage* v. *Franklin*, 11 Pa. S. C. 533 (1899), where a curious distinction is drawn between the acts of a frightened and of a balky horse.

competent for any purpose, and refused to permit plaintiff to show whether his condition at the time of the trial was due to injuries for which defendant was responsible.

The burden was upon the plaintiff to prove such of his injuries as were the direct and proximate result of defendant's acts, and in doing this it was proper to show in what respect, and to what extent, his present condition could be attributed to the assault and battery, and what could be more properly established as the result of his army experience. The injury for which plaintiff was receiving a pension affected his health and enfeebled him unquestionably, but that fact would not deprive him of the right to recover the direct consequences of the defendant's tort,—to recover such damages as could be shown to be the direct result of that wrong. That the plaintiff was in ill health, no matter what the cause, was no excuse for defendant's acts, and would not relieve him from resulting consequences. The defendant could not be held to respond for injuries arising out of other causes, but as to those for which he was the efficient cause an action would lie.

The rule is that the perpetrator of a tort is responsible for the direct and immediate consequences thereof, whether they may be regarded as natural or probable, or whether they might have been contemplated, foreseen, or expected, or not. It is not necessary, to the liability of a wrongdoer, that the result which actually follows should have been anticipated by him. It is the general character of the act, and not the general result, that the law primarily regards in this connection. 8 Am. & Eng. Enc. (2d Ed.), 598, 602, and cases cited. This rule has been adopted in this state in an action for personal injuries arising out of the negligence of a common carrier (*Purcell* v. *St. Paul City Ry. Co.*, 48 Minn. 134, 139, 50 N. W. 1034), where it was said:

"But when the act or omission is negligence as to any and all passengers, well or ill, any one injured by the negligence must be entitled to recover to the full extent of the injury so caused, without regard to whether, owing to his previous condition of health, he is more or less liable to injury."

It was error to exclude testimony tending to show that the injuries received by the plaintiff in the army had been aggravated, intensified, and increased by reason of the defendant's unlawful act, and to just what extent. * * *

Order reversed, and a new trial granted.[1]

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[1] *Accord*: *Mann Boudoir Co.* v. *Dupre*, 54 Fed. 646 (C. C. A. 5th Circ., 1893), miscarriage by woman, not obviously pregnant, due to illegal expulsion from sleeping car; *Vosburg* v. *Putney*, 80 Wis. 523 (1891), slight abrasion of skin wilfully inflicted, led, owing to condition of plaintiff's blood, to loss of leg.

Accord: *Where the defendant's act was not wilful or wanton but negligent only*: *Armstrong* v. *Montgomery Ry.*, 123 Ala. 233 (1898), death resulting from slight laceration of hand negligently crushed; *Balto. Ry.* v. *Kemp*, 61 Md. 74 (1883), cancer resulting from slight blow due to negligent operation of defendant's car; *Clifford* v. *R. R.*, 9 Col. 333 (1886), paralysis from negligent exposure; *Brown* v. *R. R.*, 54 Wis. 342 (1882), miscarriage

FITZHERBERT DE NATURA BREVIUM.

Writ de Trespass sur le Case (1547). 93 *H.*

If a man doth distrain any prior's or other prelate's horse, whereupon he is riding in his journey, for or upon any contract, debt, or trespass done by him or his predecessor, when he might have distrained or attached him by other goods or chattels of the said prior or prelate, then he shall have an action upon the case, which is such:

If A. prior, etc., put B. etc., to shew wherefore, seeing that it is not lawful for any person to distrain a prelate, nobleman, or any ecclesiastical person of our realm, passing any where through the same realm by his proper equipage, by reason of any contract or debt, when he hath there other beasts and chattels, whereby reasonable distress may be made upon him; the aforesaid B. distrained the said prior passing through the town of C. by reason of a certain contract between S. formerly prior of, etc., predecessor to the aforesaid prior, and the aforesaid B., a great while since made, as it is said, by a certain horse his palfrey, although he could have then made reasonable distress upon him by other beasts and chattels there, and maliciously detained that palfrey for a long time, by which his weighty business, for which he made his passage, were undone; and other wrongs, etc.[1]

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due to over exertion by pregnant woman negligently directed to leave train three miles from her destination; *contra, Pullman Co.* v. *Barber*, 4 Col. 344 (1878), woman in delicate health forced by fire to leave car, and see Stone, J., dissenting, *Balto. Ry.* v. *Kemp*, 61 Md. 83.

So where by reason of his weakened physical condition plaintiff is rendered susceptible to some new and different disease; T. H. & I. R. R. v. *Buck*, 96 Ind. 346 (1884), p. 349, plaintiff, having received concussion of brain through defendant's negligence, took malarial fever and died; *Beauchamp* v. *Saginaw Co.*, 50 Mich. 163 (1883), similar facts, death due to pneumonia; *Wieting* v. *Millston*, 77 Wis. 523 (1890), leg, weakened by defendant's negligence, broken in subsequent accident; see, however, *contra* (*semble*), *Raymond* v. *Haverhill*, 168 Mass. 382 (1897), plaintiff, however, knowing her ankle was weak attempted to step from a chair on which she was standing to a nearby "settee"; and *Snow* v. *R. R.*, 185 Mass. 321 (1904), similar facts.

See, as to existence of a duty to anticipate presence of abnormally sensitive persons and to take precautions to secure their safety, Holmes, C. J., *Spade* v. *R. R.*, 172 Mass. 488 (1899), p. 491, and Gilfillan, C. J., *Purcell* v. *R. R.*, *post* p. 104.

So one converting or wrongfully injuring property is responsible for its actual value though greatly enhanced by circumstances unknown to the wrongdoer and not within his reasonable foresight: *France* v. *Gaudet*, L. R. 6 Q. B. 199 (1871), wine converted had been sold on exceptionally favorable terms, *cf. Horne* v. *R. R.*, L. R. 7 C. P. D. 583 (1872), breach of contract to carry goods; *Hansen* v. *St. Paul Gaslight Co.*, 82 Minn. 84 (1901), defendant negligently permitting gas to escape into greenhouse and thereby destroying part of its contents held liable for value of all contained in it, since they happened to be only salable as a whole; *Eten* v. *Luyster*, 60 N. Y. 252 (1875), defendant in wrongfully tearing down plaintiffs' house destroyed a sum of money kept therein without defendant's knowledge.

[1] See Coke, C. J., *Everard* v. *Hopkins*, 2 Bulst 332, p. 334. "If the master sends his servant to pay money for him upon the penalty of a bond; and in his

SECTION 3.

Natural, though Indirect Consequences.

HARRISON *v.* BERKLEY.

Court of Appeals of South Carolina, 1847. 1 *Strobhart*, 525.

Tried before Mr. Justice WARDLAW, at Kershaw, Spring Term, 1847.

The following is the Report of the presiding Judge:

This was an action of trespass on the case, in which the plaintiff sought to recover damages, for that the defendant, being a shopkeeper, in violation of the Statute on the subject, and to the wrong of the plaintiff, sold and delivered ardent spirits to Bob, a slave of the plaintiff, by means whereof the said slave became intoxicated, and died.

It appeared that on the 24th day of December, 1845, Bob, being patroon of one of the plaintiff's boats, on his way from Charleston, went into the shop of defendant in Camden, and there received a gallon jug and a quart bottle of whiskey, and started with them in the afternoon, to convey to his master in Fairfield, across the Wateree, intelligence of the boat's arrival. Bob drank none at the shop, but drank repeatedly from the bottle before he reached the river, at the ferry, and afterwards; fell down in the road repeatedly; fell into a creek, in which he would have been drowned, but for the aid of some white men then in his company; and soon afterwards, at the fork of the roads, proceeded alone, staggering. He was clad in homespun, and had a bundle, besides the jug, on his back. The night was misty, and somewhat cold. He called at a house and got fire, returned and went again. Next morning he was found dead near the house where he had called; the jug of whiskey full and corked near him, the bottle not to be seen; and upon movement of his body, a fluid smelling like whiskey flowed from his mouth. A physician examined his body upon the inquest, but could discover no external injury; and from the want of rigidity in the muscles and other appearances, had no doubt that he died of drunkenness and exposure.

A witness for the plaintiff swore positively that he was present in the defendant's shop, and saw Bob hand his jug and bottle empty to the defendant, and receive them from the defendant full of whiskey, this conversation passing: defendant to Bob, when he handed back the jug, "Now, mind, old fellow, don't hurt yourself or me

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way, a smith, in shoeing, doth prick his horse, and so by reason of this, the money is not paid, this being the servant's horse he shall have no action upon the case for this pricking of his horse, and the master also shall have his action upon the case, for the special wrong which he hath sustained, by this, by the non-payment of his money occasioned by this;" but see *Brown* v. *Cummings*, 7 Allen, 507 (Mass., 1863). plaintiff held not entitled to prove as special damage in an action of assault and battery the loss of a position as surgeon's mate in the Navy for which he had made application.

either." Bob, "No, sir, I won't hurt you or myself either. How much do I owe you?" Defendant, "two dollars." Bob, "I'll pay you to-morrow when I come to unload the boat."

A brother of the defendant (as to whom eight witnesses testified against his credit, and four in favor of it), and one Shegog, who was acting as occasional assistant in the shop, testified that Bob applied to the defendant for liquor, but the defendant refused to let him have it. Eli Bass, a free negro, (who was chief patroon of the fleet to which Bob's boat belonged,) then took the jug and handed it to the defendant, who filled it and handed it back to Bass, who delivered it to Bob, there being no bottle then seen.

I submitted to the jury the question of fact, whether the defendant sold or delivered the liquor to Bob, saying, upon a proposition urged by the plaintiff, that if the sale was really made to Bass, the defendant was not answerable, although he may have suspected that Bass would deliver the liquor to Bob; but that if the defendant knew that Bass was employed as a mere instrument to enable Bob to make the purchase, such an artifice would place the defendant in no better situation that if the delivery had been direct to Bob.

The question mainly argued, was, as to the liability of the defendant for the death of the negro, said to be a consequence of his wrongful act.

I held, that for truly proximate consequences, which, in the ordinary course of nature, do actually result from a wrongful act, even where there is no wicked intention, recovery to the extent of the actual loss may be had, although the consequences may be such as are neither necessary nor easy to be foreseen.

That where there was fraud, malice, gross negligence, or active evil intention, consequences less truly proximate may be regarded, and damages be carried beyond the actual loss.

That in a case where no aggravation from evil motive arose, (and such I thought this case,) natural consequences, not immediately proximate, would be considered, if they were probable; but either those consequences called remote, or those less proximate consequences which were improbable, would be disregarded.

Assuming then, that there was in this case, no aggravation from evil motive, and that the injurious consequences were not immediately proximate, I left it to the jury (if they should find that the defendant had been guilty of the wrongful act of selling or delivering liquor to a slave,) to decide whether the drinking, intoxication, exposure and death of the slave, were the natural and probable consequences of that wrongful act—holding that if so, the defendant was answerable for the value of the slave.

I endeavor by various instances to illustrate the meaning of the terms I used, and to explain the difference between damages actual and speculative, proximate and remote, probable and contingent, natural and extraordinary; and difficult as it was, by instances, to show these diversities, I find it much more difficult by any general terms, to give precision to the propositions I laid down.

The jury found for the plaintiff six hundred and fifty dollars; and the defendant appeals on the grounds annexed.

The defendant gives notice that he will move the Court of Appeals for a nonsuit in this case, on the ground that the declaration and proof made no sufficient cause of action in law. That the injury was too remote. Failing in this, then for a new trial.

1. Because his Honor charged the jury, that if the defendant knew that the whiskey was intended for Bob, when he delivered it to Bass, he is as liable as if he had delivered it to Bob.

2. Because his Honor charged the jury, that if the natural and probable consequence of giving the liquor to Bob, was that he would drink, the defendant is liable for his value, if he died.

3. Because Bob did not die from the effect of the liquor alone, but from the combined effect of the liquor and exposure, for the latter of which the defendant is not liable, and therefore not liable at all.

4. Because the damage was too remote from the injury, and not a necessary, natural or probable consequence of the wrong.

5. Because the verdict is clearly against the evidence.

WARDLAW, J., delivered the opinion of the Court.

This action is novel in the instance, but that is no objection to it, if it be not new in principle. The law endures no injury, from which damage has ensued, without some remedy; but directs the application of principles already established, to every new combination of circumstances that may be presented for decision.

It has, however, been urged here again, as it was on the circuit, that admitting every thing which the plaintiff has alleged, he has presented either a case of damage without legal injury, or a case of injury without legal damage.

First. Damage without injury. It is said, that the act of selling or giving whiskey to the slave, Bob, was not in itself a wrong to the plaintiff, but was only a violation of a penal statute, which has imposed upon such acts penalties, to be recovered by indictment; and that, therefore, no action by the plaintiff lies, nor any remedy but the indictment prescribed by the statute.

The wrong, for which an action of trespass on the case lies, may be either an unlawful act, or a lawful act done under circumstances which render it wrongful—any act done or omitted, contrary to the general obligation of the law, or the particular rights and duties of the parties. It might not be difficult to distinguish between the selling, or giving of spirituous liquor to a slave, and the fair selling to a slave of an article, which could not be expected to produce harm; and to show that, independent of any express statutory prohibition, the former act is so contrary to the rights of the master, and to the duties imposed upon other persons in a slave-holding community, that the person who does it without special matter of excuse, subjects himself to liability for all the legal damage, that may thence ensue; in like manner, as if he had carelessly or wantonly placed noxious food within reach of domestic animals. But this case may be rested where the plaintiff left it. Our statutes,

time after time, have subjected him, who sells to a slave any article without license, to fine and imprisonment upon his conviction after indictment; and the last statute on the subject provides especially, for the punishment, upon conviction after indictment, of him, who sells or gives spirituous liquor to a slave. No express prohibition is contained in either of the statutes, but the penalties necessarily imply a prohibition, and make the thing prohibited, unlawful; (10 Co., 75.) For the injury to the public, the only remedy is that provided by the statute—indictment; but as in case of a nuisance to the whole community, if any person has suffered a particular damage beyond that suffered by the public, he may maintain an action in respect thereof, (2 Ld. Ray, 985); so in case of a misdemeanor punishable by statute, a party grieved is entitled to his action, for the particular damage done to him by reason of the unlawful act.

Second. We come then to the main ground assumed in the defence—that no legal damage followed the injury, but that which was shown was too remote—not such a consequence of the injury as the law will notice.

It would be vain to attempt to define with precision, the terms which have been used on this subject, or to lay down any general rules, by which consequences that shall be answered for, and those which are too remote for consideration, may be always distinguished. But we will endeavor, without dwelling on particular cases, to deduce from the general course of decision on this point, so much as may show that the instructions given, were sufficiently favorable for the defendant, and that verdict is conformable to law.

We are troubled here with no distinctions between the loss sustained and gain prevented; nor with any between cases, which have been aggravated by evil motive, and those which have not been: for the plaintiff here has claimed only compensation for his actual loss; and the defendant may be regarded as the jury were instructed to regard him—that is, as one who, with no particular evil purpose, or ill-will towards master or slave, has violated the law only for his own gain.

A distinction, however, is to be observed between cases where the damage ensues, whilst the injurious act is continued in operation and force, and those where the damage follows, after the act has ceased.[1]

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[1] The idea that the defendant's conduct can be the legal cause of the plaintiff's harm only when it creates the final active injurious force is exhibited in the opinions of Martin, J., in *Laidlaw* v. *Sage*, 158 N. Y. 73 (1899), where defendant changed plaintiff's position slightly so as to use him as a shield against the force of a bomb exploded by a maniac, and by Potter, J., in *Elliott* v. *Allegheny Light Co.*, 204 Pa. 568 (1903), where plaintiff fell from a ladder and came into contact with defendant's uninsulated wire. Recovery was denied because the defendant had not caused the explosion of the bomb or the fall from the ladder. The first decision may be supported on the ground that plaintiff would have been equally injured had defendant not changed his position; in the second it may be that the wire was in a position where it required some extraordinary occurrence, such as this fall, to make it dangerous to any one. See *contra*. to *Elliott* v. *Co.*, *Birsch* v. *Citizens' Elect. Co.*, 36 Mont. 574 (1908), very similar facts, and see *contra*. to views ex-

In the former class, were the cases of Wright & Gray, (2 Bay. 464,) and all the cases which have been cited, or supposed, of slaves put without permission of the owners on race-horses, in steam-boats, or on rail-roads—those of property injured during a deviation from the course which was prescribed concerning it, (6 Bing., 716;) and in general all where unexpected damage was done, whilst an unauthorized interference with another's rights lasted. Here it is usually of small moment to inquire, whether the damage was the natural consequence of the injury, because the immediate connection between the wrongful act, and the damage sustained, shows that the damage, however extraordinary, has actually resulted directly from the injury. But in the latter class, to which the case before us must be assigned, the connexion is not immediate between the injury and the consequences; and it becomes indispensable to discriminate in some way between the various consequences that in some sense, may be said to proceed from the act, for all of them cannot constitute legal damage.

Every incident will, when carefully examined, be found to be the result of combined causes, and to be itself one of various causes which produce other events. Accident or design may disturb the ordinary action of causes, and produce unlooked for results. It is easy to imagine some act of trivial misconduct or slight negligence, which shall do no direct harm, but set in motion some second agent that shall move a third, and so on, until the most disastrous consequences shall ensue. The first wrongdoer, unfortunate rather than seriously blameable, cannot be made answerable for all of these consequences. He shall not answer for those which the party grieved has contributed by his own blameable negligence or wrong, to produce, or for any which such party, by proper diligence, might have prevented. (Com. Dig. action on the case, 134; 11 East., 60; 2 Taunt., 314; 7 Pick., 284.) But this is a very insufficient restriction; outside of it would often be found a long chain of consequence upon consequence. Only the proximate consequence shall be answered for. (2 Greenleaf Ev., 210, and cases there cited.) The difficulty is to determine what shall come within this designation. The next consequence only is not meant, whether we intend thereby the direct and immediate result of the injurious act, or the first consequence of that result. What either of these would be pronounced to be, would often depend upon the power of the microscope, with which we should regard the affair. Various cases show that in search of the proximate consequences, the chain has been followed for a considerable distance, but not without limit, or to a remote point. (8 Taunt., 535; Peak's cases, 205.) Such nearness in the order of events, and closeness in the relation of cause and effect, must subsist, that the influence of the injurious act, may predominate over that of other causes, and shall concur to produce the consequence,

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pressed by Martin and Potter, JJ., *Eagle Hose Co.* v. *Elect. Light Co.*, 33 Pa. S. C. 581 (1907); *Dufur* v. *R. R.*, 75 Vt. 165 (1903); *Thompson* v. *R. R.*, 170 Mass. 577 (1898); *Thornton* v. *Agricultural Society*, 97 Maine, 108 (1902),

or may be traced in those causes. To a sound judgment must be left each particular case. The connection is usually enfeebled, and the influence of the injurious act controlled, where the wrongful act of a third person intervenes, and where any new agent, introduced by accident or design, becomes more powerful in producing the consequence, than the first injurious act. (8 East, 1; 1 Esp., 48.) It is, therefore, required that the consequences to be answered for, should be natural as well as proximate. (7 Bing., 211; 5 B. & Ad., 645.) By this, I understand, not that they should be such, as upon a calculation of chances, would be found likely to occur, nor such as extreme prudence might anticipate, but only, that they should be such, as have actually ensued one from another, without the occurrence of any such extraordinary conjuncture of circumstances, or the intervention of any such extraordinary result, as that the usual course of nature should seem to have been departed from. In requiring concurring consequences, that they should be proximate and natural to constitute legal damage, it seems that in proportion as one quality is strong, may the other be dispensed with: that which is immediate, cannot be considered unnatural; that which is reasonably to be expected, will be regarded, although it may be considerably removed. (20 Wend., 223.)

It has been supposed, in argument, that without any of these distinctions, it is always sufficient, to inquire only, whether the consequences have certainly proceeded from the injurious act: but it will be seen, that in settling what have certainly proceeded from the act, we will be obliged to determine what are natural and proximate, unless we mean to run to absurd extremes.

In the case before us, the defendant has insisted, that the damage resulted, not so much from his act, as from the acts of the slave, who was a moral being, and a free agent. (4 McCord, 223.) In cases where damage has been done, during the continuance of a wrongful interference with a slave, it was considered of no consequence, that the slave was a free agent: (2 Rich., 613; Id., 455; 9 La. Rep., 213) for there the consent of the slave could not justify the interference, and even the wilful act of the slave producing the damage, was like any other improbable misfortune, which might have occurred, whilst the wrongful act was in operation. But in cases like this, the will of a slave may well interrupt the natural consequences of a wrongdoer's act, and produce consequences, for which he should not answer. Selling whiskey to a slave is no more unlawful, than selling to a slave any other article, without license. And if a rope, sold to a slave, without license and without suspicion of mischief, should be employed by the slave to hang himself, the prominent ground of distinction between that case and the present one, would depend upon the will of the slave. If it should be said that the slave would have got a rope elsewhere or would have taken some other means of self-destruction, it might be answered that if this defendant had not sold the whiskey, Bob would have got it, or some other means of intoxication, elsewhere. But where the mischievous purpose of a slave is manifest, or should be foreseen by

ordinary prudence, the injurious act embraces the will of the slave, as one of its ingredients;—the wrong consists, in part, in ministering to the purpose, and natural consequences of that purpose, (although the purpose may have been carried to an extent not anticipated, or the consequences may have been altogether undesigned and unusual) are the legal consequences of the injurious act. Therefore, it was well left to the jury, to decide whether the drinking and intoxication of Bob, were the natural and probable consequences of selling liquor to him. If fault be found with the instructions given on this head, it is that they were too favorable to the defendant, in requiring, that the consequences should be found to be probable as well as natural. For proximate and natural consequences, not controlled by the unforeseen agency of a moral being, capable of discretion, and left free to choose, or by some unconnected cause of greater influence, a wrongdoer must generally answer, however small was the probability of their occurrence. In many instances, the will of a slave, as a controlling cause, would be found as feeble as was the will of a child, that received damage from a cart left carelessly in the street, which he unlawfully attempted to drive. (1 Adol. & El., N. S., 28.) Often the intervention of a third person's will, influenced by the injurious act, has no effect in rendering consequences too remote. (1 Ad. & El., 43; 2 C. Mer. & Rose., 707.)

The defendant, however, has further insisted, that if the drinking and intoxication were the proximate and natural consequences of his act, the exposure and death were not; but that the death resulted mainly from the exposure, and not from the intoxication only. It may well be said, (speaking in the language of every day life, which attempts no philosophical analysis) that the exposure was the immediate effect of the intoxication, and that the two produced the death. Thus, without any unconnected influence to be perceived, the death has come from the intoxication, which the defendant's act occasioned. The defendant cannot complain that an agent, which his own act naturally brought into operation, has occurred to produce the result. The proximity in order of events, and intimacy of relation as cause and effect, between the injurious act and the damage, are as great here as in various cases which have been cited. (17 Pick., 78; 3 Scott New R., 386; 17 Wend. 71; 9 Wend. 325; 11 East, 571; and the cases before cited.)

The jury have decided the facts, and this Court is of opinion that under the inferences, which must be drawn from the finding, the verdict is free from the objection, that the damages were too remote.

The instructions concerning a delivery to Bass, as an instrument of Bob, are approved.

The motion is dismissed.

WITHERS, J., having been of counsel in this cause, gave no opinion.[2]

[2] See *Hoard* v. *Peck*, 56 Barb. 202 (N. Y., 1867), druggist selling lauda-

SMITH *v.* LONDON AND SOUTHWESTERN RAILWAY CO.

In the Exchequer Chamber, 1870. *L. R.* 6, *Common Pleas,* 14.

Appeal from a decision of the Court of Common Pleas, L. R. 5, C. P. 98 (1869), discharging a rule to enter a verdict for the defendants or a nonsuit.

This was an action of negligence and the only material count of the declaration in substance sets out that "by the want of due care in the keeping and management of their engines and banks, quantities of cut grass and hedge trimmings were heaped up on the said railway and banks and became and were ignited and a fire was occasioned which spread over and along a stubble field unto the plaintiff's premises" and consumed it.

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num to a woman as a beverage, held liable for her husband's loss of her services. In actions under statutes making vendors of intoxicants liable "to the husband, wife," etc., of their vendee or "other person injured in person or means of support." "on account of" (Indiana) or "in consequence of" (New York, Ohio and Illinois), the latter's intoxication, while the statute makes the sale *per se* wrongful, "the material inquiry whether the injury" (complained of) "is the proximate and natural result of the wrongful act remains." Elliott, J., *Dunlap* v. *Wagner,* 85 Ind. 529 (1882), p. 531.

The vendor is held liable where the drunken vendee is injured or killed and his family loses his support, Meyer v. *Butterbrodt,* 146 Ill. 131 (1893); *Botwinis* v. *Allgood,* 113 Ill. App. 188 (1904), drunken vendee killed by fall from wagon; *Wall* v. *State,* 10 Ind. App. 530 (1894); *Mead* v. *Stratton,* 87 N. Y. 493 (1882), all similar facts; *Currier* v. *McKee,* 99 Me. 364 (1904), vendor liable where no wrongful act of third party supplies final cause of injury; *McNary* v. *Blackburne,* 180 Mass. 141 (1901), whether vendor liable for harm caused by third party's wrongful act, left undecided.

Where the plaintiff or his property is harmed by drunken vendee, the vendor is held liable. Dunlap v. *Wagner, supra* (overruling *Krach* v. *Heilman,* 53 Ind. 517 (1876), and *Backes* v. *Dant,* 55 Ind. 181 (1877), *contra.* to *Wall* v. *State*), plaintiff's horse lent to friend injured by his careless driving while drunk; *Jackson* v. *Brookins,* 5 Hun, 530 (N. Y., 1875), action by widow of man shot in drunken brawl; *King* v. *Haley,* 86 Ill. 106 (1877), and *Bodge* v. *Hughes,* 53 N. H. 614 (1872), plaintiff shot by drunken vendee (the latter case decided under Act of 1870, making vendor liable as principal for vendee's torts); *Aldridge* v. *Sager,* 9 Hun, 537 (N. Y., 1876), woman thrown from wagon driven by drunken son-in-law; *Duroy* v. *Blinn,* 11 Ohio St. 331 (1860), contractor's business interrupted by drunkenness of workmen; *Schlosser* v. *State,* 55 Ind. 82 (1877), wife beaten by drunken husband; *Mulford* v. *Clewell,* 21 Ohio St. 191 (1871); *Woolheather* v. *Risley,* 38 Ia. 486 (1874), and *Hemmens* v. *Bentley,* 32 Mich. 89 (1875), wife's property squandered by drunken husband; *contra, Swinford* v. *Lowry,* 37 Minn. 345 (1887), night clerk of hotel shot by drunken guest.

See as to liability of one selling liquor to one obviously drunk for the harm done by latter during his subsequent violent intoxication; *Belding* v. *Johnson,* 86 Ga. 177 (1890), the assault on plaintiff, however, took place some hours after the alleged sale and a complicated chain of events led from the one to the other, *cf. Swinford* v. *Lowry, supra.*

A saloonkeeper's duty to protect his patrons from obviously drunken fellow-customers, *Rommel* v. *Schambacher,* 120 Pa. 579 (1887), or to care for a helplessly drunken customer, *Weymire* v. *Wolfe,* 52 Ia. 533 (1879), is quite distinct and does not depend on his having furnished the liquor which has caused the intoxication—*cf. Black* v. *R. R.,* 193 Mass. 448 (1907), and *Depue* v. *Flatau,* 100 Minn. 299 (1907).

Plea, not guilty and issue joined thereon.

The case was tried by KEATING, J., at the summer assizes, 1869, held at Dorchester.

At the close of the plaintiff's case the counsel for the defendants submitted that there was no case to go to the jury. At the suggestion of the judge, and by consent, a verdict was taken for the plaintiff for 30*l.*, subject to leave reserved to the defendants to move to set it aside and instead thereof to enter a verdict for them, on the ground that there was no evidence to go to the jury of any liability on the part of the defendants. The court to be at liberty to draw inferences and to amend the pleadings.

The defendants applied for and obtained a rule pursuant to the leave reserved, which, after argument, was discharged, and from the judgment so given discharging the rule the present appeal was brought.

Kingdon, Q.C. (*Murch* with him), for the defendants.

Cole, Q.C. (*Bere, Q.C.*, with him), for the plaintiff.[1]

KELLY, C.B.:[2] I certainly entertained some doubts during the argument as to whether the judgment of the Court below could be sustained; but when I consider the facts, I cannot but feel that it is a case in which there was some evidence of negligence on the part of the defendants, and negligence which caused the injury complained of. It appears that about the time that the spot in question was passed by an engine which, as we know, would emit sparks which would fall on the adjoining ground, a fire was discovered on the defendants' ground adjoining the line. It appears that it had been a dry summer, and the hot weather had continued for many weeks before the occurrence; and probably with a view to prevent mischief, the defendants had caused the grass that grew by the line and the fence to be cut, and the cuttings of the grass and hedge were placed in small heaps on the ground between the rails and the hedge. On the other side of the hedge was a stubble-field of considerable extent which would be extremely dry, and at a distance of two hundred yards across a road was the cottage belonging to the plaintiff. This was the state of facts. The trimmings caught fire, there was a strong southeast wind blowing; and though we have no proof of the exact progress of the fire, because the company's servants who had seen it were not called, it appears to have extended to and through the hedge and across the field to the plaintiff's cottage which was burnt. The question for us is, how all this occurred. There is some doubt how the fire originated,[3] but there

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[1] The facts are restated and the arguments of counsel are omitted.

[2] The opinions of Martin and Pigott, BB., and Lush, J., concurring, are omitted.

[3] There was no evidence that the defendant's engines were improperly constructed or worked, nor was there any evidence, except that the engines had recently passed, to show that the fire originated from them. Kingdon, Q. C. having suggested that the fire might have been caused by a fuse thrown from the window of a train or by a spark from a pipe of one of the workmen on the line, Channel B. replied: "But here the two causes of the fire

was ample evidence for the jury, which would have been rightly left to them, that it originated from sparks from the engine falling on the dry heaps of trimmings, and thence extending to the hedge and stubble-field. If that was so, the question arises whether there was any negligence in the defendants. Now it can scarcely be doubted that the defendants were bound in such a summer, knowing that trains were passing from which sparks might fall upon them, to remove these heaps of trimmings; and, at any rate, it was a question for the jury whether it was not negligent of them not to do so. I think, therefore, there was a case for the jury on which they might reasonably have found that the defendants were negligent in not removing the trimmings as soon as possible, and that this was the cause of the injury. Then comes the question raised by BRETT, J., to which at first I was inclined to give some weight. He puts it thus: "I quite agree that the defendants ought to have anticipated that sparks might be emitted from their engines, notwithstanding that they were of the best construction, and were worked without negligence, and that they might reasonably have anticipated that the rummage and hedge trimmings allowed to accumulate might be thereby set on fire. But I am of opinion that no reasonable man would have foreseen that the fire would consume the hedge and pass across a stubble-field, and so get to the plaintiff's cottage at the distance of 200 yards from the railway, crossing a road in its passage." It is because I thought, and still think, the proposition is true that any reasonable man might well have failed to anticipate such a concurrence of circumstances as is here described that I felt pressed at first by this view of the question; but on consideration I do not feel that that is a true test of the liability of the defendants in this case. It may be that they did not anticipate, and were not bound to anticipate, that the plaintiff's cottage would be burnt as a result of their negligence; but I think the law is, that if they were aware that these heaps were lying by the side of the rails, and that it was a hot season, and that therefore by being left there the heaps were likely to catch fire, the defendants were bound to provide against all circumstances which might result from this, and were responsible for all the natural consequences of it. I think, then, there was negligence in the defendants in not removing these trimmings, and that they thus became responsible for all the consequences of their conduct, and that the mere fact of the distance of this cottage from the point where the fire broke out does not affect their liability, and that the judgment of the Court below must be affirmed.

CHANNELL, B.: I am of the same opinion. I quite agree that where there is no direct evidence of negligence, the question what a reasonable man might foresee is of importance in considering the question whether there is evidence for the jury of negligence or not, and this is what was meant by Bramwell, B., in his judgment in *Blyth* v. *Birmingham Waterworks Co.*, 11 Ex. 781; 25 L. J.

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suggested, viz., the engine and the pipe or cigar, are not of equal probability, and there was evidence for the jury, therefore, that the fire was caused by the more probable of the two alleged causes."

(Ex.), 212, referred to by Mr. Kingdon; but when it has been once determined that there is evidence of negligence, the person guilty of it is equally liable for its consequences, whether he could have foreseen them or not.

BLACKBURN, J.: I also agree that what the defendants might reasonably anticipate is, as my Brother Channell has said, only material with reference to the question whether the defendants were negligent or not, and cannot alter their liability if they were guilty of negligence. I have still some doubts whether there was any evidence that they were negligent, but as all the other judges are of opinion that there was evidence that they were, I am quite content that the judgment of the Court below should be affirmed. I do not dissent, but I have some doubt, and will state from what my doubt arises. I take it that, since the case of *Vaughan* v. *Taff Vale Ry. Co.*, 5 H. & N. 679; 29 L. J. (Ex.) 247, which was expressly affirmed in *Brand* v. *Hammersmith Ry. Co.*, Law Rep. 4 H. L. 171, it is clear that when a railway company is authorized by their Act of parliament to run engines on their line, and that cannot be done without their emitting sparks, the company are not responsible for injuries arising therefrom, unless there is some evidence of negligence on their part.[4] That being so, I agree that if they have the land at the edge of the line in their own occupation they ought to take all reasonable care that nothing is suffered to remain there which would increase the danger. Then comes the question, is there evidence enough in this case of a want of that reasonable care? It can hardly be negligent not to provide against that which no one would anticipate. I have no doubt that if the company strewed anything very inflammable, such as, to put an extreme case, petroleum along the side of their line, they would be guilty of negligence. The reasoning for the plaintiff is that the dry trimmings were of an inflammable character and likely to catch fire. My doubt is, whether,

[4] At common law an owner of land was liable for the spread of fire started thereon, whether negligently or accidentally or intentionally for a proper purpose and in a proper manner, by himself or his servant (Rolle, Abr. action *sur* case, B 1-3. *Tuberville* v. *Stamp*, 12 Mod. 455), and every fire on his premises was presumed to be so started (Tenterden, C. J., *Becquat* v. *McCarthy*, 2 B. & Ad. 958, 1831), though he could exculpate himself by showing that the fire was kindled by a stranger (Rolle, Abr. action *sur* case, B. 6), or even a lodger (*Allen* v. *Stephenson*, 1 Lutw. 90). The statute of 6 Anne C. 31, §6, reenacted 14, Geo. III, c. 78, Sec. 86, merely destroyed this presumption and required the plaintiff, to show that the defendant or his servant had negligently or intentionally started the fire (*Filliter* v. *Phippard*, 11 Q. B. (A. & E. N. S.) 347). In the United States, however (owing probably to the construction placed by Blackstone upon the statute 6 Anne: 1 Com. 431, see Gibson, C. J., *Lehigh, Etc., Co.* v. *L. C. & N. Co.*, 4 Rawle, Pa. 9, pp. 24-25; *Clarke* v. *Foote*, 8 Johns, N. Y. 421 (1811); *Lansing* v. *Stone*, 37 Barb. 17 (N. Y. 1862); *Bachelder* v. *Heagan*, 18 Maine 32), it has been uniformly held that negligence must be shown either in starting the fire (*Needham* v. *King*, 95 Mich. 303 and cases cited, p. 306), or in guarding or preventing the spread of a fire properly or accidentally kindled, *McCully* v. *Clark*, etc., 40 Pa. 399 (1861), failure to extinguish accidental fire; *McNally* v. *Colville*, 91 Mich. 527 (1892), no appliances for extinguishing fire kept on premises containing highly inflammable material (a saw mill); *Hauch* v. *Hernandez*, 41 La. Ann. 992 (1889), porcelain kilns heated to 3,000 deg. F. left unattended.

since the trimmings were on the verge of the railway on the company's land, if the quickset hedge had been in its ordinary state, they might not have burned only on the company's premises, and done no further harm, and whether the injury, therefore, was not really caused by the hedge being dry, so that it caught fire, and by the fire thus spreading to the stubble-field, and thence to the plaintiff's cottage. I think it is clear that when the company were planning the railway they could not expect that the hedge would become so dry, and therefore were not negligent in putting a hedge instead of a stone wall; and though the drought had lasted some weeks, I can hardly think it was negligent in them not to remove the hedge. I do not say that there is not much in what is said with respect to the trimmings being the cause of the injury, and not the state of the hedge, but I doubt on this point, and, therefore, doubt if there was evidence of negligence; if the negligence were once established, it would be no answer that it did much more damage than was expected. If a man fires a gun across a road where he may reasonably anticipate that persons will be passing, and hits some one, he is guilty of negligence, and liable for the injury he has caused; but if he fires in his own wood, where he cannot reasonably anticipate that any one will be, he is not liable to any one whom he shoots, which shews that what a person may reasonably anticipate is important in considering whether he has been negligent; but if a person fires across a road when it is dangerous to do so and kills a man who is in the receipt of a large income, he will be liable for the whole damage, however great, that may have resulted to his family, and cannot set up that he could not have reasonably expected to have injured any one but a labourer.

Judgment affirmed.[5]

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[5] *Accord*: *Clifford* v. *R. R.*, 9 Col. 333 (1886), paralysis from exposure; *Ill. Cen. R. R.* v. *Siler*, 229 Ill. 390 (1907), plaintiff burned trying to extinguish fire negligently started on her premises; *Coy* v. *Indianapolis Gas Co.*, 146 Ind. 655 (1896), plantiff's ill children suffered relapse and died as result of cold of his house due to defendant's wrongful failure to furnish gas; *Tucker & Dorsey Co.* v. *Staley*, 40 Ind. App. 63 (1906), workman's hand injured by saw lacking guard required by statute; *Cutter* v. *Des Moines*, 113 N. W. (Iowa) 1081 (1907), horse frightened by obstruction in street, threw plaintiff out of sleigh and down an embankment. *A. T. & S. F. R. R.* v. *Parry*, 67 Kan. 515 (1903), drunken passenger removed from train and left in station improperly cared for, run over at point five miles away, to which he had in his helpless drunkenness wandered; *Balto. Ry.* v. *Kemp*, 61 Md. 74 (1883), cancer developing from a slight blow received in course of transportation; *Higgins* v. *Dewey*, 107 Mass. 494 (1871), fire negligently set by defendant on his own land; *Selleck* v. *Lake Shore, Etc. R. R.*, 93 Mich. 375 (1892), horse frightened while detained at crossing improperly blocked by defendant's train; *Hansen* v. *St. Paul Gaslight Co.*, 82 Minn. 84 (1900), escape of gas into greenhouse, damage due to peculiar nature of the flowers therein; *Hoepper* v. *Southern Hotel Co.*, 142 Mo. 378 (1897), employee injured in laundry; *Harrison* v. *K. C. Electric L. Co.*, 195 Mo. 606 (1906), death by electric shock from uninsulated wire; circuit completed by plaintiff's son tapping the wire; *Erhgott* v. *Mayer*, 96 N. Y. 264 (1884), injuries due to exposure to rain and cold after falling into ditch; *Bacon* v. *Pullman Co.*, 159 Fed. 1 (1908), plaintiff's illness aggravated by lack of medicines and stimulants contained in bag stolen while en route on defendants' car; *Isham* v. *Dow*, 70 Vt. 588 (1898), dog shot

COLT, J., in *Hill* v. *Winsor*, 118 Mass. 251 (1875), p. 258: It cannot be said, as matter of law, that the jury might not properly find it obviously probable that injury in some form would be caused to those who were at work on the fender by the act of the defendants in running against it. This constitutes negligence, and it is not necessary that injury in the precise form in which it in fact resulted should have been foreseen. It is enough that it now appears to have been a natural and probable[1] consequence.[2]

DUNN, J., in *Illinois Central R. R. Co.* v. *Siler*, 229 Ill. 390 (1907) p. 394: In order to make a negligent act the proximate cause of an injury it is not necessary that the particular injury, and the particular manner of its occurrence, could reasonably have been foreseen. (*City of Dixon* v. *Scott*, 181 Ill. 116.) If the consequences follow in unbroken sequence from the wrong to the injury without an intervening efficient cause, it is sufficient if, at the time of the negligence, the wrongdoer might, by the exercise of ordinary care, have foreseen that some injury might result from his negligence. *Chicago and Alton Railroad Co.* v. *Pennell*, 94 Ill. 448; *Pullman Palace Car Co.*, v. *Laack*, 143 Ill. 242; *Chicago Hair and Bristle Co.* v. *Mueller*, 203 Ill. 558.[1]

HOAG *v.* LAKE SHORE AND MICHIGAN SOUTHERN RAILROAD CO.

Supreme Court of Pennsylvania, 1877. 85 *Pennsylvania*, 293.

Mr. Justice PAXSON delivered the opinion of the court, November 19, 1877.

This was an action on the case to recover compensation for certain property destroyed by fire, caused, as was alleged, by the negligence of the defendants. The facts, so far as they are essential to elucidate the point in controversy, are as follows: The plaintiffs were the occupiers of a piece of land situated within the limits of Oil City, on the western bank of Oil creek. The railroad of defendants is constructed along said creek, over the land of the

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by defendant ran into house and knocked down owner's wife; *Stevens* v. *Dudley*, 56 Vermont, 158 (1883), plaintiff injured by horse so violently removed from race track as to throw out driver; *Gilson* v. *D. & H. Canal Co.*, 65 Vermont, 213 (1892), water wrongfully diverted toward plaintiff's quarries, the walls of which were weakened by plaintiff's own workings therein.

[1] See *Wabash R. R.* v. *Coker*, 81 Ill. App. 660 (1898), p. 664; "a person guilty of negligence, or an unlawful act, should be held responsible for all the consequences which a prudent and experienced man, fully acquainted with all the circumstances which in fact existed, would at the time of the negligent or unlawful act, have thought reasonably to follow, if they had occurred to his mind."

[2] See *acc.* Powers, J., *Marsh* v. *Paper*, 101 Me. 489 (1906), p. 502; Elliot, J., *R. R.* v. *Wood*, 113 Ind. 544 (1887), p. 566; Walker, J., *Drum* v. *Miller*, 135 N. C. 204 (1904), p. 215.

[1] See *C. P. and St. L. R. R.* v. *Willard*, 111 Ill. App. 225 (1903), p. 230.

plaintiffs and at the base of a high hill. On the afternoon of April 5, 1873, during a rain storm, there was a small slide of earth and rock from the hill-side down to and upon the railroad. About ten minutes prior to the accident, one of the defendants' engines had passed over the road in safety. At that time no slide had occurred. This engine was followed in a few minutes by another engine drawing a train of cars loaded with crude oil in bulk. The latter engine ran into the slide, was thrown off the track, ran on about one hundred to one hundred and fifty feet, when the tender, which was in front of the engine, was overturned into Oil creek; the engine itself was partly overturned; two or three oil cars became piled up on the track and burst. The oil took fire, was carried down the creek, then swollen by the rain, for several hundred feet, set fire to the property of the plaintiffs and partly consumed it. The question of negligence in defendants' engineer in not seeing the obstruction and stopping his train before reaching it is not raised upon this record, and need not be discussed. The only question for our consideration is, whether the negligence of the defendants' servants was the proximate cause of the injury to the plaintiffs' property. The answer to the plaintiffs' third point, embraced in the second specification of error, raises this question distinctly. The court was asked to say: "That if the jury believe from the evidence, that the accident complained of was the result of negligence on the part of the defendant, and that by reason of such negligence, the oil, ignited by the engine attached to the train, ran immediately down to Oil creek, where it was carried by the current in the space of a few minutes to the property of the plaintiffs, when it set fire to and destroyed said property, the plaintiffs are entitled to recover, provided they did not in any manner contribute to said accident." The court answered this point in the negative, and then instructed the jury that as a matter of law, upon the facts in the case, the plaintiffs were not entitled to recover, which instruction is assigned here for error.

It was strongly urged that the court erred in withdrawing the case from the jury, and the recent cases of *Pennsylvania Railroad Co.* v. *Hope,* 30 P. F. Smith, 373, and *Raydure* v. *Knight,* 2 W. N. C. 713, were cited as supporting this view. In the case first cited it was said by the chief justice, in delivering the opinion of the court, "We agree with the court below that the question of proximity was one of fact peculiarly for the jury. How near or remote each fact is to its next succeeding fact in the concatenation of circumstances from the prime cause to the end of the succession of facts which is immediately linked to the injury, necessarily must be determined by the jury. These facts or circumstances constitute the case, and depend upon the evidence. The jury must determine, therefore, whether the facts constitute a succession of events, so linked together that they become a natural whole, or whether the chain of events is so broken that they become independent, and the final result cannot be said to be the natural and probable consequence of the primary cause, the negligence of the defendants." The case of *Raydure* v. *Knight,* was meagerly presented; the charge

of the court was not sent up, and a majority of the court were of opinion that no sufficient cause for reversing the judgment had been shown. I am unable to see any special bearing this case has upon the question before us. The doctrine laid down in the *Railroad Co.* v. *Hope,* and to be gathered incidentally perhaps from *Raydure* v. *Knight* is, that the question of proximate cause is to be decided by the jury upon all the facts in the case; that they are to ascertain the relation of one fact to another, and how far there is a continuation of the causation by which the result is linked to the cause by an unbroken chain of events, each one of which is the natural, foreseen, and necessary result of such cause. But it has never been held that when the facts of a case have been ascertained, the court may not apply the law to the facts. This is done daily upon special verdict and reserved points. Thus in the *Railroad Co.* v. *Kerr,* 12 P. F. Smith, 353, a case bearing a striking analogy to this, the court submitted the question of negligence to the jury, but reserved the question of proximate cause upon the undisputed facts of the case. Of course this could not have been done if the facts were in dispute. A reserved point must be based upon facts admitted in the cause or found by the jury. In questions of negligence it has been repeatedly held that certain facts when established amount to negligence *per se*: *Railroad Co.* v. *Stinger,* 28 P. F. Smith, 219; *McCully* v. *Clark,* 4 Wright, 399; *Pennsylvania Railroad Co.* v. *Barnett,* 9 P. F. Smith, 259; while in *Raydure* v. *Knight, supra,* the court below, in answer to the defendants' second point, instructed the jury that if certain facts were believed by them, the negligence complained of was the proximate cause of the injury to plaintiff's property. This ruling was affirmed by this court. I do not understand the decision in the *Railroad Co.* v. *Hope,* to be in conflict with this view. It remains to apply this principle to the case before us. There is not a particle of conflict in the evidence, so far as it affects the question of proximate cause. This was doubtless the reason why the plaintiffs assumed the facts in their third point. They would not have been justified in doing so had not the facts been admitted, nor is it likely the learned judge would have answered it. We may, therefore, regard the plaintiff's third point as a prayer for instructions upon the undisputed facts of the case. Can it be doubted that the court had the right to give a binding instruction? We think not.

But one question remains. Was the negligence of the defendants' servants, in not seeing the land-slide, and stopping the train before reaching it, the proximate cause of the destruction of the plaintiff's property? We need not enter into an extended discussion of the delicate questions suggested by this inquiry. That has been done so fully in two of the cases cited as to render it unnecessary. A man's responsibility for his negligence and that of his servants must end somewhere. There is a possibility of carrying an admittedly correct principle too far. It may be extended so as to reach the *reductio ad absurdum,* so far as it applies to the practical business of life. We think this difficulty may be avoided by adhering

to the principle substantially recognized in *The Railroad Company* v. *Kerr,* and *The Railroad Company* v. *Hope, supra,* that in determining what is proximate cause, the true rule is that the injury must be the natural and probable consequence of the negligence—such a consequence as, under the surrounding circumstances of the case, might and ought to have been foreseen by the wrongdoer as likely to flow from his act. This is not a limitation of the maxim *causa proxima non remota spectatur;* it only affects its application. There may be cases to which such a rule would not apply, but this certainly is not one. It would be unreasonable to hold that the engineer of the train could have anticipated the burning of the plaintiff's property as a consequence likely to flow from his negligence in not looking out and seeing the land-slide. The obstruction itself was unexpected. An engine had passed along within ten minutes, with a clear track. But the obstruction was there, and the tender struck it. The probable consequences of the collision, such as the engineer would have a right to expect, would be the throwing of the engine and a portion of the train off the track. Was he to anticipate the bursting of the oil-tanks; the oil taking fire; the burning oil running into and being carried down the stream; and the sudden rising of the waters of the stream, by means of which, in part at least, the burning oil set fire to the plaintiff's building? This would be a severe rule to apply, and might have made the defendants responsible for the destruction of property for miles down Oil creek. The water was an intervening agent, that carried the fire, just as the air carried the sparks in the case of the *Railroad Company* v. *Kerr.* It is manifest that the negligence was the remote and not the proximate cause of the injury to the plaintiff's building. The learned judge ruled the case upon sound principles, and his judgment is affirmed.[1]

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[1] *Contra*: *Kuhn* v. *Jewett,* 32 N. J. Eq. 647 (1880), burning oil carried by stream to plaintiff's property—see especially, Van Fleet, V. C. pp. 550, 551, and *Brennan* v. *Cumberland,* 29 D. C. App. 544 (1907).

Accord: *Chicago, Etc. R. R.* v. *Elliott,* 55 Fed. 949; 5 C. C. A. 347 (C. C. A. 8th Cir., 1893); *Cole* v. *Savings Co.,* 124 Fed. 113 (C. C. A. 8th Cir., 1903); *Lake* v. *Milliken,* 62 Me. 240 (1873); *Murphy* v. *N. Y.,* 89 App. Div. N. Y. 93 (1903), *cf. Haverly* v. *R. R. post* p. 82, and *Oil City* v. *Robinson, post* p. 74, n. 1; *Pass. Ry. Co.* v. *Trich,* 117 Pa. 390 (1888); *West Mahanoy* v. *Watson,* 112 Pa. 574 (1886), 116 Pa. 344 (1887); in these cases the defendants' act was either proved, admitted or conceded to be negligent—and the rule announced by Paxson, J., was applied to ascertain the extent of his liability for its consequences. See also Cooley Torts, 3rd Ed. *91, n. 27, 28.

In the following cases the rule was applied, the negligent character of the defendants' conduct being still in question: *McCauley* v. *Logan,* 152 Pa. 202 (1892); *Sturgis* v. *Kounts,* 165 Pa. 358 (1894); *Behling* v. *Pipe Line,* 160 Pa. 359 (1894); *Scott* v. *R. R.,* 172 Pa. 646 (1896); *Cochran* v. *Phila.,* 184 Pa. 565 (1898); see also *Scott* v. *Hunter,* 46 Pa. 192 (1863); *McGrew* v. *Stone,* 53 Pa. 436 (1866); *Fairbanks* v. *Kerr,* 70 Pa. 86 (1871); so also *Kreigh* v. *Westinghouse,* et al, 152 Fed. 120 (8th Circ., 1907); *Barry* v. *R. R.,* 84 Fed. 944 (C. C. A., 8th Circ., 1898); *Deisenrieter* v. *Kraus-Merkel Co.,* 97 Wis. 279 (1897), all cases dealing with the measure of care owed by a master to his servants.

In *Wood* v. *R. R.,* 177 Pa. 306 (1896), as in *Hoag* v. *R. R.,* while the carelessness of the defendant was beyond question, his negligence toward the plaintiff was in doubt [*cf. Denman* v. *R. R.,* 26 Minn. 357 (1880)], a passen-

BUNTING *v.* HOGSETT.

Supreme Court of Pennsylvania, 1890. 139 Pennsylvania, 363.

MR. JUSTICE CLARK: The defendant, Robert Hogsett, is the owner of the Lemont furnace, on the line of the Southwest Pennsylvania railroad, and the plaintiff, who, on the thirteenth of October, 1883, was a passenger upon one of the railroad trains, brings this suit to recover damages for a personal injury, received through the alleged negligence of the defendant's employees. It appears that a railroad track was used in connection with the furnace, and that what is called a dinkey engine was operated thereon, in furnishing supplies of stock, ore, and coke to the furnace. The furnace track, in running out from the furnace to the coke ovens, forms, as it were, the arc of a circle, and the railroad track, crossing the furnace track twice, subtends the arc as a chord.

The collision which occurred at the first crossing, was caused by the culpable negligence of the defendant's engineer; this fact is conclusively established by the verdict of the jury, and in the determination of the questions of law raised upon the assignments of error, this fact must necessarily be assumed.[1]

It is unnecessary, therefore, to refer to the evidence bearing upon that question. The appellant's contention is, however, that, as the plaintiff's injuries were not received in that collision, but in the collision which subsequently occurred at the other extremity of the chord, the negligence of the engineer, under the circumstances, cannot be regarded as the proximate, but as the remote cause of the injury. Ordinarily, the question of proximate cause is for the jury; but, where the facts are not in dispute, the determination of that question is for the court: *West Mahanoy Twp.* v. *Watson*, 112 Pa. 574; s. c., 116 Pa. 344. Some reference to the undisputed facts, therefore, is necessary to a complete understanding of the question thus raised.

It is conceded that in the first collision, although no one was injured, the rear truck of the rear coach of the passenger train was derailed. The brakeman pulled the automatic cord which operates

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ger while waiting on a station platform was struck by the body of a woman negligently run down at a level crossing some distance away from the platform; *cf. R. R.* v. *Chapman*, 80 Ala. 615 (1886); *Quill* v. *R. R.*, 11 N. Y. Supp. 80 (1890); *R. R.* v. *Bailey*, 105 Ga. 100 (1898), in all of which cases the plaintiff while not upon the track when struck was near the place of collision.

[1] When the train in which the plaintiffs were traveling approached the first crossing, a "dinkey engine" of the defendant, pushing a coke car, was upon the semi-circular part of the defendant's track, backing toward the same crossing. The engineer of the dinkey engine was inexperienced, and had no watch or time card. The passenger train was hidden from his view by a heap of slag and cinder, dumped upon the defendant's property, until it arrived at the crossing, and until then the defendant's engineer was ignorant of its approach. The engineer of the passenger train did not see the dinkey engine until the same time. The testimony was conflicting as to whether the whistle of the passenger engine was sounded before it reached the crossing, and also as to whether the defendant's engineer whistled.

the air brakes. The enginer put on the air from the engine, and, the truck having regained the track, the train, which consisted of three cars, came to a full stop, with the middle car standing upon the second crossing. The engineer of the dinkey says that, about the time of, or immediately before the collision, he reversed his engine, shut off the steam, and fearing that they would be crushed, both the engineer and the fireman jumped from it to the ground. By some means, however, presumably by the jar of the collision, the throttle was re-opened, and the dinkey at once started with some speed around the arc to the second crossing, where it came in collision with the middle coach, in which the plaintiff was riding. The injuries complained of were received in this second collision. The appellant's contention is that the throttle having been closed before Leehan, the engineer, left the dinkey, the second collision, under all the circumstances, could not have been foreseen by him, as the natural and probable consequence of his conduct, and that, being in fear of his life, he had a right to quit the engine for a place of safety. It may be, perhaps, that the engineer and fireman, being under actual apprehension of great bodily harm, were, in any criminal aspect of the case, justified in leaping from the engine to save themselves, even if in so doing they should put in jeopardy the lives of others. But, assuming this to be so, it must be remembered that it was their own negligence which put them in fear of their lives, and constrained them to leap from the engine and submit it, without control, to the consequences of the collision. They will be justified, perhaps, as we have said, in saving themselves, but it does not follow that either they, or their employer, would not be held for the negligent act which not only put them in peril but resulted in personal injury to the plaintiff.

It is true, as the appellant contends, that the injury must be the natural and proximate consequence of the negligence,—a consequence likely to flow from the negligent act. The engineer would be held to have foreseen whatever consequences might ensue from his negligence without the intervention of some other independent agency,[2] and both his employer and himself would be held for what might, in the nature of things, occur in consequence of that negligence, although, in advance, the actual result might have seemed improbable: *Oil City Gas Co.* v. *Robinson*, 99 Pa. 6. We do not know that the throttle was opened by the jar of the collision, only from the fact that it was liable to be so, and the engineer will be

[2] So in *Reimard* v. *Bloomsburg & S. R. Co.*, 228 Pa. 384 (1910), Brown, J., while holding that a result to be proximate must be within the foresight of a prudent man at the time of the wrongful act, held that "the circumstances surrounding the plaintiff when ejected from the train (among others that she did not know her way from the small station where she was put off) are presumed by law to be known by the defendant company," and so it was for the jury to say whether they ought to have anticipated that she would walk home along the tracks and be run over; and so in *Brenisholtz* v. *Pennsylvania R. Co.*, 229 Pa. 89 (1910), Potter, J., holds that it is within the foresight of one operating a train so that it runs into a house and partially destroys it that the female owner, in running along the usual route to her children in dark and confusion to save them, will fall into an opening so created; *cf. Hill* v. *Winsor*.

presumed to have foreseen what was liable to occur. The inquiry must always be whether there was any intermediate cause, disconnected from the primary fault and self-operating, which produced the injury: *Milwaukee, etc., Ry. Co.* v. *Kellogg*, 94 U. S. 469. But no intermediate cause, disconnected with the primary fault and self-operating, existed in this case, to affect the question of the defendant's liability; it was the engineer's negligence that caused the first collision, and what occurred in consequence of this collision was not broken by the intervention of any independent agent, whatever; the first collision derailed the truck, and at the same instant opened the throttle and turned loose the destructive agency which inflicted the injuries complained of. The negligence of the defendant's engineer was the natural, primary, and proximate cause of the entire occurrence.

Judgment is affirmed.[3]

FELL, J., in *McKee* v. *Harrisburg Traction Co.*, 211 Pa. 47 (1905), p. 50: True, when an act is clearly negligent one may be held liable for its unforeseen consequences, however remote, which follow in the natural sequence of events.[1] But an act cannot be held to be negligent when, as in this case, there was no reasonable ground for supposing that it would cause injury to anyone.[2]

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[3] Applied in *Quigley* v. *Canal Co.*, 142 Pa. 388 (1891), p. 397, to hold injury to a frightened horse while running away to be the legally proximate result of a failure to give warning of approach of train, whereby horse was driven close to track and in *Gudfelder* v. *R. R.*, 207 Pa. 629 (1904), to hold that a railroad which drew a punctured naphtha car within reach of a lighted switch lamp must foresee that the resulting fire would follow the naphtha into and through a sewer to its outlet 2,800 feet away; in both these cases the defendant's act was negligent, a breach of a duty of care admittedly owed the plaintiff.

See *accord*, Thompson, Negligence, Vol. 1, § 156, "Proximate cause is probable cause; and the proximate consequences of a given act or omission, as distinguished from a remote consequence, is one which succeeds naturally in the ordinary course of things and which, therefore, ought to have been anticipated by the wrongdoer." In *Watson* v. *Dilts*, 116 Iowa 249 (1902), this is applied to require that a trespasser stealthily entering the house of plaintiff's husband at night should anticipate her subsequent paralysis through fright and in *Stewart* v. *Ripon*, 38 Wis. 584 (1875), to hold that city authorities ought to know that scrofulous people may use the street and so should anticipate that the effects of fall in a defective pavement would be aggravated by the plaintiff's scrofulous condition; *Armstrong* v. *Railway Co.*, 123 Ala. 233 (1898), death from blood poisoning, following slight laceration of fingers; and per Cockburn, C. J., *Clark* v. *Chambers*, L. R. 3 Q. B. D. 327, p. 338 (1878).

[1] *Accord*: *Oil City* v. *Robinson*, 99 Pa. 1 (1881); *Pittsburg* v. *Grier*, 22 Pa. 54 (1853), and cases given in note to *Bunting* v. *Hogsett*, *supra*.

[2] *Accord*: Cases given in note to *Hoag* v. *R. R.*, *supra*, p. 71.

The plaintiff to succeed must make out, first, that the defendant was guilty of negligence, *i. e.*, some breach of duty owing by the defendant to the plaintiff; secondly, that the injury was the direct (here the rule of liability appears to be too narrowly stated) result of the negligence. Lord Hershell, *O'Neill* v. *Everest*, 7 Aspinwall 163 (1892), p. 165. A tendency to overlook the twofold nature of the question of defendant's liability for harm done by his acts and to treat it as a single problem has led to much confusion—see *Wood* v. *R. R.*, 177 Pa. 306 (1896), *supra*; *Hoag* v. *R. R.*; *supra*, p. 68.

SECTION 4.

Intervening Agents. (a) Natural Forces.

DERRY *v.* FLITNER.

Supreme Judicial Court of Massachusetts, 1875. 118 *Massachusetts*, 131.

MORTON, J.: The plaintiffs were engaged in building a sea wall for the Boston Gas Light Company, around and in front of their wharf at Commercial Point. There was evidence tending to show that the Gas Light Company had given to the plaintiffs the exclusive right to use the wall to lay their vessels at as a place of safety in case of storms.

The judge, who tried the case without a jury, has found that the plaintiff's had such exclusive right, and it is not our province to revise his findings upon any questions of fact. The defendant Dutch, therefore, had no right to use the wall to the exclusion of the plaintiffs' vessels, and having done so, and having refused to remove his vessel when requested, he is guilty of a violation of the plaintiffs' rights, for which they may recover, in this action of tort, whatever damages they sustained by reason of the tortious acts of the defendant. The ruling of the Superior Court to this effect was correct.

The defendant contended, and asked the court to rule, "that the damage alleged and proved is too remote from the act complained of, and is not the proximate consequence of the same sufficiently in law to render the defendants or any of them liable therefor."

The facts bearing upon this question are as follows: At the time of the accident, the plaintiffs had several vessels engaged in bringing and laying stone for the construction of the sea wall. Most of the wall had been built only up to low water mark, but the plaintiffs, in the beginning of the work, had built about two hundred feet of the wall to a height of thirteen feet above low water mark, for the purpose of furnishing a safer place to lay their vessels at in case of easterly winds or heavy seas. They could lay two of their vessels behind this high part of the wall. On the night of the accident this part of the wall was wholly occupied by the defendant's schooner, so that there was no room for any other vessel. The plaintiffs had five vessels at the sea wall. About five o'clock it began to blow strongly from the eastward: the storm increased during the night, and about eleven o'clock two of the plaintiffs' vessels were sunk. The court found as a fact that the storm was such as is not uncommon in this climate.

The defendant contends that the injury to the plaintiffs was the result of the storm solely, and that he is not liable for it, although his exclusion of the plaintiffs' vessels from a place of safety behind the wall was tortious. The cases upon this subject are numerous. The rule is well settled and is constantly applied

in this Commonwealth, that one who commits a tortious act is liable for any injury which is the natural and probable consequence of his misconduct. He is liable not only for those injuries which are caused directly and immediately by his act, but also for such consequential injuries as, according to the common experience of men, are likely to result from his act. And he is not exonerated from liability by the fact that intervening events or agencies contribute to the injury. The true inquiry is whether the injury sustained was such as, according to common experience and the usual course of events, might reasonably be anticipated. A few of the more recent cases are cited. *Hoadley* v. *Northern Transportation Co.*, 115 Mass. 304; *Metallic Compression Casting Co.* v. *Fitchburg Railroad*, 109 Mass. 277; *Salisbury* v. *Herchenroder*, 106 Mass. 458; *Wellington* v. *Downer Kerosene Oil Co.*, 104 Mass. 64; *Carter* v. *Towne*, 98 Mass. 567; *McDonald* v. *Snelling*, 14 Allen, 290.

Applying these principles to the case at bar, we are of opinion that the injury to the plaintiffs' vessels by the storm was an injury which was reasonably to be apprehended as a consequence of their exclusion from the place of safety furnished by the sea wall. The wall was built for protection against storms. It is found as a fact that the storm which arose was not an uncommon one in this climate. It was reasonably to be anticipated that such a storm might arise, and that vessels exposed to it would be in danger of injury. The wrongful act of the defendant, in taking and retaining exclusive possession of this place of safety, exposed the plaintiffs' vessels to the dangers of the storm, and the injury which they sustained was the natural and probable consequence of this wrongful act. Within the rule above stated, the defendant is liable for such injury.

Exceptions overruled.[1]

RYAN *v.* NEW YORK CENTRAL RAILROAD COMPANY.

Court of Appeals of New York, 1866. 35 New York, 210.

HUNT, J.: On the 15th day of July, 1854, in the city of Syracuse, the defendant, by the careless management, or through the insufficient condition, of one of its engines, set fire to its woodshed, and a large quantity of wood therein. The plaintiff's house, situated at a distance of one hundred and thirty feet from the shed, soon took fire from the heat and sparks, and was entirely consumed, notwithstanding diligent efforts were made to save it. A number of other houses were also burned by the spreading of the fire. The plaintiff brings this action to recover from the railroad company the value of his building thus destroyed. The judge at the Circuit nonsuited the plaintiff, and the General Term of the fifth district affirmed the judgment.

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[1] *Accord*: *Bailiff of Romney Marsh* v. *Trinity House*, L. R. 5 Ex. 204 (1870); *Scott* v. *Hunter*, 46 Pa. 192 (1863). See as to winds, *Haverley* v. *R. R.*, p. 82, and notes p. 84, and as to water carrying burning oil, *Kuhn* v. *Jewett*, 32 N. J. Eq. 647 (1880); *contra* (*semble*), *Hoag* v. *R. R.*, 85 Pa. 293 (1877).

The question may be thus stated: A house in a populous city takes fire, through the negligence of the owner or his servant; the flames extend to and destroy an adjacent building: Is the owner of the first building liable to the second owner for the damage sustained by such burning?

It is a general principle that every person is liable for the consequences of his own acts. He is thus liable in damages for the proximate results of his own acts, but not for remote damages. It is not easy at all times to determine what are proximate and what are remote damages. In *Thomas* v. *Winchester* (2 Seld. 408), Judge RUGGLES defines the damages for which a party is liable, as those which are the natural or necessary consequences of his acts. Thus, the owner of a loaded gun, who puts it in the hands of a child, by whose indiscretion it is discharged, is liable for the injury sustained by a third person from such discharge. (5 Maule & Sel. 198.) The injury is a natural and ordinary result of the folly of placing a loaded gun in the hands of one ignorant of the manner of using it, and incapable of appreciating its effects. The owner of a horse and cart, who leaves them unattended in the street, is liable for an injury done to a person or his property, by the running away of the horse (*Lynch* v. *Nurdin*, 1 Adol. & Ellis, N. S., 29; *Illidge* v. *Goodin*, 5 Car. & P. 190), for the same reason. The injury is the natural result of the negligence. If the party thus injured had, however, by the delay or confinement from his injury, been prevented from completing a valuable contract, from which he expected to make large profits, he could not recover such expected profits from the negligent party, in the cases supposed. Such damages would not be the necessary or natural consequences, nor the results ordinarily to be anticipated, from the negligence committed. (6 Hill, 522; 13 Wend. 601; 3 E. D. Smith, 144.) So if an engineer upon a steamboat or locomotive, in passing the house of A., so carelessly manages its machinery that the coals and sparks from its fires fall upon and consume the house of A., the railroad company or the steamboat proprietors are liable to pay the value of the property thus destroyed. (*Field* v. *N. Y. Central R. R.*, 32 N. Y. 339.) Thus far the law is settled and the principle is apparent. If, however, the fire communicates from the house of A. to that of B., and that is destroyed, is the negligent party liable for his loss? And if it spreads thence to the house of C., and thence to the house of D., and thence consecutively through the other houses, until it reaches and consumes the house of Z., is the party liable to pay the damages sustained by these twenty-four sufferers? The counsel for the plaintiff does not distinctly claim this, and I think it would not be seriously insisted that the sufferers could recover in such case. Where, then, is the principle upon which A. recovers and Z. fails?

It has been suggested that an important element exists in the difference between an intentional firing and a negligent firing merely; that when a party designedly fires his own house or his own fallow land, not intending, however, to do any injury to his neighbor, but a damage actually results, that he may be liable for

more extended damages than where the fire originated in accident or negligence. It is true that the most of the cases where the liability was held to exist, were cases of an intentional firing. The case, however, of *Vaughan* v. *Menlove* (3 B. N. C. 468, *ante*, p. 18.) was that of a spontaneous combustion of a hay-rick. The rick was burned, the owner's buildings were destroyed, and thence the fire spread to the plaintiff's cottage, which was also consumed. The defendant was held liable. Without deciding upon the importance of this distinction, I prefer to place my opinion upon the ground that, in the one case, to wit, the destruction of the building upon which the sparks were thrown by the negligent act of the party sought to be charged, the result was to have been anticipated the moment the fire was communicated to the building; that its destruction was the ordinary and natural result of its being fired. In the second, third or twenty-fourth case, as supposed, the destruction of the building was not a natural and expected result of the first firing. That a building upon which sparks and cinders fall should be destroyed or seriously injured must be expected, but that the fire should spread and other buildings be consumed, is not a necessary or an usual result. That it is possible, and that it is not unfrequent, cannot be denied. The result, however, depends, not upon any necessity of a further communication of the fire, but upon a concurrence of accidental circumstances, such as the degree of the heat, the state of the atmosphere, the condition and materials of the adjoining structures and the direction of the wind. These are accidental and varying circumstances. The party has no control over them, and is not responsible for their effects.

My opinion, therefore, is, that this action cannot be sustained, for the reason that the damages incurred are not the immediate but the remote result of the negligence of the defendants. The immediate result was the destruction of their own wood and sheds; beyond that, it was remote.[1]

To sustain such a claim as the present, and to follow the same to its legitimate consequences, would subject to a liability against which no prudence could guard, and to meet which no private fortune would be adequate.[2] Nearly all fires are caused by negligence, in its extended sense. In a country where wood, coal, gas and oils are universally used, where men are crowded into cities and villages, where servants are employed, and where children find their home in all houses, it is impossible that the most viligant prudence should guard against the occurrence of accidental or negligent fires. A man may insure his own house or his own furniture, but he cannot insure his neighbor's building or furniture, for the reason that he

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[1] A portion of the opinion is omitted.

[2] See *accord*, Thompson, C. J., 62 Pa. 367—but see *contra*, Lawrence, J., 59 Ill. 349 (1871), p. 361, *inter alia*, he says, that this argument "proceeds on the assumption that, if a great loss is to be suffered, it had better be distributed among a hundred innocent victims than wholly visited upon the wrongdoer." "The simple question is, whether a loss, that must be borne somewhere, is to be visited on the head of the innocent or guilty."

has no interest in them. To hold that the owner must not only meet his own loss by fire, but that he must guarantee the security of his neighbors on both sides, and to an unlimited extent, would be to create a liability which would be the destruction of all civilized society. No community could long exist, under the operation of such a principle. In a commercial country, each man, to some extent, runs the hazard of his neighbor's conduct, and each, by insurance against such hazards, is enabled to obtain a reasonable security against loss. To neglect such precaution, and to call upon his neighbor, on whose premises a fire originated, to indemnify him instead, would be to award a punishment quite beyond the offense committed. It is to be considered, also, that if the negligent party is liable to the owner of a remote building thus consumed, he would also be liable to the insurance companies who should pay losses to such remote owners. The principle of subrogation would entitle the companies to the benefit of every claim held by the party to whom a loss should be paid.

In deciding this case, I have examined the authorities cited from the Year Books, and have not overlooked the English statutes on the subject, or the English decisions extending back for many years. It will not be useful further to refer to these authorities, and it will be impossible to reconcile some of them with the view I have taken.

The remoteness of the damage, in my judgment, forms the true rule on which the question should be decided, and which prohibits a recovery by the plaintiff in this case.

Judgment should be affirmed.[8]

PENNSYLVANIA RAILROAD CO. *v.* HOPE.

Supreme Court of Pennsylvania, 1876. 80 Pennsylvania, 373.

AGNEW, C. J.: Two principal questions arise in this case. The first has relation to the fact of negligence as causing the fire, and the second to the nearness or remoteness of the injury to the negligence causing it. The first three assignments of error belong to the former, and the fourth to the latter.

[The court held that the question of negligence could not on the evidence presented be withdrawn from the jury, who found the fact of actual negligence.]

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[8] *Accord*: *Read* v. *Nicholls, et al*, 118 N. Y. 224 (1890), defendant liable only for destruction of building first ignited by sparks from their factory stacks; *Judd* v. *Cushing*, 50 Hun, 181 (N. Y. Sup. Ct., 1888), this applies to city houses having same party wall; *Hine* v. *Cushing*, 53 Hun, 519 (1889), but not when by openings made in party wall two houses are thrown into one; *Hoffman* v. *King*, 160 N. Y. 618 (1899), liability in country districts limited to property line of owner of property first set on fire; see *Webb* v. *R. R.*, 49 N. Y. 420 (1872), a railroad or owner of property is liable for fire negligently set on own property and spreading to that adjacent.

Kerr v. *R. R.*, 62 Pa. 353 (1869), and *St. J. and D. C. R. R.* v. *Chase*, 11 Kans. 47 (1873), *acc.* have been overruled—*Hope* v. *R. R.*, 80 Pa. 373 (1876) and *A. T. & S. F. R., R.*, v. *Bales*, 16 Kans. 252 (1876).

The second question is of importance, and in view of our own case of *Pennsylvania Railroad Co.* v. *Kerr*, 12 P. F. Smith, 353, requires a careful examination. After the mail train passed, fire was immediately discovered in one of the cross-ties of the track, which was communicated directly to the grass adjoining, and running into a small heap of dry grass that had been cut and pulled and thrown into a pile, in the fall before, was carried thence by means of rubbish and dry grass on the company's ground, across the roadway to the fence, which was fired, and thence across two grass fields, burning the dry grass in its pathway, until it reached the plaintiff's fence and woodland, about six hundred feet from the railroad, burning the fence, and a large part of the woods. The weather was dry and windy, and the direction of the wind was strongly toward the plaintiff's fields and woods.

It is contended that the defendants are not liable for the injury to the plaintiff's fence and woods, on the ground that the injury was too remote from the original cause; and *The Pennsylvania Railroad Company* v. *Kerr* is cited as authority for this. We agree with the court below that the question of proximity was one of fact peculiarly for the jury. How near or remote each fact is to its next succeeding fact in the concatenation of circumstances from the prime cause to the end of the succession of facts, which is immediately linked to the injury, necessarily must be determined by the jury. These facts or circumstances constitute the case, and depend upon the evidence. The jury must determine, therefore, whether the facts constitute a continuous succession of events, so linked together, that they become a natural whole, or whether the chain of events is so broken, that they become independent, and the final result cannot be said to be the natural and probable consequence of the primary cause—the negligence of the defendants. The rule concerning involuntary negligence, as distinguished from wanton or intentional injury, is expressed in the maxim, ***causa proxima non remota spectatur***. The rule is undisputed, but the difficulty lies in its application arising sometimes from the barrenness or uncertainty of the evidence, and sometimes from the intrinsic difficult in the nature of the circumstances. In all or nearly all cases, the rule for determining what is a proximate cause is, that the injury must be the natural and probable consequence of the negligence, and that this might and ought to have been foreseen under the surrounding circumstances. These are the circumstances of the particular case, and from the nature of the thing must be referred to the jury. All the court can do is to aid the jury by pointing to the relations of the facts. The jury must determine whether the original cause, that is, the negligence, is, by continuous operation, so linked to each successive fact, as that all may be said to be one continuous operating succession of events, in which the first becomes naturally linked to the last, and to be its cause, and thus to be within the probable foresight of him whose negligence ran through the succession to the injury. In determining this relation, it is obvious we are not to be governed by abstrac-

tions, which, in theory only, cut off the succession. Abstractly each blade of grass or stalk of grain is distinct from every other; so one field may be separated from another by an ideal boundary, or a different ownership, or it may be by a real but combustible division line. But we cannot say that therefore the succession fails. It is at this point the province of the jury takes up the successive facts and ascertains whether they are naturally and probably related to each other by a continuous sequence, or are broken off or separated by a new and independent cause. The practical knowledge and common sense of the jury applied to the evidence steps in to determine whether the injury is the real proximate result of the negligence, or, by reason of intervening and independent causes must be regarded as too remote, and the result not within the probable foresight of the party whose negligence is alleged to have produced it. Applying to the facts of this case this practical every day sense, we cannot say that the verdict of the jury was not a well formed judgment. In a field of dry grass, such as is described, and in such a state of the weather, it is obvious that a fire communicated to it from the fence of the roadway, will pass from blade to blade, and stalk to stalk, until reaching a fence where old dried grass lies entangled among the rails, the fence, instead of being a barrier, only adds fuel to the flames. Thus by a continuous succession, open and probable to every eye, a fire started by negligence on the roadway continues onward without cessation, and every blade, stalk and rail becomes a part of the concatenation leading to the result, however far it be from the starting point.[1]

Upon the whole case the conclusion seems to be with the plaintiff below, and the judgment should be affirmed.[2]

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[1] The remainder of the opinion is omitted. In it the Court defends and distinguishes *Kerr* v. *R. R.*, 62 Pa. 353 (1869) and explains it on the ground that the point there reserved for the appellate court presented the bare question of the liability of one negligently starting a fire for all the loss due to its further spread, whether naturally or by reason of some abnormal assisting force, human or of nature; whether the fire started naturally being a question for the jury.

[2] *Accord*: *P. R. R.* v. *Lacey*, 89 Pa. 458 (1879); *L. V. R. R.* v. *McKeen*, 90 Pa. 122 (1879); *Haverly* v. *R. R.*, 135 Pa. 50 (1890). *Accord* also: *Fent* v. *R. R.*, 59 Ill. 349 (1871); *A. T. & S. F. R. R.* v. *Stanford*, 12 Kans. 354 (1874), prairie fire—property destroyed at distance of four miles; *Atchison, etc.*, v. *Bales*, 16 Kans. 252 (1876); *P. W. & B. R. R.* v. *Constable*, 39 Md. 149 (1873); *Hart* v. *R. R.*, 13 Metc. 99 (Mass., 1847); *Parley* v. *R. R.*, 98 Mass. 414 (1868); *Coates* v. *R. R.*, 61 Mo. 38 (1875); *Poeppers* v. *R. R.*, 67 Mo. 715 (1878), property eight miles from track destroyed by prairie fire; *R. R.* v. *Westover*, 4 Neb. 268 (1876), property half a mile away; *Adams* v. *Young*, 44 Ohio, 80 (1886); *Atkinson* v. *Goodrich Trans. Co.*, 60 Wis. 141 (1884); *Milwaukee & St. Paul R. R.* v. *Kellogg*, 94 U. S. 469 (1876). See also *Knowlton* v. *R. R.*, 147 Mass. 606 (1888), the whole conflagration so far as it affects the plaintiff's property is one entire cause of action.

HAVERLY *v.* STATE LINE, ETC., R. CO.

Supreme Court of Pennsylvania, 1890. 135 *Pennsylvania,* 50.

The plaintiff was engaged in lumbering upon a tract of land adjoining the defendant's railroad. The plaintiff's testimony tended to show that owing to a defective arrester on one of defendant's engines, an old hemlock stump, "rotten and punky," and surrounded by dried grass, was set on fire about 4 P. M. on May 11, 1880. On discovering smoke issuing from the stump, one of the plaintiff's employees was sent to extinguish the fire, and on his return reported that he had done so. An employee sent at 10 o'clock next morning to see if the fire was out, found it still smouldering about the roots and after throwing water on it, he waited about half an hour and went away satisfied the fire was out. At noon a high wind arose and fire broke out near the stump which the plaintiff could not control and which burned over the plaintiff's tract, destroying his logs and lumber.

Defendant took this appeal from a judgment upon a verdict for the plaintiff, assigning for error *inter alia* the court's refusal to charge that if the fire spread from the stump under the above circumstances the verdict must be for the defendant.[1]

OPINION, MR. JUSTICE MITCHELL: The test by which the line is to be drawn between proximate and remote cause, in reference to liability for the consequences of negligence, has been firmly established by the three cases of *Penna. R. Co.* v. *Kerr,* 62 Pa. 353; *Penna. R. Co.* v. *Hope,* 80 Pa. 373; and *Hoag* v. *Railroad Co.,* 85 Pa. 293. It is most elaborately expressed by Chief Justice AGNEW in *Penna. R. Co.* v. *Hope,* in the following language: "The jury must determine, therefore, whether the facts constitute a continuous succession of events, so linked together that they become a natural whole, or whether the chain of events is so broken that they become independent, and the final result cannot be said to be the natural and probable consequence of the primary cause,—the negligence of the defendants;" and the rule is again put somewhat more tersely by the present Chief Justice in *Hoag* v. *Railroad Co.,* as follows: "The injury must be the natural and probable consequence of the negligence; such a consequence as * * * might and ought to have been foreseen by the wrong-doer as likely to flow from his act."

The three leading cases above referred to, though frequently cited on opposite sides of the same argument, are not at all in conflict in principle. The different results which were reached in them depended not on any different view of the law, but of the facts, and on the application of the familiar doctrine that, where a plain inference is to be drawn from undisputed facts, the court will decide it as a matter of law. In *Penna. R. Co.* v. *Kerr,* the negligence had been held by the court below to be the proximate cause of the plaintiff's loss. This court held that it was remote, and did not award a

[1] The facts are restated.

new venire, but said that it would do so if plaintiff should desire it upon grounds shown. The question was then new; and, from what was said about the venire, the court itself does not seem to have been entirely clear that it should be decided as matter of law. It may be doubted whether, on the same facts, the court would not now send it to a jury. Certainly no subsequent case has assumed to decide where the facts were so near the line. *Hoag* v. *Railroad Co.* was a much clearer case, and so were *Pittsburgh, etc., Ry. Co.* v. *Taylor,* 104 Pa. 306; *West Mahanoy Tp.* v. *Watson,* 116 Pa. 344; *South Side Pass. Ry. Co.* v. *Trich,* 117 Pa. 390, and the other cases where the court has pronounced the negligence to be remote as matter of law. But, whatever the result of the views taken of the facts in these cases, the principles of decision are the same in all.

In the present case, the learned judge left the question of proximate or remote cause to the jury, in substantial conformity with the doctrine of *Penna. R. Co.* v. *Hope.* Appellant, however, claims that the succession of events was so broken as to bring the case under *Hoag* v. *Railroad Co.,* and require the judge to direct the jury in its favor. The break in the chain of events was merely a gap in the time. Had the fire extended from the stump to plaintiff's lumber without interval, on the same afternoon, this case would have been exactly parallel with *Penna. R. Co.* v. *Hope.* But the fact that the fire smouldered awhile in the stump, and, after it was supposed to have been extinguished, broke out again the next day, while it makes the conclusion less obvious that the damage was done by the same fire, does not interpose any new cause, or enable the court to say as matter of law that the casual connection was broken.[2] The sequence from the original fire to the burning of plaintiff's logs was interrupted by two apparent cessations of the fire, but the jury have found that the cessations were only apparent, leaving intervals of time in the visible progress of the fire, but making no real break at all in the actual connection. In *Railroad Co.* v. *Kerr,* page 366, it is said by THOMPSON, C. J., that the rule "is not to be controlled by time or distance, but by the succession of events;" and in *Hoag* v. *Railroad Co.,* TRUNKEY, P. J., in charging the jury, had quoted the foregoing, and added: "Whether the fire communicated to the plaintiff's property within a few minutes, or after the lapse of hours from the negligent act, may be immaterial." It is said in this case that the agents of plaintiff on the ground did not anticipate a further spread of the fire after the interval of time, and therefore it cannot be assumed that the defendant should have anticipated it. But the agents of plaintiff did not expect it, because they thought the fire had been put out, not because they did not see the danger of its spreading while it was burning; and this was the danger that appellant was bound to contemplate, to wit, the natural and probable consequence of the original act, not the effect of the supposed extinguishment subsequently.[3] The pauses in the progress

[2] *Accord*: *Krippner* v. *Biebl,* 28 Minn. 139 (1882) *contra; Doggett* v. *R. R.,* 78 N. C. 305 (1878).

[3] *Contra*: *Doggett* v. *R. R.,* 78 N. C. 305 (1878). See as to failure of

of the fire, therefore, and the lapse of time, while matter for the consideration of the jury in determining the continuity of effect, do not of themselves make such a change as requires the court to say that they break the connection.

But it is argued that it was not until the next morning after the fire started in the stump, and during the time when it was apparently extinguished, that the wind rose, and became a new cause of the spread of the fire to plaintiff's lumber. This, however, was, like the point already considered, dependent on the circumstances.[4] In *Penna. R. Co.* v. *Hope,* one of the facts was, a strong wind which carried the fire and so, also, it was in *Penna., etc., R. Co.* v. *Lacey,* 89 Pa. 458, and in *Lehigh V. R. Co.* v. *McKeen,* 90 Pa. 129; and in this last case, TRUNKEY, J., says the jury "could also determine whether dry weather and high winds, in the spring time, are extraordinary, and whether, under these conditions, * * * the injury was within the probable foresight of him whose negligence ran through from the beginning to the end." No doubt a hurricane or a gale may be such as to be plainly out of the usual course of nature, and therefore to be pronounced by the court as the intervention of a new cause. Such a wind would be like the flood in *Morrison* v. *Davis,* 20 Pa. 171. But the ordinary danger of wind helping a fire to spread is one of the things to be naturally anticipated. The lapse of time before the wind rose, in this case, was therefore not clearly a new cause to be so pronounced by the court, but a circumstance to be considered, with the others, by the jury.

On this branch of the case, generally, the injury was not more remote from the alleged cause than in *Penna. R. Co.* v. *Hope, supra; Penna., etc., R. Co.* v. *Lacey,* 89 Pa. 458, and *Lehigh V. R. Co.* v. *McKeen,* 90 Pa. 129; and not so much so as in *Fairbanks* v. *Kerr,* 70 Pa. 86, and *Oil Creek, etc., Ry. Co.* v. *Keighron,* 74 Pa. 316, in all of which the question was held to have been properly submitted to the jury.

There remains only the question of contributory negligence, and we do not find any evidence that would have justified taking this from the jury. If plaintiff had not known of the fire in the stump, he would have had no duty in regard to it; but, knowing of

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third person to extinguish fire; *Doggett* v. *R. R., supra; Wiley* v. *R. R.,* 44 N. J. L. 244 (1883); *Atkinson* v. *Goodrich Trans. Co.,* 60 Wis. 141 (1884). As to suggestion that since plaintiff did not foresee spread of fire, defendant could not be required to do so, see *Oil City* v. *Robinson,* 99 Pa. 1 (1881) *acc; Roedecker* v. *Met. St. Ry. Co.,* 87 N. Y. App. Div. 227 (1903), and *Wood* v. *R. R.,* 177 Pa. 306 (1896).

[4] *Accord*: *P. R. R.* v. *Lacey,* 89 Pa. 458 (1879); *Kellogg* v. *R. R.,* 26 Wis. 223 (1870); 94 U. S. 469 (1876); *Hart* v. *R. R.,* 13 Metc. 99 (Mass., 1847); *Coates* v. *R. R.,* 61 Mo. 38 (1875). In the following cases the wind arose after the negligent act was complete. *Hewey* v. *Nourse,* 54 Me. 256 (1868); *Poeppers* v. *R. R.,* 67 Mo. 715 (1878); *Needham* v. *King,* 95 Mich. 303 (1893); but see *Lillibridge* v. *McCann,* 117 Mich. 84 (1898), *contra* (*semble*) and *R. R.* v. *Whitlock,* 99 Ind. 16 (1884), and *Cf.*: *Marvin* v. *R. R.,* 79 Wis. 140 (1891), fire spread by subsequent "whirlwind."

it, he was bound to take all reasonable and practicable measures to prevent its spreading to his lumber. He was not an insurer. The measure of his duty in this regard was reasonable care and diligence, and whether he used these was fairly and accurately submitted to the jury. That they found against the defendant's view was no fault of their instruction as to the law.

Judgment affirmed.

ULRICK *v.* DAKOTA LOAN & TRUST COMPANY.

Supreme Court of South Dakota, 1892. 3 South Dakota, 44.

KELLAM, P. J.:[1] The complaint is that "defendant (appellant) wrongfully and negligently * * * excavated the land adjacent and contiguous to plaintiff's said land, * * * and removed the earth therefrom, without leaving sufficient lateral support for the plaintiff's said land and building; * * * that defendant did so make such excavation as aforesaid, without using proper and ordinary care and skill in so doing, and without taking reasonable precaution to sustain the plaintiff's said land and building; that by reason of the excavation made as aforesaid, and the lack of support to plaintiff's said land and building caused thereby, the stone walls under said building sank and gave way," etc. The evidence most directly tending to show negligence, if any, and that upon which the verdict undoubtedly rested, was that after the excavation was substantially done, but still open, awaiting the masons, with trenches for the footing courses of appellant's wall, dug along and by the side of respondent's wall, it was left in such condition that water ran in from the street outside, and so soaked up and softened the earth by which respondent's wall was supported that it settled, and gave way, causing the damage complained of. In our former opinion we meant to be understood as holding that in the excavation of this work appellant owed a duty to respondent as a coterminous owner; that that duty extended not only to the digging up of the earth and hauling it away, but to the care of the excavation during the progress of the work. Whether so leaving the excavation open to the influx of water was such negligence as would make appellant liable, depends upon circumstances. The circumstances were left to the jury under an instruction which we think fairly stated the law. They were told that while appellant could not, in general, be held liable for injury caused by an unusual and excessive rain, yet if the rain itself would not have run into the excavation in sufficient quantity to cause damage, except for the careless and negligent conduct of appellant in leaving the same exposed to the gathered inflow of water from the street and gutter, appellant might be liable. We think this was correct law. Suth. Dam., pp. 20-28; *Pittsburg City* v. *Grier*, 22 Pa. St. 54; *Higgins* v. *Dewey*, 107 Mass. 494.[2]

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[1] Part of the opinion is omitted.

[2] *Accord*: *Helbling* v. *Cemetery Co.*, 201 Pa. 171 (1902), obstruction

BALTIMORE & OHIO R. R. CO. *v.* SULPHUR SPRING SCHOOL DISTRICT.

Supreme Court of Pennsylvania, 1880. 96 *Pennsylvania,* 65.

The lessor of the defendant road had constructed an embankment across the mouth of a hollow through which ran a rivulet. A rain of great violence caused the water dammed up by the embankment to rise so that it swept away the plaintiff's schoolhouse situated higher up on the brook and carried it over the embankment. The plaintiff gave evidence tending to show that the culverts in the embankment were insufficient and had been suffered to become clogged with stones and debris.

The jury found a verdict for the plaintiff, and after judgment thereon the defendant took a writ of error, alleging that the court erred *inter alia* in affirming the plaintiff's points, which are stated in the opinion.

GREEN, J.:[1] We are also of opinion that the court erred in their answers to the plaintiff's second and third points. In affirming the first point, the court ruled that: "If there was negligence on the part of the defendant concurring with the act of God, at the time plaintiff's loss was sustained, then the defendant is liable, and the jury are not bound to inquire whether the loss would have happened if the defendant had not been guilty of negligence." As we understand this point, it practically declares that although the act of God alone, without any negligence of the defendant would have caused the injury, the jury were not at liberty to consider that fact, if in reality there was negligence on the part of the defendant concurring with the act of God. In other words, no matter how terrible, extraordinary and unprecedented were the storm and flood, so that they alone caused the injury, yet if there was concurring negligence of the defendant, although it did not produce the injury, and its absence would not have prevented it, still the defendant would

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of inlet to sewer—adjacent property flooded during excessive rainfall; *Rife* v. *Middletown,* 32 Pa. S. C. 68 (1906), insufficient culvert; flooding caused largely by backing up of stream due to exceptional flood; *Elder* v. *Lykens Valley Coal Co.,* 157 Pa. 490 (1893), act of God accelerated and increased a harm probable under normal conditions; an extraordinary flood carried mine refuse placed within reach of ordinary freshets on to the land of a lower riparian owner; *Salisbury* v. *Herchenroder,* 106 Mass. 458 (1871), overhead sign, erected in violation of ordinance, blown down by violent gale; *Prussak* v. *Hutton,* 30 App. Div. (N. Y.) 66 (1898), powder magazine, so situate as to be a nuisance, struck by lightning and exploded; *Smith* v. *Faxon,* 156 Mass. 589 (1892), water flooding plaintiff's cellar through wall negligently built; *Needham* v. *King,* 95 Mich. 303 (1893), fire started at improper place, spread by subsequent high wind; "a man may not tempt the winds and then charge the result to Providence," *McGrath,* J.; *Brash* v. *City of St. Louis,* 161 Mo. 433 (1901), defective sewer bursting during extraordinary rainfall; *Schwartz* v. *Adsit,* 91 Ill. App. 576 (1899), walls left standing after fire, blown down by gale; *Cf.*: *Nordheimer* v. *Alexander,* 19 S. C. Canada 248 (1891), similar facts, decided under the civil code of Lower Canada, modeled on the Code Napoleon.

[1] The facts are restated and only that part of the opinion which deals with the affirmance of the plaintiff's points is given.

be liable. The same idea is repeated in the plaintiff's second point, that if the defendant's negligence in any degree caused the loss, they would be liable. Now a small pebble in one of the culverts would in some small degree, impede the course of the water, yet the doctrine of this point, which the court affirmed, would make the defendant liable for the entire injury, even though a huge avalanche of water were suddenly launched upon the stream and hurled with irresistible force upon the embankment and culvert in question. Such is not the law.

We apprehend that the concurring negligence, which, when combined with the act of God, produces the injury, must be such as is in itself a real producing cause of the injury, and not a merely fanciful or speculative or microscopic negligence which may not have been in the least degree the cause of the injury. In other words: If the act of God in this particular case was of such an overwhelming and destructive character, as by its own force, and independently of the particular negligence alleged or shown, produced the injury, there would be no liability, though there were some negligence in the maintenance of the particular structure. To create liability it must have required the combined effect of the act of God and the concurring negligence to produce the injury. The present case affords a fair illustration of the reason for this distinction. The defendant's witnesses testified that the force and volume of the water were so very great that it would have required one hundred and twenty such culverts to pass it off. Hence, if the three culverts were in the most perfect condition, they would not at all have prevented the injury, and therefore the fact that they were somewhat obstructed might be quite immaterial. If the jury believed this testimony, it might have had a most important bearing upon their verdict, to the extent even of inducing them to find in favor of the defendant. But the case was not put to them in that way, and they had no opportunity of considering it in that aspect. For these reasons we sustain the second and fourth assignments of error. The other assignments are not material and are not considered.

Judgment reversed and *venire facias de novo* awarded.[2]

RAILROAD COMPANY *v.* REEVES.

Supreme Court of the United States, 1869. 10 *Wallace,* 176.

MILLER, J.[1] The testimony in the case, wholly uncontradicted, shows one of the most sudden, violent, and extraordinary floods ever known in that part of the country. The tobacco was being trans-

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[2] *Accord*: *Lehigh Bridge Co.* v. *Lehigh C. & N. Co.*, 4 Rawle (Pa.) 9 (1833), defendant's bridge hurled by flood against that of plaintiff; *Livesey* v. *Philadelphia*, 64 Pa. 106 (1870), bridge carried by flood onto plaintiff's land; *Siegfried* v. *So. Bethlehem Boro.*, 27 Pa. S. C. 456 (1905), clogged sewer, adjacent property flooded during violent rain.

[1] Part of the opinion is omitted.

ported from Salisbury, North Carolina, to Memphis, on a contract through and by several railroad companies, of which defendant was one. At Chattanooga it was received by defendant, and fifteen miles out the train was arrested, blocked by a land slide and broken bridges, and returned to Chattanooga, when the water came over the track into the car and injured the tobacco.

The second instruction given by the court says that if, while the cars were so standing at Chattanooga, they were submerged by a freshet which no human care, skill, and prudence could have avoided, then the defendant would not be liable; but if the cars were brought within the influence of the freshet by the act of defendant, and if the defendant or his agent had not so acted the loss would not have occurred, then it was not the act of God, and defendant would be liable. The fifth instruction given also tells the jury that if the damage could have been prevented by any means within the power of the defendant or his agents, and such means were not resorted to, then the jury must find for plaintiff.

In contrast with the stringent ruling here stated, and as expressive of our view of the law on this point, we cite two decisions by courts of the first respectability in this country.

In *Morrison* v. *Davis & Co.*, 20 Pa., 171, goods being transported on a canal were injured by the wrecking of the boat, caused by an extraordinary flood. It was shown that a lame horse used by defendants delayed the boat, which would otherwise have passed the place where the accident occurred in time to avoid the injury The court held that the proximate cause of the disaster was the flood, and the delay caused by the lame horse the remote cause, and that the maxim, *causa proxima, non remota spectatur,* applied as well to contracts of common carriers as to others The court further held, that when carriers discover themselves in peril by inevitable accident, the law requires of them ordinary care, skill, and foresight, which it defines to be the common prudence which men of business and heads of families usually exhibit in matters that are interesting to them

In *Denny* v. *New York Central Railroad Co.*, 13 Gray, 481, the defendants were guilty of a negligent delay of six days in transporting wool from Suspension Bridge to Albany, and while in their depot at the latter place a few days after, it was submerged by a sudden and violent flood in the Hudson River. The court says that the flood was the proximate cause of the injury, and the delay in transportation the remote one; that the doctrine we have just stated governs the liabilities of common carriers as it does other occupations and pursuits, and it cites with approval the case of *Morrison* v. *Davis & Co.*

Of the soundness of this principle we are entirely convinced, and it is at variance with the general groundwork of the court's charge in this case.

As the case must go back for a new trial, there is another error which we must notice, as it might otherwise be repeated. It is the third instruction given by the court, to the effect that if defendant

had contracted to start with the tobacco the evening before, and the jury believe if he had done so the train would have escaped injury, then the defendant was liable. Even if there had been such a contract, the failure to comply would have been only the remote cause of the loss.

But all the testimony that was given is in the record, and we see nothing from which the jury could have inferred any such contract, or which tends to establish it, and for that reason no such instruction should have been given.

Judgment reversed and a new trial ordered.[2]

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[2] *Accord*: *St. Louis, etc., R. R.* v. *Commercial Ins. Co.*, 139 U. S. 223 (1890); *Martin* v. *R. R.*, 55 Ark. 510 (1892); *Moffatt* v. *R. R.*, 113 Mo. App. 544 (1905), but *cf. Pruitt* v. *R. R.*, 62 Mo. 527 (1876); *Daniels* v. *Ballentine*, 23 Ohio 532 (1872); *Herring* v. *R. R.*, 101 Va. 778 (1903), all cases where defendants were carriers of goods; *McClary* v. *R. R.*, 3 Neb. 44 (1873), defendant, a carrier of passengers, not liable to passenger injured through blowing over by violent gale, of delayed train, but see *Wabash R. R.* v. *Sharpe*, 76 Neb. 424 (1906), carrier of goods liable to shipper for destruction by flood of delayed goods; here, however, the delay was persisted in after notice had been given by the U. S. Weather Bureau of probable floods; *Cf. Pinkerton* v. *R. R.*, 117 Mo. App. 288 (1906), and *Dubuque Wood Co.* v. *Dubuque*, 30 Iowa 176 (1870), plaintiff's wood, piled on a levee, the removal of which was delayed and prevented by the impassable condition of defendant's bridge, was carried away by a flood.

Contra, R. R. v. *Gidley*, 119 Ala. 523 (1898), goods destroyed by fire during delay; *Wald* v. *R. R.*, 162 Ill. 545 (1896), passenger's luggage, shipped by train later than that he was himself on, lost in Johnstown flood; *Cassilay* v. *Young & Co.*, 4 B. Mon. 265 (Ky., 1843); *Campbell* v. *Morse*, Harper, 468 (S. C. 1824) carrier's wagon stalled in a ford caught by freshet; *Meyer* v. *R. R.*, 41 La. Ann. 639 (1889), decided largely on the ground that the cotton burned was insured while in shippers gin house but not while in transit; *Cf. Daniels* v. *Ballentine, supra*, and *Erie R. R.* v. *Star & Crescent Milling Co.*, 162 Fed. 879 (C. C. A., 7th circ., 1908); *Bibb Broom Co.* v. *R. R.*, 94 Minn. 269 (1905); *Read* v. *Spaulding*, 30 N. Y. 630 (1864); *Michaels* v. *R. R.*, 30 N. Y. 564, and *Condict* v. *R. R.*, 54 N. Y. 500 (1873).

Where delay in shipment exposes inflammable goods, such as cotton, to obvious risk of accidental fire the carrier is liable; *M. K. & T. R. R.* v. *McFadden & Bro.*, 89 Tex. 137 (1896), or where after notice of the danger the goods are lost by subsequent delay or other misconduct, *Wabash R. R.* v. *Sharpe, supra; Deming* v. *Merchants, Etc., Co.*, 90 Tenn. 306, p. 353 (1891), couplings of train broke while cars were being removed from burning freight yard; *B. & O. R. R.* v. *Keedy*, 75 Md. 320 (1892), failure to remove cars from flooded tracks; *Pinkerton* v. *R. R., supra.*

See, as to delay exposing goods to risks excepted in bill of lading or charter party; *Hoadley* v. *Northern Transportation Co.*, 115 Mass. 304 (1874), carrier not liable; *Contra, Condict* v. *R. R.*, and *Erie R. R.* v. *Star & Crescent Co., supra;* and as to damage to cargo sustained through accidental causes or "act of God" while vessel is wilfully deviating from agreed voyage; *Davis* v. *Garrett*, 6 Bing. 716 (Eng., 1830), and *Phillips* v. *Brigham, Kelley & Co.*, 26 Ga. 617 (1859).

(b) Instinctive Acts of Human Beings and Animals.

SCOTT *v.* SHEPHERD.

In the Common Pleas, 1772. 2 William Blackstone, 892.

Trespass and assault for throwing, casting and tossing a lighted squib, at and against the plaintiff, and striking him therewith on the face, and so burning one of his eyes, that he lost the sight of it, whereby, &c.

On not guilty pleaded, the cause came on to be tried before Nares Justice last Summer Assises at Bridgwater, when the jury found a verdict for the plaintiff with 100*l.* damages, subject to the opinion of the court on this case.

On the evening of the fair-day at Milbourne-Port, 28th October, 1770, the defendant threw a lighted squib, made of gunpowder, etc., from the street into the market house, which is a covered building, supported by arches, and enclosed at one end, but open at the other, and both the sides, where a large concourse of people were assembled; which lighted squib, so thrown by the defendant, fell upon the standing of one Yates, who sold gingerbread, etc. That one Willis instantly, and to prevent injury to himself and the said wares of the said Yates, took up the said lighted squib from off the said standing, and then threw it across the said market house; when it fell upon another standing there of one Ryall, who sold the same sort of wares; who instantly, and to save his own goods from being injured, took up the said lighted squib from off the said standing, and then threw it to another part of the said market house, and in so throwing it struck the plaintiff then in the said market house in the face therewith, and the combustible matter then bursting, put out one of the plaintiff's eyes.

Qu. If this action be maintainable?

This case was argued last term by Glyn for the plaintiff and Burland for the defendant; and this term, the Court being divided in their judgment, delivered their opinions seriatim.

Nares Justice was of opinion, that trespass would well lie in the present case. That the natural and probable consequence of the act done by the defendant was injury to somebody, and therefore the act was illegal at common law. And the throwing of squibs has by statute W. 3 been since made a nuisance. Being therefore unlawful, the defendant was liable to answer for the consequences, be the injury mediate or immediate. 21 Hen. 7, 28, is express that *malus animus* is not necessary to constitute a trespass. So, too, 1 Stra. 196; Hob. 134; T. Jones 205; 6 Edw. 4, 7, 8; Fitzh. Trespass, 110. The principle I go upon is what is laid down in Reynolds and Clark, Stra. 634, that if the act in the first instance be unlawful, trespass will lie. Wherever therefore an act is unlawful at first, trespass will lie for the consequences of it. So in 12 Hen. 4. Trespass lay for stopping a sewer with earth, so as to overflow the plain-

tiff's land. In 26 Hen. 8, 8, for going upon the plaintiff's land to take the boughs off which had fallen thereon in lopping. See also Hardr. 60; Reg. 108, 95; 6 Edw. 4, 7, 8; 1 Ld. Raym. 272; Hob. 180; Cro. Jac. 122, 43; F. N. B. 202, 91, g. I do not think it necessary to maintain trespass, that the defendant should personally touch the plaintiff; if he does it by a mean it is sufficient. *Qui facit per aliud facit per se.* He is the person, who, in the present case, gave the mischievous faculty to the squib. That mischievous faculty remained in it till the explosion. No new power of doing mischief was communicated to it by Willis or Ryal. It is like the case of a mad ox turned loose in a crowd. The person who turns him loose is answerable in trespass for whatever mischief he may do. The intermediate acts of Willis and Ryal will not purge the original tort in the defendant. But he who does the first wrong is answerable for all the consequential damages. So held in the King and Huggins, 2 Ld. Raym. 1574; Parkhurst and Foster, 1 Ld. Raym. 480; Rosewell and Prior, 12 Mod. 639. And it was declared by this Court in Slater and Baker, M. 8, Geo. 3, 2 Wilf. 359, that they would not look with eagle's eyes to see whether the evidence applies exactly or not to the case: but if the plaintiff has obtained a verdict for such damages as he deserves, they will establish it if possible.

Blackstone Justice was of opinion, that an action of trespass did not lie for Scot against Shepherd upon this case. He took the settled distinction to be, that where the injury is immediate an action of trespass will lie; where it is only consequential, it must be an action on the case. Reynolds and Clarke, Ld. Raym. 1401; Stra. 634; Haward and Banks, Burr. 1114; Harker and Birbeck, Burr. 1559. The lawfulness or unlawfulness of the original act is not the criterion; though something of that sort is put into Lord Raymond's mouth in Stra. 635, where it can only mean, that if the act then in question, of erecting a spout, had been in itself unlawful, trespass might have lain; but as it was a lawful act (upon the defendant's own ground) and the injury to the plaintiff only consequential, it must be an action on the case. But this cannot be the general rule, for it is held by the court in the same case, that if I throw a log of timber into the highway, (which is an unlawful act) and another man tumbles over it, and is hurt, an action on the case only lies, it being a consequential damage; but if in throwing it I hit another man, he may bring trespass, because it is an immediate wrong. Trespass may sometimes lie for the consequences of a lawful act. If in lopping my own trees a bough accidentally falls on my neighbor's ground, and I go thereon to fetch it, trespass lies. This is the case cited from 6 Ed. 4, 7. But then the entry is of itself an immediate wrong. And case will sometimes lie for the consequence of an unlawful act. If by false imprisonment I have a special damage, as if I forfeit my recognizance thereby, I shall have an action on the case. Per Powel Justice, 11 Mod. 180. Yet here the original act was unlawful, and in the nature of trespass. So that lawful or unlawful is quite out of the case; the solid distinction is between direct or immediate injuries on the one hand, and mediate or consequential on the other. And trespass never lay for the latter.

If this be so, the only question will be, whether the injury which the plaintiff suffered was immediate or consequential only, and I hold it to be the latter. The original act was as against Yates a trespass; not as against Ryal, or Scot. The tortious act was complete, when the squib lay at rest upon Yates's stall. He, or any bystander had, I allow, a right to protect themselves by removing the squib, but should have taken care to do it in such a manner as not to endamage others. But Shepherd, I think is not answerable in an action of trespass and assault for the mischief done by the squib in the new motion impressed upon it, and the new direction given it, by either Willis or Ryan; who both were free agents, and acted upon their own judgment. This differs it from the cases put of turning loose a wild beast or a madman. They are only instruments in the hand of the first agent. Nor is it like diverting the course of an enraged ox, or of a stone thrown, or an arrow glancing against a tree; because there the original motion, the *Vis impressa*, is continued though diverted. Here the instrument of mischief was at rest, till a new impetus and a new direction are given it, not once only, but by two successive rational agents.

But it is said, that the act is not complete, nor the squib at rest, till after it is spent or exploded. It certainly has a power of doing fresh mischief, and so has a stone that has been thrown against my windows, and now lies still. Yet if any person gives that stone a new motion, and does farther mischief with it, trespass will not lie for that against the original thrower.

No doubt but Yates may maintain trespass against Shepherd. And, according to the doctrine contended for, so may Ryal and Scot. Three actions for one single act! nay it may be extended *in infinitum*. If a man tosses a football into the street, and, after being kicked about by 100 people, it at last breaks a tradesman's windows; shall he have trespass against the man who first produced it? Surely only against the man who gave it that mischievous direction.

But it is said, if Scott has no action against Shepherd, against whom must he seek his remedy? I give no opinion whether case would lie against Shepherd for the consequential damage; though, as at present advised, I think upon the circumstances it would. But I think, in strictness of law, trespass would lie against Ryal, the immediate actor in this unhappy business. Both he and Willis have exceeded the bounds of self-defence, and not used sufficient circumspection in removing the danger from themselves. The throwing it across the market house, instead of brushing it down, or throwing out of the open sides into the street, (if it was not meant to continue the sport as 'tis called) was at least an unnecessary and incautious act. Not even menaces from others are sufficient to justify a trespass against a third person. Much less a fear of danger to either his goods or his person:—nothing but inevitable necessity. Weaver and Ward, Hob. 134; Dickenson and Watson, T. Jones, 205; Gilbert and Stone, Al. 35, Styl. 72. So in the case put by Brian Justice and assented to by Littleton and Cheke Chief Justice

and relied on in Raym. 467. If a man assaults me, so that I cannot avoid him, and I lift up my staff to defend myself, and in lifting it up, undesignedly hit another who is behind me, an action lies by that person against me; and yet I did a lawful act, in endeavoring to defend myself. But none of these great lawyers ever thought that trespass would lie by the person struck against him who first assaulted the striker.

The cases cited from the Register and Hardres are all of immediate acts, or the direct and inevitable effects of the defendant's immediate acts. And I admit that the defendant is answerable in trespass for all the direct and inevitable effects caused by his own immediate act? But what is his own immediate act? The throwing the squib to Yates's stall. Had Yates's goods been burnt, or his person injured, Shepherd must have been responsible in trespass. But he is not responsible for the acts of other men. The subsequent throwing across the market house by Willis, is neither the act of Shepherd, nor the inevitable effect of it. Much less the subsequent throwing by Ryal.

Slater and Barker was first a motion for a new trial after verdict. In our case the verdict is suspended till the determination of the court. And though after verdict the court will not look with eagle's eyes to spy out a variance; yet, when a question is put by the jury upon such a variance and it is made the very point of the cause, the court will not wink against the light, and say that evidence, which at most is only applicable to an action on the case, will maintain an action of trespass. 2. It was an action on the case that was brought; and the court held the special case laid to be fully proved. So that the present question could not arise upon that action. 3. The same evidence that will maintain trespass, may also frequently maintain case, but not *e converso*. Every action of trespass with a *per quod* includes an action on the case. I may bring trespass for the immediate injury, and subjoin a *per quod* for the consequential damages;—or may bring case for the consequential damages and pass over the immediate injury, as in the case from 11 Mod. 180, before cited. But if I bring trespass for an immediate injury, and prove at most only a consequential damage, judgment must be for the defendant. Gates and Bailey, Tr. 6 Geo. 3, 2 Wilf. 313.

It is said by Lord Raymond, and very justly, in Reynolds and Clarke, "We must keep up the boundaries of actions, otherwise we shall introduce the utmost confusion." As I therefore think no immediate injury passed from the defendant to the plaintiff, and without such immediate injury, no action of trespass can be maintained, I am of opinion that in this action judgment ought to be for the defendant.

Gould Justice was of the same opinion with Nares Justice, that this action was well maintainable. The whole difficulty lies in the form of the action, and not in the substance of the remedy.[1] The

[1] And so, *Ricker* v. *Freeman*, 50 N. H. 420 (1870), plaintiff a school

line is very nice between case and trespass upon these occasions; I am persuaded there are many instances wherein both or either will lie. I agree with brother Nares, that wherever a man does an unlawful act, he is answerable for all the consequences; and trespass will lie against him, if the consequence be in nature of trespass.[2] But, exclusive of this, I think the defendant may be considered in the same view, as if he himself had personally thrown the squib in the plaintiff's face. The terror impressed upon Willis and Ryal excited self-defence, and deprived them of the power of recollection. What they did was therefore the inevitable consequence of the defendant's unlawful act. Had the squib been thrown into a coach full of company, the person throwing it out again would not have been answerable for the consequences. What Willis and Ryal did, was by necessity, and the defendant imposed that necessity upon them. As to the case of the football, I think that if all the people assembled act in concert, they are all trespassers; 1. from the general mischievous intent; 2. from the obvious and natural consequences of such an act. Which reasoning will equally apply to the case before us. And that action of trespass will lie for the mischievous consequences of another's act, whether lawful or unlawful, appears from their being maintained for acts done in the plaintiff's own land. Hardr. 60, Courtney and Collett, Ld. Raym.

I shall not go over again the ground which Brother Nares has relied on and explained, but concur in his opinion, that this action is supported by the evidence.

De Grey Chief Justice.

This case is one of those wherein the line drawn by the law between actions on the case and actions of trespass is very nice and delicate.

Trespass is an injury accompanied with force, for which an action of trespass *vi et armis* lies against the person from whom it is received. The question here is, whether the injury received by the plaintiff arises from the force of the original act of the defendant, or from a new force by a third person.

I agree with my Brother Blackstone as to the principles he has laid down, but not in his application of those principles to the present case. The real question certainly does not turn upon the lawfulness or unlawfulness of the original act. For actions of trespass will lie for legal acts when they become trespasses by accident. As in the cases cited of cutting thorns, lopping of a tree, shooting at a

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boy was swung violently round two or three times by defendant, an older schoolmate; being let go he was propelled against other boys in the same passageway who pushed him each off himself and on to another and so in time he was thrown against a coat hook and severely injured. See *Reynolds* v. *Pierson*, 29 Ind. App. 273 (1902).

[2] It is immaterial whether the defendant's act is intentionally harmful or negligent, if the injury is direct in either case trespass lies—*Ricker* v. *Freeman* (*supra*) p. 430. Nor is a negligent wrongdoer the less liable "for all the consequences," than is one guilty of wanton misconduct nor is the liability less where the action brought is case rather than trespass—*Isham* v. *Dow*, 70 Vt. 588 (1898), p. 590.

mark, defending oneself by a stick which strikes another behind, etc.—They may also not lie for the consequences even of illegal acts, as that of casting a log in the highway, etc.—But the true question is, whether the injury is the direct and immediate act of the defendant, and I am of opinion that in this case it is.

The throwing the squib was an act unlawful and tending to affright the bystanders. So far, mischief was originally intended; not any particular mischief, but mischief indiscriminate and wanton. Whatever mischief therefore follows, he is the author of it;—*Egreditur Personam*, as the phrase is in criminal cases. And though criminal cases are no rule for civil ones, yet in trespass I think there is an analogy. Every one who does an unlawful act is considered as the doer of all that follows; if done with a deliberate intent, the consequences may amount to murder; if incautiously, to manslaughter. Fost. 261. So. too, in Ventr. 295. A person breaking a horse in Lincoln's Inn Fields hurt a man, held that trespass lay: and 2 Lev. 172, that it need not be laid *scienter*. I look upon all that was done subsequent to the original throwing as a continuation of the first force and first act, which will continue till the squib was spent by bursting. And I think that any innocent person removing the danger from himself to another is justifiable; the blame lights upon the first thrower. The new direction and new force flow out of the first force, and are not a new trespass.

The writ in the Register 95 *b*. for trespass is maliciously cutting down a head of water, which thereupon flowed down to and overwhelmed another's pond, shews that the immediate act need not be instantaneous, but that a chain of effects connected together will be sufficient.

It has been urged that the intervention of a free agent will make a difference: But I do not consider Willis and Ryal as free agents in the present case, but acting under a compulsive necessity for their own safety, and self-preservation. On these reasons I concur with Brothers Gould and Nares that the present action is maintainable.

Postea to the Plaintiff.

TUTTLE *v.* ATLANTIC CITY RAILROAD COMPANY.

Court of Errors and Appeals of New Jersey, 1901. 66 *N. J. L.*, 327.

VROOM, J.: The writ of error in this cause brings up the record of a suit brought in the Supreme Court and tried at the Camden Circuit Court. The defendant, the Atlantic City Railroad Company, maintained a freight yard on the south side of Mechanic Street, in the city of Camden, and on the 25th day of September, 1899, while a flying drill was being made, one of the cars was derailed and dashed across Mechanic Street, over two curbstones and two trolley tracks, and broke through the front of the house opposite, No. 293, belonging to a Mrs. Brennan. At the time of the accident, Mrs. Tuttle, one of the plaintiffs, was on the sidewalk near the Brennan

house, and looking she saw the car coming across the street at full speed; becoming frightened at the noise, she started to run, and when three or four doors below fell and injured her left knee. * * *

The real question in issue in the case and to be determined by the jury was whether the plaintiff (Mrs. Tuttle), seeing the car approaching at great speed across this street, was justified in running to escape from what she supposed was an imminent danger.

In the case of *Stokes* v. *Saltonstall,* 13 Pet. 181, which was an action brought to recover damages sustained by the wife of the plaintiff by the upsetting of a stage coach in which she was a passenger, the question was whether the stage was upset by the negligence of the driver or by the act of the plaintiff and his wife in rashly and improperly springing from it. The court held that "if the want of proper skill or care of the driver placed the passengers in a state of peril, and they had at that time a reasonable ground for supposing that the stage would upset, or that the driver was incapable of managing his horses, the plaintiff was entitled to recover; although the jury may believe, from the position in which the stage was placed from the negligence of the driver, the attempt of the plaintiff and his wife to escape may have increased the peril or even caused the stage to upset, and although they also find that the plaintiff and his wife would probably have sustained little or no injury if they had remained in the stage."

And in the case of *Jones* v. *Boyce,* I Stark. 402, which was an action against a coach proprietor for so negligently conducting the coach that the plaintiff, an outside passenger, was obliged to jump off the coach, in consequence of which his leg was broken, Lord Ellenborough held: "To enable the plaintiff to sustain the action it is not necessary that he should have been thrown off the coach; it is sufficient if he was placed, by the misconduct of the defendant, in such a situation as obliged him to adopt the alternative of a dangerous leap, or to remain at a certain peril. On the other hand, if the plaintiff's act resulted from a rash apprehension of danger, which did not exist, and the injury he sustained is to be attributed to rashness and imprudence, he is not entitled to recover."

The doctrine is concisely stated in 1 *Shearm.* & *R. Negl.* *89: "If one is placed, by the negligence of another, in such a position that he is compelled to choose instantly, in the face of grave and apparent peril, between two hazards, and he makes such a choice as a person of ordinary prudence placed in such a position might make, the fact that if he had chosen the other hazard he would have escaped injury, is of no importance." * * *

It is not perceived that the question of recovery for peril, causing mere fright unaccompanied by physical suffering, is, in the remotest sense, presented in this case. The injury sustained by the plaintiff and for which recovery is sought was not the result of fright, but was due to the falling down of the plaintiff and the injury to her knee. She was placed in peril by the negligent act of the defendant, and in her effort to escape from danger she fell and was injured. Does it require any stretch of imagination to believe

that everyone in the neighborhood of this derailed car was frightened, and it would be extraordinary, indeed, if they attempted to escape and were injured that they should be without remedy. * * *

In the case under consideration the negligence of the defendant, in permitting the derailing and escape of the car, is too plain for argument, and it was such negligence as caused the plaintiff, in terror, to attempt to escape the peril by running, and in so doing she fell and was injured.

The true rule governing cases of this character may be stated as follows: That if a defendant, by negligence, puts the plaintiff under a reasonable apprehension of personal physical injury, and plaintiff, in a reasonable effort to escape, sustains physical injury, a right of action arises to recover for the physical injury and the mental disorder naturally incident to its occurrence.

The case below was properly submitted to the jury, and the judgment below should be affirmed.[1]

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[1] *Accord*: *Quigley* v. *Canal Co.*, 142 Pa. 388 (1891), plaintiff jumped in justifiable fright from wagon and so lost control of his horses which ran away; *Vallo* v. *Express Co.*, 147 Pa. 404 (1892), in trying to avoid a negligently handled trunk plaintiff fell over a safe left on sidewalk; *Twomley* v. *R. R.*, 69 N. Y. 158 (1877), plaintiff jumped from a street car to avoid an apparently imminent collision at a level crossing, the car got safely over but she was injured by her fall; *Jones* v. *Boyce*, 1 Starkie 493 (1817), similar facts; *Ellick* v. *Wilson*, 58 Neb. 584 (1899); *Atlantic Coast Line* v. *Daniels*, 8 Ga. App. 775 (1911), somewhat curious state of facts.

So where the plaintiff is injured by the acts of third persons in their effort to avoid a peril wrongfully created by the defendant: *Jackson* v. *Galveston Ry. Co.*, 90 Tex. 372 (1897), "His acts, under the circumstances, are in law regarded as would be the movements of an inanimate object set in motion by such negligence," Denman, J., p. 376—plaintiff injured by crew jumping from train to avoid imminent collision; *Vanderburgh* v. *Truax*, 4 Denio 464, (N. Y., 1847), plaintiff's property injured by boy fleeing from defendant's violence; *Chambers* v. *Carroll*, 199 Pa. 371 (1901), boy, jostled by companion in trying to avoid negligently driven wagon, fell under its wheels; *Lowery* v. *Manhattan R. R.*, 99 N. Y. 158 (1885); *Turner* v. *Page*, 186 Mass. 600 (1904). So the defendant is answerable for the harm received by the plaintiff in reasonable efforts to save persons or property from a peril wrongfully created by defendant—*Eckert* v. *R. R.*, 43 N. Y. 502 (1871); *Corbin* v. *City of Philadelphia*, 195 Pa. 461 (1900); *Love* v. *New Fairview Co.*, 10 Brit. Columbia, 330 (1904), injuries received in attempt to save life out of motives of humanity; *Muhs* v. *Fire Ins. Co.*, 89 N. Y. App. Div. 389 (1903); *Cottrill* v. *R. R.*, 47 Wis. 634 (1879), plaintiff bound in duty to take risk to save life—policeman stopping runaway and railroad engineer remaining at the throttle.

As to injuries received in effort to save property; property that of plaintiff, *Page* v. *Bucksport*, 64 Maine 51 (1874); *Cooper* v. *Richland County*, 76 S. C. 202 (1906) *contra*, *Crowley* v. *West End*, 149 Ala. 349 (1907), plaintiffs injured trying to extricate their horses from hole in highways; *Siler* v. *R. R.*, 229 Ill. 390 (1907), plaintiff injured while trying to extinguish fire on his premises, *acc. Glans* v. *R. R.*, 119 Iowa 611 (1903); *Connell* v. *Town of Prescott*, 22 Can., S. C. 147 (1893); *Henry* v. *R. R.*, 67 Fed. 426 (1895); *contra*, *Seale* v. *R. R.*, 65 Tex. 274 (1886), and *Pike* v. *R. R.*, 39 Fed. 255 (1889). Injuries received in attempt to save property of third persons, *Liming* v. *R. R.*, 81 Iowa 246 (1890); *contra*, *Cook* v. *Johnson*, 58 Mich. 437 (1886), and see City of Lincoln, L. R. 15 P. D. 15 (1889), barque ran ashore in attempt to reach port without compasses, etc., destroyed in collision.

SNEESBY *v.* LANCASHIRE AND YORKSHIRE RAILWAY COMPANY.

Court of Queen's Bench, 1874. L. R. 9 Q. B., 263.

On the admitted facts [which sufficiently appear in the opinion of Blackburn, J.], the learned judge directed a nonsuit, with leave to move to enter a verdict for the plaintiff for 153*l.* 13*s.*; the court to draw inferences of fact.

A rule was obtained accordingly, on the grounds that the defendants were guilty of negligence, and also of a breach of duty in respect of the fences; and were liable for the death and injury to the cattle.

Price, Q.C., and *Beasley,* shewed cause. First, the death of the cattle was attributable to the defect of the fences. But the defendants were not bound to keep up the fences as against the plaintiff's cattle.

Secondly, the defect of the fences was the proximate cause of the damage, and the damage was too remote from the defendants' negligence. There was a considerable lapse of time between the time when the cattle were frightened and when they were run over.

[BLACKBURN, J.: There was no evidence as to when the train passed which did the mischief. However, on the facts as left for us, we must take it that there was no negligence on the part of the drovers in looking after and endeavoring to recover the cattle. This is the case of a tort, but it is somewhat analogous to the case of insurance; and where a ship is taken out of the control of the crew by a peril insured against, and is afterwards destroyed by another cause, still there is a total loss for which the underwriter is liable. The loss here is the same as if the cattle had fallen into an unfenced quarry.][1]

BLACKBURN, J.: I am of opinion that the rule must be made absolute. The facts seem to be that, by what is admitted to have been negligence on the part of the servants of the company, the cattle of the plaintiff, as they were crossing the railway on the level, were frightened and scattered, so that for a time the plaintiff's drovers lost control of all of them; they recovered the chief part of the cattle, but some were found killed on another railway. It happens that this was also the defendants' railway; and it appears that the cattle got on to the railway through a defect in the fence of a garden or orchard belonging to the defendants; but from the nature of the accident it seems to me that we may treat the case as if it had been the railway of some other company, or as if the cattle had fallen down an unguarded quarry. The question is, are the defendants, whose negligence drove the cattle out of the custody of the plaintiff, liable for their death, or is the damage too remote? No doubt the rule of our law is that the immediate cause, the causa proxima, and not the remote cause, is to be looked at: for, as Lord Bacon says: "It were infinite for the law to judge the causes of

[1] The argument of Field, Q. C., in support of the rule, is omitted.

causes and their impulsions one of another; therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree." Bac. Max. Reg. 1. The rule is sometimes difficulty to apply, but in a case like the present this much is clear, that so long as the want of control over the cattle remains without any fault of the owner, the causa proxima is that which caused the escape, for the consequences of which he who caused it is responsible. Suppose, for instance, in former times a reclaimed falcon were frightened and escaped, the natural consequence would be that it would be lost altogether, and the person who negligently frightened it would be liable. The natural and proximate consequence was that it would not be got back at all. So, if you have lost control of cattle and cannot get them back under your control till they have run into danger and are killed, the death is a natural consequence of the negligence which caused you to lose control of them. It is the most natural consequence of cattle being frightened that they should go galloping about and get into a dangerous position, and, being in the neighborhood of railways, should get on the line and be run over by a passing train, whether that of the defendants or not is immaterial. When once it is established that the cattle were driven out of the control of the plaintiff by the defendants' negligence and that the control could not be recovered till they were killed, which was the natural consequences of their being uncontrolled, the liability of the defendants is beyond dispute.[2]

Rule absolute.[3]

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[2] Opinions of Quain and Archibald, J. J., concurring, are omitted.

[3] *Accord*: *Wilder* v. *Stanley*, 65 Vt. 145 (1893), colts negligently allowed to escape from defendant's pasture some days later ran into a barbed wire fence and were injured. It was uncertain whether or not they had not been driven into the fence by one J., who under the evidence might or might not have been plaintiff's servant, but who was trying to drive them back. See *contra*, *West Mahanoy Township* v. *Watson*, 112 Pa. 574 (1886); 116 Pa. 344 (1887), horses frightened by defect in highway broke loose and some hours later, after first fright had subsided but while still out of control were run over by railroad train at a point some distance away, and *Gilman* v. *Noyes*, 57 N. H. 627 (1876), where it was held that when sheep were negligently permitted to escape and were destroyed by bears it was for the jury to say whether this particular risk should have been foreseen, and see *acc. R. R.* v. *Parry*, 67 Kans. 515 (1903), plaintiff while helpless and dazed by illness or drunkenness being ejected from defendant's train wandered on the tracks of another railroad five miles away and was run over. See also, *Southern R. R.* v. *Webb*, 116 Ga. 152 (1902), a passenger was negligently jolted out of defendant's train and fell unconscious on the track where he was run over by a train of another company which had right to use same track, but see *contra*, *Pass. R. R.* v. *Trich*, 117 Pa. 390 (1887), passenger jolted from street car onto street, run over by runaway horse.

One frightening a horse is liable for all injuries resulting from its eccentric acts while out of control whether to its owner or driver or his property; *Harris* v. *Mobbs*, L. R. 3 Ex. Div. 268 (1878); *Quinlan* v. *Phila.*, 205 Pa. 309 (1903); *Cutter* v. *Des Moines*, 113 N. W. 1081 (Iowa, 1907), or to the public, *McDonald* v. *Snelling*, 14 Allen, 290 (Mass., 1867); *Turner* v. *Page*, 186 Mass. 600 (1904); *Collins* v. *West Jersey Exp. Co.*, 72 N. J. L. 231 (1905); *Stevens* v. *Dudley*, 56 Vt. 158 (1884).

DANIELS *v.* NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

Supreme Judicial Court of Massachusetts, 1903. 183 *Massachusetts*, 393.

KNOWLTON, C. J.[1]

The important question in the second case relates to the manner of Daniel's death and to the law applicable to a death caused as his was. He received a blow on the head and other injuries at the time of the accident, which occurred on August 12, 1899, and he died on the third day of the next October. The evidence tended to show that his mind was clear for several weeks after the accident, but after that he showed symptoms of insomnia and restlessness and began to suffer from severe attacks of headache, was melancholy and at times delirious. The autopsy after his death showed circumscribed meningitis which produced mental aberration. On October 3d he was left alone on his bed in a room from which the door opened into the dining room. This door was left open, and, after a time, it was found closed and locked from the bedroom on the inside. His wife entered the room through a window, and he was discovered lying on his bed, with a napkin which had been left on a tray, used for bringing his food, twisted tightly around his neck and held tightly in his hands so as to produce strangulation. He was not then dead, but died soon afterwards. Experts testified that he was probably insane when he took his life.

The question is whether his life was lost by the collision within the meaning of the statute. The jury were well warranted in finding that his mental condition was caused by the collision. If his mental condition had remained normal, probably he would not have died in this way. We are thus brought to the consideration of the question which is often very difficult to decide, whether an essential condition precedent, is the active, efficient, proximate cause of a subsequent event, or is only a producer of conditions which open the door to another cause which directly and actively produces the result. Was death in this case a remote consequence of the collision, or was it an effect actively produced by it? A similar question has often been considered under policies of life insurance which except from the terms of the contract cases of death by suicide or by the hand of the assured. The decisions upon this question are conflicting. All agree that death self-caused is an uncontrollable frenzy, without knowledge or appreciation of the physical nature of the act, would not be death by suicide or by one's own hand within the meaning of such a provision in a policy. Some judges make a distinction between death by one's own hand and death by suicide; but most judges consider the language in either form as meaning death by one's own act. Some courts hold that if death is the result of volition by one who has a conscious purpose to end his life, and has intelligence to adapt means to ends, it is his

[1] The Reporter's statement of the facts and a portion of the opinion are omitted.

own act within the meaning of such a contract, even though he is so far insane as not to be morally responsible for his conduct. That is the doctrine of this court as stated in *Dean* v. *American Ins. Co.*, 4 Allen, 96, and in *Cooper* v. *Massachusetts Ins. Co.*, 102 Mass. 227, following *Borradaile* v. *Hunter*, 5 M. & G. 639, and *Clift. v. Schwabe*, 3 C. B. 437. The same doctrine has been laid down as the true rule by several other American courts. On the other hand, the Court of Appeals of New York and the Supreme Court of the United States and some other courts, hold that if one, by reason of his insanity, is unable to appreciate the nature and qualities of his own act in its relations to the moral world, so that he is not criminally responsible for it, he does not commit suicide or cause death by his own hand within the meaning of such a policy, if he deliberately and wilfully takes his own life. *Breasted* v. *Farmers' Loan & Trust Co.*, 4 Seld. 299; *Life Ins. Co.* v. *Terry*, 15 Wall. 580; *Manhattan Ins. Co.* v. *Broughton*, 109 U. S. 121. The question is not precisely the same in these cases as in the case now before us. The question in such policies is, What did the parties mean by their language, and some courts have invoked the principle that the language should be interpreted most strongly against the insurer who used it. In the present case the question is, What is meant by the language of the statute in reference to a death that occurs a long time after the collision, from direct causes which come into existence and take form after the lapse of weeks, or months, or possibly years, although they may be traced back to the collision as a first cause. In interpreting the present statute in reference to such facts, the question is not exactly whether the insane person who takes his life dies by his own hand or commits suicide; it is whether the act of volition, the wilful, deliberate purpose to take his life, when put in execution, is to be treated as an independent, direct and proximate cause of the death, notwithstanding that he was so far insane as to be unable fully to comprehend the moral quality of his act. In a condition such as is here supposed, the injury has caused mental disease which has weakened the forces that hold one in check and restrain him from acts of violence, and that enable him to appreciate the reasons for not interfering with the natural laws of his being. Very likely the disease also causes him extreme suffering, and deprives him of the pleasures of life, and thus exposes him to great temptation from which he would be free if in good health. In this weakened and wretched condition, lacking a sound mind to guide him morally, but still having powers which enable him to know what he thinks he wants to do and how to do it, by an action of volition, he chooses to die, and thereupon takes his own life. It may be said that he is forced to the deed by his disordered faculties. Some contend that we are all slaves of destiny. Our subject brings us near to the vexed theological problem as to free will and predestination. Without attempting to pursue these inquiries too far, we are of opinion that the voluntary, wilful act of suicide of an insane person, whose insanity was caused by a railroad accident, and who knows the purpose and the physical effect of his act, is such a new

and independent agency as does not come within and complete a line of causation from the accident to the death.

Suppose, under such conditions, one of an aggressive and irritable disposition should take the life of another person, when, if his mind had not been weakened by the disease, he would have held himself in control, would it be said that the life of the other was lost by the collision on the railroad? Insanity is often a permanent condition of mind, lasting many years, and it calls for care and often for restraint of the insane person. Would suicide or the homicide of another person resulting from such conditions, after the expiration of many years, be held to be caused by the collision, within the meaning of this statute, if the insanity was the effect of a collision?

We are of opinion that the principal reasons which induced the decisions in the first class of cases under insurance policies, to which we have referred, are still stronger to compel a decision that a defendant is not liable under this statute for a death such as we have supposed. Indeed, the Supreme Court of the United States, which holds that an insane person who takes his own life does not die by his own hand within the meaning of the words in the insurance policies, has decided unanimously in *Scheffer* v. *Railroad Co.*, 105 U. S. 249, that the representative of a person who was injured in a railroad accident, and took his own life while insane about eight months afterwards, could not recover under a statute like that now before us, by showing that his insanity was caused by the accident.[2] We are satisfied with the conclusions reached in *Dean* v. *American Ins. Co.* and *Cooper* v. *Massachusetts Ins. Co., ubi supra;* and under this statute, involving different but similar considerations, we are of opinion that the liability of a defendant for a death by suicide exists only when the death is the result of an uncontrollable impulse, or is accomplished in delirium or frenzy caused by the collision, and without conscious volition to produce death, having knowledge of the physical nature and consequences of the act. An act of suicide resulting from a moderately intelligent power of choice, even though the choice is determined by a disordered mind, should be deemed a new and independent, efficient cause of the death that immediately ensues. We are of opinion that the term "rational volition," used in the charge, was understood by the jury to mean volition attended by the powers of reason, to consider and judge of the act in all its relations, moral as well as physical, and that the charge was in this respect too favorable to the plaintiff.

The burden of proof was on the plaintiff to show that the death was caused by the collision. All the evidence tended to show that the deceased, with deliberate purpose, planned to take his own life, that he closed the door and locked it with a view to exclude others

[2] *Contra*: *Garrigan* v. *Kennedy*, 19 S. Dak. 11 (1904), suicide during fit of insanity resulting from intoxication—widow suing under act giving married women action for injuries received by improper sale of liquor to their husbands; and see able adverse criticism of *Scheffer* v. *R. R.*, by Thomas Beven, Esq. "Negligence in Law," 3rd Ed. 99.

and prevent interruption, and that he then took the napkin and used it effectively to strangle himself. All this points to an understanding of the physical nature and effect of his act, and to a wilful and intelligent purpose to accomplish it. That he was insane, so as to be free from moral responsibility, is not enough to make the defendant liable. We are unable to discover any evidence that he was acting without volition, under an uncontrollable impulse, or that he did not understand the physical nature of his act. In the absence of any affirmative evidence for the plaintiff on this point, the jury should have been instructed to render a verdict for the defendant.

So ordered.[8]

PURCELL *v.* ST. PAUL CITY RY. CO.

Supreme Court of Minnesota, 1892. 48 Minnesota, 134.

Appeal by defendant from an order of the district court, Ramsey County, OTIS, J., made May 18, 1891, overruling a demurrer to the complaint.

GILFILLAN, C. J.: Appeal from an order overruling a general demurrer to the complaint. From the complaint it appears that the plaintiff was a passenger on one of defendant's cars running upon its line on Jackson Street, St. Paul; that, when the car reached the intersection of that line with the defendant's cable-car line running on East Seventh Street, the persons in charge of it negligently attempted to cross, and did cross, the cable line in front of a then near and rapidly approaching cable train thereon; that a collision seemed so imminent, and was so nearly caused, that the incident and attending confusion of ringing alarm bells and passengers rushing out of the car caused to plaintiff sudden fright and reasonable fear of immediate death or great bodily injury, and that the shock thus caused threw her into violent convulsions, and caused to her, she being then pregnant, a miscarriage, and subsequent illness. The complaint shows a duty on the part of the defendant to exercise the highest degree of care to carry the plaintiff safely. It also shows negligence in respect to that duty, and, if the negligence caused what the law regards as actionable injury, the action is well brought. Of course, negligence without injury gives no right of action. On the argument there was much discussion of the question whether fright and mental distress alone constitute such injury that the law will allow a recovery for it. The question is not involved in the case. So it may be conceded that any effect of a wrongful act or neglect on the mind alone will not furnish ground of action. Here is a physical injury, as serious, certainly, as would be the breaking of an arm or a leg. Does the complaint show that defendant's negligence was the proximate cause of that injury? If so, the action will, of course, lie. What is in law a proximate cause is well expressed in

[8] *Accord*: *Koch* v. *Fox*, 71 N. Y. App. 288 (1902), death due to pneumonia alleged to have been caused by decedent jumping into a river during fit of insanity produced by injuries caused by defendant's misconduct; *Brown* v. *American Steel & W. Co.*, 43 Ind. App. 560 (1908), "if the decedent, at the time of taking his life, had mind enough to know what he wanted to do and how to do it," his act would break the chain of causation and would be the proximate cause of his death. *Aliter*, if his suicide "was the result of uncontrollable influence or is accomplished in delirium or frenzy." Contra: *Malone* v. *Cuzzer, Irvine & Co.*, 1908, Court of Sessions 479, 45 Scottish

the definition, often quoted with approval, given in *Milwaukee & St. P. Ry. Co.* v. *Kellogg*, 94 U. S. 469, as follows: "The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement; or, as in the oft-cited case of the squib thrown in the market place. *Scott* v. *Shepherd*, 2 W. Bl. 892. The question always is, was there an unbroken connection between the wrongful act and the injury,—a continuous operation? Did the facts constitute a continuous succession of events so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury?"

There may be a succession of intermediate causes, each produced by the one preceding, and producing the one following it. It must appear that the injury was the natural consequence of the wrongful act or omission. The new, independent, intervening cause must be one not produced by the wrongful act or omission, but independent of it, and adequate to bring about the injurious result. Whether the natural connection of events was maintained, or was broken by such new, independent cause, is generally a question for the jury. In this case the only cause that can be suggested as intervening between the negligence and the injury is plaintiff's condition of mind, to wit, her fright. Could that be a natural, adequate cause of the nervous convulsions? The mind and body operate reciprocally on each other. Physical injury or illness sometimes causes mental disease. A mental shock or disturbance sometimes causes injury or illness of body, especially of the nervous system. Now, if the fright was the natural consequence of—was brought about, caused by—the circumstances of peril and alarm in which defendant's negligence placed plaintiff, and the fright caused the nervous shock and convulsions and consequent illness, the negligence was the proximate cause of those injuries. That a mental condition or operation on the part of the one injured comes between the negligence and injury does not necessarily break the required sequence of intermediate causes. If a passenger be placed, by the carrier's negligence, in apparent, imminent peril, and, obeying the natural instinct of self-preservation, endeavor to escape it by leaping from the car or coach, and in doing so is injured, he may, if there be no contributory negligence on his part, recover for the injury, although, had he remained in the car or coach, he would not have been injured. The endeavor to escape is not of itself contributory negligence. *Wilson* v. *Northern Pac. R. Co.*, 26 Minn. 278 (3 N. W. Rep. 333.) In such case, though there comes as an intermediate cause between the negligence and injury, a condition or operation of mind on the part of the injured passenger, the negligence is nevertheless the proximate cause of the injury. The defendant suggests that plaintiff's pregnancy rendered her more susceptible to groundless alarm, and accounts more naturally and fairly than defendant's negligence for the injurious consequences. Certainly a

L. R. 351 (Scotland), the dependents of a workman committing suicide during insanity caused by an accident while in the defendant's employment held entitled to compensation under the Workmen's Compensation Act of 1906.

woman in her condition has as good a right to be carried as any one, and is entitled to at least as high a degree of care on the part of the carrier. It may be that, where a passenger, without the knowledge of the carrier, is sick, feeble, or disabled, the latter does not owe to him a higher degree of care than he owes to passengers generally, and that the carrier would not be liable to him for an injury caused by an act or omission not negligent as to an ordinary passenger. But when the act or omission is negligence as to any and all passengers, well or ill, any one injured by the negligence must be entitled to recover to the full extent of the injury so caused, without regard to whether, owing to his previous condition of health, he is more or less liable to injury. If the recovery of a passenger in feeble health were to be limited to what he would have been entitled to had he been sound, then, in case of a destruction by fire or wrecking of a railroad car through the negligence of those in charge of it, if all the passengers but one were able to leave it in time to escape injury, and that one could not because sick or lame, he could not recover at all. The suggestion mentioned would, if carried to its logical consequences, lead to such a conclusion.

Order affirmed.[1]

MITCHELL *v.* ROCHESTER RAILWAY COMPANY.

Court of Appeals of New York, 1896. 151 New York, 107.

MARTIN, J.: The facts in this case are few and may be briefly stated. On the first day of April, 1891, the plaintiff was standing upon a crosswalk on Main Street in the city of Rochester, awaiting an opportunity to board one of the defendant's cars which had stopped upon the street at that place. While standing there, and just as she was about to step upon the car, a horse car of the defendant came down the street. As the team attached to the car drew near, it turned to the right and came so close to the plaintiff that she stood between the horses' heads when they were stopped.

She testified that from fright and excitement caused by the approach and proximity of the team she became unconscious, and also that the result was a miscarriage and consequent illness. Medical testimony was given to the effect that the mental shock which she then received was sufficient to produce that result.

Assuming that the evidence tended to show that the defendant's

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[1] *Accord*: *Dulieu* v. *White*, L. R. 1901, 2 K. B. 669; *Bell* v. *R. R.*, Ir. R. 26, Ex. 428 (1890); *Cooper* v. *Caledonian R. R.*, 1902 Scotch Ct. of Session, 4 Fraser 880; *Fitzpatrick* v. *Gt. West. R. R.*, 12 U. C. Q. B. 645 (1855); *Sloane* v. *S. C. R. R.*, 111 Cal. 668 (1896); *C. & N. R. R.* v. *Hunerberg*, 16 Ill., App. 387 (1885), *cf.* facts with those in *Ewing* v. *R. R.*, 147 Pa. 40 (1892); see however *Braun* v. *Craven*, 175 Ill. 401 (1898), and *Liebig* v. *R. R.*, 79 Ill. App. 567 (1898); *Stewart* v. *R. R.*, 112 La. 764 (1904); *Hickey* v. *Welch*, 91 Mo. App. 4 (*semble*) (1901); *Watkins v. Kaolin Co.*, 131 N. C. 536 (1902); *Ohliger* v. *Toledo Trac. Co.*, 23 Ohio C. C. 265 (1901); *Simone* v. *R. R.*, 66 Atlantic Rep. (R. I. Jan. 15, 1907), 202; *Mack* v. *R. R.*, 52 S. C. 323 (1897); *G. C. & S. F. R. R.* v. *Hayter*, 93 Tex. 239 (1900); *Oliver* v. *La Valle*, 36 Wis. 592 (1874), *semble*; *Armour & Co.* v. *Kollmeyer*, 161 Fed. 78 (C. C. A. 8th Cir., 1908).

servant was negligent in the management of the car and horses, and that the plaintiff was free from contributory negligence, the single question presented is whether the plaintiff is entitled to recover for the defendant's negligence which occasioned her fright and alarm, and resulted in the injuries already mentioned. While the authorities are not harmonious upon this question, we think the most reliable and better considered cases, as well as public policy, fully justify us in holding that the plaintiff cannot recover for injuries occasioned by fright, as there was no immediate personal injury. (*Lehman* v. *Brooklyn City R. R. Co.*, 47 Hun, 355; *Victorian Railways Commissioners* v. *Coultas*, L. R. [13 Appeal Cases] 222; *Ewing* v. *P., C. & St. L. Ry. Co.*, 147 Penn. St. 40.) The learned counsel for the respondent in his brief very properly stated that, "The consensus of opinion would seem to be that no recovery can be had for mere fright," as will be readily seen by an examination of the following additional authorities: *Haile* v. *Texas & Pacific R. Co.* (23 Lawyers' Rep. 774); *Joch* v. *Dankwardt* (85 Ill. 331); *Canning* v. *Inhabitants of Williamstown* (1 Cush. 451); *Western Union Tel. Co.* v. *Wood* (57 Fed. Repr. 471); *Renner* v. *Canfield* (36 Minn. 90); *Allsop* v. *Allsop* (5 Hurl & Nor. [N. S.] 534); *Johnson* v. *Wells, Fargo & Co.* (6 Nev. 224); *Wyman* v. *Leavitt* (71 Me. 227).

If it be admitted that no recovery can be had for fright occasioned by the negligence of another, it is somewhat difficult to understand how a defendant would be liable for its consequences. Assuming that fright cannot form the basis of an action, it is obvious that no recovery can be had for injuries resulting therefrom. That the result may be nervous disease, blindness, insanity, or even a miscarriage, in no way changes the principle. These results merely show the degree of fright or the extent of the damages. The right of action must still depend upon the question whether a recovery may be had for fright. If it can, then an action may be maintained, however slight the injury. If not, then there can be no recovery, no matter how grave or serious the consequences. Therefore, the logical result of the respondent's concession would seem to be, not only that no recovery can be had for mere fright, but also that none can be had for injuries which are the direct consequences of it.[1]

If the right of recovery in this class of cases should be once established, it would naturally result in a flood of litigation in cases where the injury complained of may be easily feigned without detection, and where the damages must rest upon mere conjecture or speculation. The difficulty which often exists in cases of alleged physical injury, in determining whether they exist, and if so, whether they were caused by the negligent act of the defendant, would not only be greatly increased, but a wide field would be opened for fictitious or speculative claims. To establish such a doctrine would be contrary to principles of public policy.[2]

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[1] *Accord*: *Ewing* v. *R. R.*, 147 Pa. 40 (1892); *Trigg* v. *R. R.*, 74 Mo. 147 (1881); *R. R.* v. *Bragg*, 69 Ark. 402 (1901); *Mahoney* v. *Dankwart*, 108 Ia. 321 (1899), *semble*.

[2] *Accord*: *Ewing* v. *R. R. supra*; *Huston* v. *Freemansburg*, 212 Pa. 548

Moreover, it cannot be properly said that the plaintiff's miscarriage was the proximate result of the defendant's negligence. Proximate damages are such as are the ordinary and natural results of the negligence charged, and those that are usual and may, therefore, be expected. It is quite obvious that the plaintiff's injuries do not fall within the rule as to proximate damages. The injuries to the plaintiff were plainly the result of an accidental or unusual combination of circumstances, which could not have been reasonably anticipated, and over which the defendant had no control, and, hence, her damages were too remote to justify a recovery in this action.[8]

These considerations lead to the conclusion that no recovery can be had for injuries sustained by fright occasioned by the negligence of another, where there is no immediate personal injury.

The orders of the General and Special Terms should be reversed, and the order of the Trial Term granting a nonsuit affirmed, with costs.

All concur, except HAIGHT, J., not sitting, and VANN, J., not voting.

Ordered accordingly.

(c) Negligent or Deliberate Acts of Third Persons.

VICARS *v.* WILCOCKS.

Court of King's Bench, 1806. 8 East, 1.

In an action on the case for slander the plaintiff declared, that whereas he was retained and employed by one *J. O.* as a journeyman for wages, the defendant knowing the premises, and maliciously intending to injure him, and to cause it to be believed by *J. O.* and others that the plaintiff had been guilty of unlawfully cutting the cordage of the defendant, and to prevent the plaintiff from continuing in the service and employ of *J. O.*, and to cause him to be dismissed therefrom, and to impoverish him; in a discourse with one *J. M.* concerning the plaintiff and concerning certain flocking cord of the defendant alleged to have been before then cut, said that he, (the

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(1905); *Spade* v. *R. R.*, 168 Mass. 285 (1897); *Homans* v. *Boston El. Ry.*, 180 *Mass.* 456 (1902). "Recognizing as we must the logic in favor of the plaintiff when a remedy is denied because the only immediate wrong was a shock to the nerves, we think that when the reality of the cause is guaranteed by proof of a substantial battery of the person there is no occasion to press further the exception to general rules." Holmes, C. J., p. 458; *Cameron* v. *N. E. Tel. Co.*, 182 Mass. 310 (1902), "the principle of the Spade case is confined strictly to cases where the connection of the physical illness with the fright is wholly internal." Holmes, C. J., p. 312. Plaintiff, having risen in alarm from her chair, either stumbled or fainted and fell.

[8] *Accord*: *Ewing* v. *R. R.*, 147 Pa. 40 (1892; *Coultas* v. *Victoria Com.*, L. R. 13 A. C. 222 (1887); *Ward* v. *R. R.*, 65 N. J. L. 384 (1900); *Henderson* v. *R. R.*, 25 Ont. App. 437 (1898); *Haile* v. *R. R.*, 9 C. C. A. 134, 60 Fed. 557 (1894); *W. Chic. St. R. R.* v. *Liebig*, 79 Ill. App. 567 (1898); *Braun* v. *Craven*, 175 Ill. 401 (1898), but *cf. R. R.* v. *Hunerberg*, 16 Ill. App. 389 (1885).

defendant) had last night some flocking cord cut into six yard lengths, but he knew who did it; for it was *William Vicars;* meaning that the plaintiff had unlawfully cut the said cord. And so it stated other like discourse with other third persons, imputing to the plaintiff that he had maliciously cut the defendant's cordage in his rope-yard. By reason whereof the said *J. O.* believing the plaintiff to have been guilty of unlawfully cutting the said flocking cord, &c., discharged him from his service and employment, and has always since refused to employ him; and also one *R. P.,* to whom the plaintiff applied to be employed after his discharge from *J. O.,* on account of the speaking and publishing the said slanderous words, and on no other account whatsoever, refused to receive the plaintiff into his service. And by reason of the premises the plaintiff has been and is still out of employ and damnified, &c.

It appeared at the trial before *Lawrence* J. at *Stafford* that the plaintiff had been retained by *J. O.* as a journeyman for a year at certain wages, and that before the expiration of the year his master had discharged him in consequence of the words spoken by the defendant. That the plaintiff afterwards applied to *R. P.* for employment who refused to employ him, in consequence of the words, and because his former master had discharged him for the offence imputed to him. The plaintiff was thereupon non-suited; it being admitted that the words in themselves were not actionable without special damage; and the learned Judge being of opinion that the plaintiff having been retained by his master under a contract for a certain time then unexpired, it was not competent for the master to discharge him on account of the words spoken; but it was a mere wrongful act of the master, for which he was answerable in damages to the plaintiff; that the supposed special damage was the loss of those advantages which the plaintiff was entitled to under his contract with his master; which he could not in law be considered as having lost, as he still had a right to claim them of his master, who, without a sufficient cause, had refused to continue the plaintiff in his service. 2dly, With respect to the subsequent refusal of *R. P.* to employ the plaintiff, that it did not appear to be merely on account of the words spoken; but rather on account of his former master having discharged him in consequence of the accusation; without which he might not have regarded the words.

Jervis now moved to set aside the nonsuit, and urged that it was always deemed sufficient proof of special damage in these cases to shew that the injury arose in fact from the slander of the defendant, and it was not less a consequence of it because the act so induced was wrongful on the part of the master. He said, that he could find no case where such a distinction was laid down, and that the practice of Nisi Pruis was understood to be otherwise. 2dly, That the refusal of *R. P.* to employ the plaintiff was clear of that objection; and that such refusal had preceded upon the alleged cause of discharge by the first master, and not upon the bare act itself of discharge.

LORD ELLENBOROUGH, C. J. said, that the special damage must be the legal and natural consequence of the words spoken, other-

wise it did not sustain the declaration; and here it was an illegal consequence; a mere wrongful act of the master; for which the defendant was no more answerable, than if, in consequence of the words, other persons had afterwards assembled and seized the plaintiff, and thrown him into a horsepond by way of punishment for his supposed transgression. And his Lordship asked whether any case could be mentioned of an action of this sort sustained by proof only of an injury sustained by the tortious act of a third person. [1]

Upon the second ground, non liquet that the refusal by *R. P.* to employ the plaintiff was in consequence of the words spoken, as it is alleged to be; there was at least a concurrent cause, the act of his former master in refusing to continue him in his employ; which was more likely to weigh with *R. P.* than the mere words themselves of the defendant. [2]

The other Judges concurring,

Rule refused.

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[1] *Accord*: *Bentley* v. *Reynolds*, 1 McMullan 16 (S. C., 1840), *semble; Beach* v. *Ranney*, 2 Hill 309 (N. Y., 1842); *Terwilliger* v. *Wands*, 17 N. Y. 58 (1858), *semble;* the two latter cases injuries resulting from repetition of slander. But see Blake Odger's, Libel and Slander, 4th Ed., p. 385 *et seq.* "It is now clear law that the defendant is liable for any act which it was his obvious intention, or the natural result of his words, to induce another to commit," and Lord Wensleydale, *Lynch* v. *Knight, ante*, p. 38; see also *Wallace* v. *Rodgers*, 156 Pa. 395 (1893).

In torts, other than slander, Lord Ellenborough's statement is followed or quoted with approval, *Crain* v. *Petrie*, 6 Hill, 522 (N. Y., 1844); *Hughes* v. *McDonough*, 43 N. J. L. 459 (1881); *Cate* v. *Cate*, 50 N. H. 144 (1870), and *Fawcett* v. *R. R.*, 24 W. Va. 759 (1884); see also Cooley, Law of Torts, p. 76 and *Currier* v. *McKee*, 99 Me. 364, p. 368 (1904), and in *Washington* v. *B. & O. R. R.*, 17 W. Va. 190 (1880), the doctrine of the last chance in contributory negligence is worked out by its application, see on this point 21 Harv. L. R., pp. 236 to 242.

Compare Anon., Huntingdon Assizes (1367), 42 Ed. iii, Lib. Assis. pl. 19, Appellor for robbery not liable to acquitted appellee for imprisonment due to delay of justices in taking the inquest; but see *Newman* v. *Zachary*, Aleyn 3 (1647), one falsely representing a sheep to be an estray liable for its seizure as such.

See *Contra*: *R.* v. *Moore*, 3 B. & Ad. 184 (1832), indictment for nuisance, "in attracting disorderly crowd by maintaining grounds for pigeon shooting. If the experience of mankind must lead any one to expect the result, the defendant will be answerable for it," Littledale, J., p. 188; *Barber* v. *Penley*, L. R., 1893, 2 Ch. D. 447, crowd collected in front of theatre blocking highway; and *Collins* v. *Middle Level Commissioners* and *Lane* v. *Atlantic*, post. pp. 110, 112 and notes.

[2] An originator of a slander or libel is not liable for the results of its unauthorized repetition, *Shoepflin* v. *Coffey*, 162 N. Y. 12 (1900), slanderous statements made to one who is known to be a newspaper reporter, nothing being said on either side as to their publication; but see *Whitney* v. *Moignard*, L. R. 24 Q. B. D. 630 (1890); *aliter*, if repeated by one legally or morally bound to repeat it, *Derry* v. *Handley*, 16 L. Times 263 (1867). In *Terwilliger* v. *Wands*, 17 N. Y. 58 (1858), this is said to be due to the fact that in the one case the repetition is illegal and wrongful, and in the other innocent; see, however, Blake Odger's, Libel and Slander, 4th Ed., pp. 388-389, "the repetition by a free agent is neither a direct nor a natural result of a slander while repetition by one bound to repeat it is natural."

COLLINS *v.* THE MIDDLE LEVEL COMMISSIONERS.

Court of Common Pleas, 1869. *L. R.* 4 *C. P.* 279.

This was an action brought by the plaintiff, a farmer and occupier of lands situate in a district called the Marshland Fen, in the County of Norfolk, against the defendants, being the Commissioners for carrying into execution an act of Parliament of the 7 & 8 Dict. c. cvi, intituled "An act for improving the drainage and navigation of the middle level of the fens," to recover compensation for damage sustained by the plaintiff, by reason of lands in his occupation being inundated and injured and his crops destroyed through the breaking of a sluice and the bank of a certain cut made by and belonging to the Commissioners, in consequence of the negligence of the Commissioners in making and maintaining the sluice and cut. The action was referred to three arbitrators.

By the drainage act, the Commissioners were to construct a cut, with proper walls, gates, and sluices, to keep out the waters of a tidal river, and also a culvert under the cut to carry off the drainage from the lands on the east to the west of the cut, and to keep the same at all times open. In consequence of the negligent construction of the gates and sluices, the waters of the river flowed into the cut, and bursting its western bank, flooded the adjoining lands.

The plaintiff and other owners of lands on the east side of the cut closed the end of the culvert, which prevented the waters overflowing their lands to any considerable extent; but the occupiers of the lands on the west side, believing that the stoppage of the culvert would be injurious to their lands, reopened it, and so let the waters through on to the plaintiff's land to a much greater extent. [1]

The total damage which the plaintiff sustained from the flood waters coming on his lands and destroying his crops amounted to 1180*l.*; but, if he should not be entitled to recover such damages as were consequent on the opposition made by the occupiers of the land on the west side of the defendants' cut to the closing of the culvert, and on the removal of the obstructions placed by the plaintiff and the other occupiers on the east side to the passage of the flood waters through the culvert, the damages sustained and recoverable by him would then be 118*l.* only.

The question for the opinion of the Court was, whether, under the circumstances above mentioned, the plaintiff was entitled to recover in the said action against the defendants the larger or the smaller of the said two sums.

Keane, Q. C. (*Mereweather* with him), for the plaintiff. [2]

Mellish, Q. C. (*O'Malley*, Q. C. and *Metcalf*, with him), for the defendants. [3]—If by adopting reasonable precautions the plaintiff might have avoided the injury, he was bound to adopt them; and, if

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[1] The facts given are as stated in the head note.

[2] Argument omitted.

[3] Only part of the argument is given.

these failed through the wrongful acts of third parties, the damage resulting therefrom cannot be said to be the proximate consequence of the defendants' negligence.

[BRETT, J.—Could the defendants have complained if it had never suggested itself to anybody that the damage to the plaintiff's land might have been prevented or materially diminished by the closing of the culvert?]

That might have raised a question for a jury, the answer to which would depend upon a variety of circumstances.

[BRETT, J.—Assuming that those who removed the dam from the mouth of the culvert were wrongdoers, how can the liability be apportioned between them and the defendants, but for whose negligence no damage would have occurred?]

No wrong was done to the plaintiff until the flood waters reached his land. But for the wrongful act of strangers, the plaintiff would have sustained little or no injury.

Keane, Q. C., in reply.—The case of Scott *v.* Shepherd, 2 W. Bl. 892, 1 Sm. L. C. 343, 4th ed., is an answer to the argument on the part of the defendants. If the squib had not been originally thrown in that case, or if the defendants in this case had kept the tidal waters of the Ouze penned back, no mischief could have happened.

MONTAGUE SMITH, J.—I am of opinion that the plaintiff is entitled to judgment for the larger amount of damages mentioned in the question submitted to us. The misfortune was proximately caused by the defendants' negligence. It appears that there was a culvert under the cut for the purpose of draining the lands of the plaintiff and others on the east side; and that, when the waters broke through the bank of the cut, the owners of the land on the west side, imagining that if the neighbouring lands on the east were also overflowed the injury to themselves would be diminished, removed the obstruction which the plaintiff and others had placed at the mouth of the culvert to prevent their lands being flooded. The act of Parliament seems to require the culvert to be kept open at all times. It may be that no person had a right to close it. But, at all events, the defendants cannot excuse themselves from the natural consequences of their negligence, by reason of the act, whether rightful or wrongful, of those who removed the obstruction placed in the culvert under the circumstances found in this case.

BRETT, J.—The culvert was existing by virtue of the act of Parliament, and was to be kept open at all times. No person, therefore, could have a legal right to close it; and consequently the landowners on the west side of the cut could no more be called wrongdoers for removing the obstruction, than the plaintiff for placing it there. But, assuming that the former were wrongdoers, the primary and substantial cause of the injury was the negligence of the defendants; and it is not competent to them to say that they are absolved from the consequence of their wrongful act by what the plaintiff or some one else did. The plaintiff had impeded the passage of the water into the lower end of the culvert; and the owners of land on that side removed the impediment. I cannot see how the defendants can

excuse themselves by urging that the plaintiff was prevented by other wrongdoers from preventing a part of the injury. That would be apportioning the consequences of their negligence between themselves and other wrongdoers. I think the plaintiff is entitled to recover the larger sum.

Judgment for the plaintiff.[4]

LANE *v.* ATLANTIC WORKS.

Supreme Judicial Court of Massachusetts, 1872. 111 Massachusetts, 136.

Tort. The declaration alleged, in substance, that the defendant had wrongfully left in a public highway in Boston a truck so carelessly loaded with iron that the iron would easily fall off; and that the plaintiff being lawfully on the highway and in the exercise of due

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[4] *Accord: Intervening negligent conduct of strangers themselves removing conditions created by defendant's wrong which interfere with the enjoyment of their property or the exercise of their legal rights. Clark* v. *Chambers,* L. R. 3, Q. B. D. 327 (1878), defendants placed a *cheveaux de frise* across the cartway of a private road, it was removed by a third person in order to enjoy his right to use the cartway and was, by him placed on the sidewalk where the plaintiff ran into it and was injured; *Fishburn* v. *Railway Co.,* 127 Ia. 483 (1905), the plaintiff, a young child, in order to get at some vegetables on his father's premises, lifted up a snow fence, which, having been negligently constructed thereon by the defendants, had been blown over upon the bed, and replaced it as nearly as he could; whereupon it was again blown down, injuring the plaintiff; see also *Bloom* v. *Ins. Co.,* 97 Ind. 478 (1884), the death of insured from a beating, administered by a man in defense of his wife attacked by the insured, was held to be the result of his wrongful act in attacking the woman. Elliott, C. J., p. 485.

So where strangers act negligently in their efforts to make safe a condition, created by defendant, dangerous to the public or some class thereof; Henry v. *Dennis,* 93 Ind. 452 (1883), a passerby, seeing cows drinking fish brine from barrels left open by defendant in the street, emptied it into the gutter, where the plaintiff's cows drank it and were injured; *Williams* v. *Koehler Co.,* 41 N. Y. App. Div. 426 (1899), defendant's horse, left untied, having wandered away, a passerby stops and in driving it back injures plaintiff, but see, *Mann* v. *Ward,* 8 Times L. R. 699 (1892), while the defendant is drunk and asleep in his cab, another drunken man drives it negligently; *Cf.* also *Harton* v. *Forrest City Tel. Co.,* 146 N. C. 429 (1907), defendant's telegraph pole being negligently maintained, falls; a passerby sets it up again but does not make it secure so that it falls again upon the plaintiff.

So where strangers act negligently in assisting plaintiff injured by defendant's wrong: Pullman Co. v. *Bluhm,* 109 Ill. 20 (1884); *Rice* v. *Des Moines,* 40 Ia. 644 (1875); *Nagel* v. *R. R.,* 75 Mo. 654 (1882); *Stover* v. *Bluehill,* 51 Me. 439 (1863); *Eastman* v. *Sanborn,* 3 Allen, 594 (Mass., 1861); *Tuttle* v. *Farmington,* 58 N. H. 13 (1876); *Sauter* v. *R. R.,* 66 N. Y. 50 (1876); *Wallace* v. *P. R. R.,* 222 Pa. 556 (1909), plaintiff's injuries aggravated by the negligence of physicians and surgeons; *Contra, Schmidt* v. *Mitchell,* 84 Ill. 197 (1876), a surgeon not guilty of negligence, but of, at most, an unavoidable error of judgment; *Cf.* also *Parsons* v. *State,* 21 Ala. 301 (1852), and *Teis* v. *Smuggler Mining Co.,* 158 Fed. 260 (C. C. A. 8th Ed., Circ. 1907), miner, imperilled by employer's misconduct, injured by negligence of rescuers.

care was injured by the said iron which was thrown and fell upon him in consequence of the defendant's negligence.

On the trial in the Superior Court before Devens, J., the plaintiff introduced evidence showing that the defendant's truck was left standing in front of their works in Marion Street, that the iron was not fastened but would easily roll off the truck, that the plaintiff, Fergus Lane, then seven years old, was walking with another boy in the street opposite the truck when Horace Lane, a boy of twelve called them to come over and see him move the truck, that the plaintiff went over and stood near the truck to see the wheels move, that Horace Lane took hold of the tongue of the truck and moved it and that the iron rolled off and injured the plaintiff's leg and that he himself had not touched the truck or the iron. The Court refused to give the following instruction as requested by defendant.

"3. While it is true that negligence alone on the part of Horace Lane, which contributed to the injury combining with the defendants' negligence, would not prevent a recovery, unless the plaintiff's negligence also concurred as one of the contributory causes also; yet, if the fault of Horace Lane was not negligence, but a voluntary meddling with the truck or iron, for an unlawful purpose, and wholly as a sheer trespass, and this culpable conduct was the direct cause of the injury which would not have happened otherwise, the plaintiff cannot recover."

And *inter alia* gave the following ruling: "If the sole or the direct cause of the accident was the act of Horace Lane, the defendants are not responsible. If he was the culpable cause of the accident, that is to say, if the accident resulted from the fault of Horace Lane, they are not responsible. But if Horace Lane merely contributed to the accident, and if the accident resulted from the joint negligence of Horace Lane in his conduct in regard to moving the truck and the negligence of the defendants in leaving it there, where it was thus exposed, or leaving it so insecurely fastened that this particular danger might be reasonably apprehended therefrom, then the intermediate act of Horace Lane will not prevent the plaintiff from recovering, provided he himself was in the exercise of due and reasonable care. If the plaintiff himself participated in the act of Horace Lane no further than to go there and be a witness to this transaction which Horace Lane proposed to perform, crossing over the street by his invitation, and witnessing him move this truck, that would not make him such a participator in the wrongful act of Horace Lane as to prevent his recovery, provided he himself was in the exercise of reasonable care."

The jury returned a verdict for the plaintiff for $6000 and the defendants alleged exceptions.

COLT, J.[1] In actions of this description, the defendant is liable for the natural and probable consequences of his negligent act or omission. The injury must be the direct result of the misconduct charged; but it will not be considered too remote if, according to

[1] The facts are restated and only so much of the opinion is printed as deals with legal cause.

the usual experience of mankind, the result ought to have been apprehended.

The act of a third person, intervening and contributing a condition necessary to the injurious effect of the original negligence, will not excuse the first wrongdoer, if such act ought to have been foreseen. The original negligence still remains a culpable and direct cause of the injury. The test is to be found in the probable injurious consequences which were to be anticipated, not in the number of subsequent events and agencies which might arise.

Whether in any given case the act charged was negligent, and whether the injury suffered was, within the relation of cause and effect, legally attributable to it, are questions for the jury. They present oftentimes difficult questions of fact, requiring practical knowledge and experience for their settlement, and where there is evidence to justify the verdict, it cannot be set aside as matter of law. The only question for the Court is, whether the instructions given upon these points stated the true tests of liability.

3. The last instruction asked was rightly refused. Under the law as laid down by the court the jury must have found the defendants guilty of negligence in doing that from which injury might reasonably have been expected, and from which injury resulted; that the plaintiff was in the exercise of due care; that Horace Lane's act was not the sole, direct or culpable cause of the injury; that he did not purposely roll the iron upon the plaintiff; and that the plaintiff was not a joint actor with him in the transaction, but only a spectator. This supports the verdict. It is immaterial whether the act of Horace Lane was mere negligence or a voluntary intermeddling. It was an act which the jury have found the defendants ought to have apprehended and provided against. *McDonald* v. *Snelling*, 14 Allen, 290, 295. *Powell v. Deveney*, 3 Cush. 300. *Barnes v. Chapin*, 4 Allen, 444. *Tutein* v. *Hurley*, 98 Mass. 211. *Dixon* v. *Bell*, 5 M. & S. 198. *Mangan* v. *Atherton*, L. R. 1 Ex. 239. *Illidge* v. *Goodwin*, 5 C. & P. 190 *Burrows* v. *March Gas Co.* L. R. 5 Ex. 67, 71. *Hughes* v. *Macfie*, 2 H. & C. 744.

Exceptions overruled.[2]

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[2] *The habitually thoughtless, though legally culpable, inadvertences of careless people, children or adults,* (see Allen, J., 155 Mass., p. 586); *that "occasional negligence which is one of the ordinary incidents of human life"* (Irish R., 1897, 2 Q. B., p. 312), *and as such is to be expected. Illidge* v. *Goodwin*, 5 C. & P. 190 (1831); *McCahill* v. *Kip*, 2 E. D. Sm. 413 (N. Y., 1854), horses left unguarded and unsecured in street; *McCauley* v. *Norcross*, 155 Mass. 584; The J. B. Thomas, 81 Fed. 578 (1897), heavy objects likely to fall if disturbed; *Pastene* v. *Adams*, 49 Cal. 87 (1874), lumber carelessly piled in street; *Village of Carterville* v. *Cook*, 129 Ill. 152 (1889), wayfarers forced into contact with defects in highways by negligence of fellow-travellers; see *acc. Ashborn* v. *Waterbury*, 70 Conn. 551 (1898, *semble*). In many cases the wrongful act of the fellow-traveller is considered only as affording an excuse for the plaintiff not observing or avoiding the defect and so bearing upon his contributory negligence or assumption of the risk thereof, the *prima facie* liability of the municipality being apparently admitted, see *Barton* v. *Springfield*, 110 Mass. 131 (1872): *Burrows* v. *Marsh Gas Co.*, L. R., 5 Ex. 67 (1870); *Koelch* v. *Phila.*, 152 Pa. 355 (1893); *Koplan* v. *Boston Gas Co.*,

177 Mass. 15 (1900), gas allowed to escape and exposed to ignition; *Patterson* v. *Mayor of Blackburn*, 9 Times, L. R. 39 (1893), gas pipes, merely capped after removal of meter and left exposed in cellar, instead of being cut off outside of the premises, broken by careless workmen, strangers to defendant; but see *Stone* v. *R. R.*, 171 Mass. 536 (1898), railroad, storing inflammables in freight house in violation of a statute, held not liable for the consequences of its explosion in a fire started by a shipper carelessly throwing away a lighted match; *Sheridan* v. *Brooklyn R. R.*, 36 N. Y. 39 (1867), passenger injured on crowded platform by fellow passenger, violently and abruptly forcing his way out; *Cf. Snyder* v. *R. R.*, 36 Col. 288 (1906) *Col. Mortgage Co.* v. *Rees*, 21 Col. 435 (1895); *Tousey* v. *Roberts*, 114 N. Y. 312 (1889), elevator doors, left unfastened or ajar, opened by strangers, *contra*, *Cole* v. *German Saving Soc.*, 124 Fed. 113 (C. C. A., 8th Circ., 1903). See also the many cases where employes are injured by the negligent use by their fellow-employes of defective tools and appliances furnished by their master; *R. R.* v. *Cummings*, 106 U. S. 700 (1882); *Armour* v. *Golkowska*, 202 Ill. 144 (1903); *R. R.* v. *Perriquey*, 138 Ind. 414 (1893); *Wallace* v. *Henderson*, 211 Pa. 142 (1905), and Labatt, Master and Servant, Vol. II, 2249, n. 1, but see, *Phila, etc., Co.*, v. *Davis*, 111 Pa. 597, and Labatt, Master and Servant, Vol. II, 2231, n. 1.

Acts deliberate and careless or mischievous, but the particular consequence not intended. Dangerous articles exposed in places where persons, who by reason of their youth or known character are apt to meddle with them, are known to be wont to congregate. Horses left unguarded and unsecured in street. *Lynch* v. *Nurdin*, 1 A. & E. N. S. (Q. B.) 29 (1841), horse started by child in play; *Engelhart* v. *Farrant*, L. R., 1897, 1 Q. B. 240, defendant's driver leaves cart in charge of boy who, though forbidden to drive it, does so and injures plaintiff—held per. Esher M. R. Lopes and Rigby, L. J. J., that defendant was liable; *Thompson* v. *Platt*, 44 App. Div., N. Y. 291 (1899), if horse were insufficiently tied, a charge, that defendant was liable though boys by teasing and throwing stones at it, excited it and caused it to break loose, was correct; *Cf. Berman* v. *Schultz*, 81 N. Y. Supp. 647 (1903), electric truck left in street with brakes on and power shut off, started by boys who released brakes and turned power lever, and *Mars* v. *D. & H. C. Co.*, 61 N. Y. Sup. (54 Hun) 625 (1889), unknown third parties started engine left on siding; and see, Romer and Vaughan Williams, L. J. J., *McDowell* v. *R. R.*, L. R., 1903, 2 K. B. 331, pp. 338 and 336, and see comments of counsel on *Engelhart* v. *Farrant*, p. 333; and see the very interesting case of *Dominion Gas Co.* v. *Collins*, L. R. 1909 A. C. 640, where Lord Duneden said, "In the case of articles dangerous in themselves, such as loaded firearms, poisons, explosives and other things, *ejusdem generis*, there is a peculiar duty imposed upon those who sent forth or installed such articles, when it was necessarily the case that other parties would come within their proximity. The duty being to take precaution, it was no excuse to say that the accident would not have happened unless some other agency than that of the defendant had intermeddled with the matter. . . . On the other hand if the cause of the accident was not the negligence of the defendant, but the conscious act of another volition, then he would not be liable. For against such conscious act of volition no precaution could really prevail." It was held that the care required was of the highest and that negligence sufficiently appeared from a finding that the safety valve opened, not into the open air where the escaping gas would be harmless, but into a confined space (a room) in which it was explosive and dangerous. *Acc.* also, *Harriman* v. *R. R.*, 45 Ohio 11 (1887), torpedo left unexploded on track where children were accustomed to play; *True & True* v. *Woda*, 201 Ill. 315 (1903), material carelessly or improperly piled in street, thrown down by children in play; *Hughes* v. *Macfie*, 2 H. & C. 744 (1863), cellar door placed against wall at dangerous angle, *cf. Mangan* v. *Atterton*, L. R. 1 Exch. 239 (1866), but see criticism thereon, L. R., 3 Q. B. D., p. 338. *Creed* v. *Sullivan*, I. R., 1904, 2 K. B. 317, boy thinking a gun unloaded points it at friend; *Dannenhower* v. *Tel. Co.*, 218 Pa. 216 (1907), fallen telegraph wire brought into contact with live wire and so rendered dangerous by acts of children in play; *Harrison* v. *K. C. Elec. L. Co.*, 195 Mo. 606 (1906), circuit completed by plaintiff's son cutting a wire in two; *Pa. Steel Co.* v. *Wilkinson*, 69 Atl. Rep. 412 (Md., 1908), horse frightened by bystanders (whether adults or children does not

GLASSEY *v.* WORCESTER, ETC., STREET RAILWAY CO.

Supreme Judicial Court of Massachusetts, 1904. 185 Massachusetts, 315.

MORTON, J. These two cases were tried and have been argued together. At the close of the plaintiffs' evidence in the Superior Court the presiding Judge ruled at the defendant's request that the plaintiffs could not recover and directed verdicts for the defendant. The cases are here on exceptions by the plaintiffs to these rulings.

The case of the plaintiff Rachel, who is a married woman, is for injuries alleged to have been received by her in consequencs of the negligence of the defendant in having a large reel by the side of or in Cameron Street in Clinton, which some boys rolled down the street and which struck the carriage in which the plaintiff was driving and threw her out and caused the injuries complained of. The other action is by her husband for the loss of consortium and the expense incurred by him because of the injuries to his wife.

The evidence would have warranted a finding, and for the purposes of these cases we assume that such was the fact, that the reel belonged to the defendant and had had feed wire upon it which had been strung upon its poles by persons in its employ. But it is not clear whether the reel was left on a vacant piece of land just outside the limits of the highway, or whether it was left within the location of the highway. We assume as most favorable to the plaintiffs that it was left within the limits of the highway. The uncontradicted testimony shows, however, that it was left outside the travelled portion of the highway lying on its side in the grass in a secure position. The plaintiffs introduced in evidence a by-law of the town forbidding persons to leave obstructions of any kind in the highway without a written license from the road commissioners or other board having charge of the streets, and they contend that, if the reel was left within the location of the highway when forbidden by the by-law, that of itself constituted such negligence as renders the defendant liable. But the most, we think, that can be said of this contention is that the leaving of the reel within the limits of the highway was evidence of negligence, not that in and of itself it rendered the defendant liable or should be held as matter of law to have contributed directly to the accident. *Hanlon* v. *South Boston Railroad,* 129 Mass. 310. The question is whether in leaving the reel lying on its side in the grass near the road the defendant ought reasonably to have anticipated that children passing along the street on their way to school, or for other purposes, would take it from the place where it had been left, and engage in rolling it up and down the street, and that travellers on the highway would thereby be injured. The question is not whether a high degree of caution ought to have led the defendant to anticipate that such a thing might possibly occur, but whether it ought reasonably to have been expected to happen in the ordinary course of events. In the former case the defendant would not be liable, and in the latter it might be held liable, nothwithstanding an active human agency had intervened between the original wrongful act and the injury. The case of *Stone* v. *Boston & Albany*

appear) swinging a rope hung by defendant across the highway; *Dempsey* v. *D. C.,* 13 D. C. App. 533 (1898), substantially similar facts. *Cf. Shotwell* v. *Reading,* 5 Ohio N. P. 241 (1896); *Byrne* v. *Wilson,* 15 Ir. C. L. 332 (1862), plaintiff was thrown in a lock of a canal by the negligence of the

Railroad, 171 Mass. 536, furnishes an illustration of the former class of cases, and the case of *Lane* v. *Atlantic Works*, 111 Mass. 136, of the latter.

It is clear that the plaintiff Rachel was in the exercise of due care. But assuming that the reel was left in the highway and that that was some evidence of negligence, we think that such negligence was the remote and not the direct and proximate cause of the plaintiff Rachel's injury. The material facts with the inferences to be drawn from them are not in dispute, and in such a case the question of remote or proximate cause is one of law for the court. *Stone* v. *Boston & Albany Railroad*, 171 Mass. 536, 543. *McDonald* v. *Snelling*, 14 Allen, 290, 299. *Hobbs* v. *London & Southwestern Railway*, L. R. 10 Q. B. 111, 122. The defendant's servants left the reel in a secure position lying on its side in the grass outside the travelled part of the street, and not in immediate proximity to it. As the reel was left it was entirely safe. It was not possible for a slight or accidental movement to set it in motion so as to injure others, as in the case of *Lane* v. *Atlantic Works, ubi supra*. The reel was large and cumbersome and required active effort on the part of a number of children to move it, from the place where it had been left, on to the travelled part of the highway, and set it in motion. And in order to injure the plaintiff or any other traveller on the highway it was necessary that it should be set in motion at a time when the plaintiff or other travellers were passing along the highway. In other words, in order to render the defendant liable, it must appear, not only that it should have anticipated that in the ordinary course of events school children would take the reel from the position where it had been securely left outside the travelled part of the road, but that they would set it in motion on the highway under such circumstances that it was liable to injure a traveller thereon. It seems to us that, conceding that there was evidence of negligence on the part of the defendant in leaving the reel where its servants did, they could not be required to anticipate that this would happen in the ordinary course of events, and therefore, that the negligence was too remote. See *Speake* v. *Hughes*, (1904) K. B. 138. *Exceptions overruled.* [1]

driver of defendant's omnibus and drowned. A plea that her death was caused by the willful act of the lockkeeper letting in the water was held bad on demurrer.

[1] *Accord*: *Marsh* v. *Giles*, 211 Pa. 17 (1905), defendant having left a large stone leaning against an electric light pole, the plaintiff, 7 years old, suggested to a companion, a year older, that they use it to jar the pole as they had seen a policeman do. The elder boy drew back the upper edge of the stone and let it fall on the plaintiff's hands which were around the pole; *Murphy* v. *R. R.*, Irish R., 2 Q. B. (1897), 301, baggage truck placed near top of stairs, thrown down by fighting out-porters. See, especially, Gibson, J., p. 312. The company "would not be answerable if the truck was deliberately or wilfully set in motion by an outsider."

As to effect of defendant's knowledge of what third persons had done on other similar occasions as enlarging the extent of their expectable interferences,—see, Vaughan Williams, L. J., *McDowell* v. *Railway*, L. R., 1903, 2 K. B., p. 336. See, however, *Bellino* v. *Columbus Co.*, 188 Mass. 430, p. 433 (1905), where defendant knowing that the plaintiff's servants were in the habit of stealing gasoline from its storehouse and negligently using it to light fires in plaintiff's building, continued to leave the storehouse unlocked.

No liability attaches to one who by his wrongful act creates a condition

MARSHALL *v.* CALEDONIAN RAILWAY COMPANY.

Court of Sessions, Scotland, 1899. 1 *Session Cases, 5th Sec.,* 1060.

THE GLASGOW CENTRAL RAILWAY COMPANY were incorporated by the Act 51 and 52 Vict. cap. cxciv., and were authorized, *inter alia,* to make a railway underneath Argyle Street, Glasgow.

By section 50 of the Caledonian Railway Act, 1889 (52 and 53 Vict. cap L.), the whole undertaking and powers of the Glasgow Central Railway Company were transferred to the Caledonian Railway Company.

In the course of constructing the railway, the Caledonian Railway Company found it necessary to underpin the premises, No. 227 Argyle Street, occupied by Alexander Marshall, hardware merchant. These premises consisted of a shop on the street floor, and a cellar below, which was lighted by a window fronting a small area under the pavement. This area was covered by an iron grating. To enable the underpinning to be done, the railway company removed the wall of the area and pavement in front of the premises, and, having constructed a retaining wall they built the wall of the area in May, 1895.

In April, 1897, Alexander Marshall raised an action in the Sheriff Court at Glasgow against the Caledonian Railway Company for payment of £300 as damages. He alleged that in rebuilding the wall of the area the defenders had culpably left an opening in it, through which one of their workmen, John McGuire, had obtained access to

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which affords a third person, legally responsible or not, an opportunity to do a deliberate, intentionally harmful act to another. *Alexander* v. *Town of New Castle,* 115 Ind. 51 (1888), a Deputy Sheriff deliberately thrown by a prisoner into an excavation negligently left in a highway; *Loftus* v. *Dehail,* 133 Cal. 214, p. 219 (1901), a child thrown by little brother in a fit of temper into a pond left unguarded in vacant lot where children were known to congregate.

One who uses premises or chattels is bound to see that they are fit for the use to which he puts them. One who supplies them in a defective and dangerous condition, by sale, lease, loan or otherwise and has parted with all interest in their further use, is not liable for the harm caused by their use for a purpose for which their condition rendered them unfit if such condition is made known or is open or obvious. *Goodlander Mill Co.* v. *Standard Oil Co.,* 63 Fed. 400 (C. C. A., 7th Circ. 1894), even though he knew of the probability of their misuse; *Marvin Safe* v. *Ward,* 46 N. J. L. 19 (1884), *semble.* So one who directs another to do an act proper in itself is not liable because he has reason to believe it probable that it will be done improperly, *Sowell* v. *Champion,* 2 Nevile and Perry 627, p. 634 (1837). *Aliter* if the condition be latent and undisclosed and the use one which would be proper if the article was as it appeared to be. *Standard Oil Co.* v. *Wakefield,* 102 Va. 824 (1904), see also, *B. & A. R. R.* v. *Shanley,* 107 Mass. 568 (1871); *Farrant* v. *Barnes,* 11 C. B. N. S. 553 (1862). See, as to negligent use by third persons of premises openly defective, *Fawcett* v. *R. R.,* 24 W. Va. 755 (1884). See also, *Carter* v. *Towne,* 103 Mass. 507 (1870), where explosives wrongfully sold to a child are by him placed in the custody of his parent to whom the vendor might lawfully have sold them, the vendor is not liable for the parent's act in giving them, with full knowledge of their character, back to the child.

the area, and thence to the cellar and shop, where he had stolen goods to the value of the amount sued for.

The defenders denied having left any aperture in the area wall.

The defenders pleaded, *inter alia;*—(7) The loss and damage condescended on being due to the wilful and criminal act of the said John McGuire . . . the defenders should be assoilzied. (9) In any event, the loss and damage condescended on not being the immediate or natural result of the defenders' operations, the defenders should be assoilzied.

On 11th July, 1898, the Sheriff-substitute (Strachan) pronounced the following interlocutor:—(After preliminary findings) —"Finds that, in rebuilding the said area wall, an opening was left therein which was sufficient to admit of a person getting from the underground works of the defenders into the pursuer's premises: Finds that on various occasions between the months of May and October, 1895, a man named John McGuire, who was employed at the said works, entered the pursuer's premises through the said opening, and stole and carried away large quantities of goods belonging to the pursuer of the value of at least £300: Finds that the opening through which the said premises were entered as aforesaid was left in the said wall through the fault or negligence of the defenders or those for whom they are responsible, and that they are liable to the pursuer for the value of the goods stolen from his premises as aforesaid: Therefore decerns against the defenders for payment to the pursuer of the said sum of £300: Finds the defenders liable in expenses."

The defenders appealed, and argued, *inter alia;*—Assuming it to be proved that the defenders left an opening in the area wall, the loss sustained by the pursuer was due to the criminal act of a third party, and the ordinary rule was that one person was not responsible for the crime of another. The theft was not the natural result of the defenders' negligence in leaving the opening. The chance of the opening being used by a thief was so remote that no action lay. *Vicars* v. *Wilcocks,* 1806, 8 East, 1.

Argued for the pursuer;—When statutory powers were given to a railway company to do work which necessarily interfered with the security of premises, there was an implied obligation upon them to safeguard the proprietors of such premises. If they negligently failed to discharge that obligation, by leaving a passage open to a thief, as in the present case, they were responsible for the loss sustained by the proprietor, which was the natural consequence of their negligence.

Lord President (Sir J. P. B. Robertson).[1]—Well now it seems to be perfectly plain that if the railway company under statutory powers desire to open up a man's premises they are bound to fill up the aperture completely, and that one of the ordinary risks against which walls are expected to stand as a safeguard is theft. As the Sheriff pointed out, the man who was superintending the construction of this work mentioned that he considered it part of his duty to

[1] The portion of the opinion reviewing the evidence is omitted.

guard against thieves. I am not prepared to say that if the company have the misfortune to have a thief amongst their workmen, it is not likely he will cast his eye ten feet up and see this hole, and make such use of it as was congenial to his propensities, and accordingly on this second point I am against the defenders.

(His Lordship then proceeded to deal with the question of the amount of damages allowed by the Sheriff).

LORD ADAM.—(After expressing his concurrence with the Lord President on the evidence)—Assuming it to be true that the railway company left this hole in the original wall, does it follow in law that the company are liable? It was said by Mr. Balfour that it was difficult to connect the loss of the pursuer through the criminal action of a third party with the defenders' negligent act in leaving the wall in that state. I cannot take that view. Not only is it said that the attention of the railway company was drawn to the fact of the danger arising from a matter of this sort, but I think looking to the number of employees of the Caledonian Railway Company who were engaged in the work, and who had access to the spot all along, it was not improbable that some loose character might be employed amongst them, and if that should happen I think that it was very probable that this hole would be made use of, as it was made use of, and there is nothing in that which would relieve the company of liability. As to the amount of damages I also agree with your Lordship. On the whole matter I should be loath to disturb the opinion of the Sheriff-substitute. [2]

GALVIN *v.* THE MAYOR, ETC., OF NEW YORK.

Court of Appeals of New York, 1889. 112 *N. Y. App.*, 223.

RUGER, Ch. J. We think this was a case for the jury in all of its aspects. The plaintiff's intestate was the driver of a cart employed to deliver coal at the court-house in the city of New York. While engaged in the performance of this duty a heavy iron grating fell upon him and inflicted injuries from which he subsequently died. This grating hung on hinges and was used to cover a hole or hatchway in the sidewalk leading into the basement of the court-house, through which the coal was to be delivered. While the work of de-

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[2] *Accord*: *De la Bere* v. *Pearson*, L. R., 1907, 1 K. B. 483; 1908, 1 K. B. 280, a reader of defendant's newspaper had her money embezzled by broker recommended to her without proper investigation as to character by the financial editor; *Cf. Baxendale* v. *Bennett*, L. R., 3 Q. B. D. 525 (1878), where the question presented was whether defendant, who had left a bill accepted in blank, in an unlocked desk whence it was lost or stolen, was guilty of any negligence toward one who had discounted it, the finder without authority having filled it in.

See also, *Henderson* v. *Dade Coal Co.*, 100 Ga. 568 (1897), a lessee of convicts carelessly permitting one, a negro of the lowest type, to escape held not liable for a rape committed by such negro; *Ballinger* v. *Rader*, 151 N. Car. 383 (1909), 153 N. Car. 488 (1910), the keeper of an insane asylum, who negligently discharged as cured a dangerous maniac, held not liable for a murder committed by him; *Hullinger* v. *Worrell*, 83 Ill. 220 (1876), a Sheriff negligently permitting the escape of a prisoner under indictment for assault, with intent to murder the plaintiff, not liable for renewal of assault.

livery was in progress this grating was intended to be thrown back against the side of the building. It then stood nearly upright, and when unfastened was liable to be thrown down by the slightest jar or interference.

The evidence tended to show that the grating, while thrown back to permit the dumping of coal, was dangerous and liable to inflict injury upon those engaged in that business, unless securely fastened by a hasp, hook or other contrivance. It also tended to show that the appliances furnished by the city were wholly inadequate to effect the purpose. A case of substantially undisputed negligence was made out against the defendant.

Upon the trial the plaintiff was nonsuited upon two grounds, viz., first, that negligence producing the injury was imputable to Purcell, a co-servant of the deceased, for which the defendant was held not to be liable; and, second, that the deceased was himself, as matter of law, guilty of contributory negligence. [1]

Purcell and the deceased were in the employ of the contractor delivering the coal, not of the city; Purcell, who was with the load preceding that of the deceased, with the help of others, raised the grating.

We are not aware of any rule which exempts a wrongdoer from the consequences of his own negligence, because some stranger discovers it and omits to repair it. [2] Purcell was not the servant of the city, and owed it no duty to put the court-house in condition to receive coal safely. This duty the law imposed upon the city, and it was not not excused from its performance by the fact that third persons had observed its non-performance and had omitted to repair its neglect. (*Benzing* v. *Steinway*, 101 N. Y. 547; *Webster* v. *Hud. R. R. R. Co.*, 38 id. 260; *Barrett* v. *Third Ave. R. R. Co.*, 45 id. 628) The familiar rule that a master is not liable to his servant for damages occasioned to him through the negligence or unskillfulness of his co-servant has no application to the facts of this case, and cannot be invoked to shield the defendant from the consequences of its negligence. (*Wright* v. *N. Y. C. R. R. Co.*, 25 N. Y. 541.)

Judgment reversed. [3]

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[1] Only that part of the opinion which deals with the first point is given.

[2] See Ripley, C. J., in *Cahill* v. *Eastman*, 18 Minn. 324 (1872), p. 372. "It cannot lessen the liability of the defendants for the result of their own acts, that another, a mere volunteer for aught that appears, had undertaken to prevent such result, but had failed, whether from carelessness or not. Such a defence really comes to this: That though the defendants stood aside and let the water take its course, they are not liable because a stranger might have stopped it if he had used the proper means. An analogous position would be, that I am not responsible for the damage done by my cattle escaping into my neighbor's close, because a stranger who tried to keep them in might have done so if he had taken proper pains."

[3] *Accord: Wiley* v. *R. R.*, 44 N. J. L. 247 (1883), the spread of fire to plaintiff's premises would have been prevented had the intermediate owners taken due care to extinguish it while on their land. "The failure to extinguish it (the fire) was not, in any just sense, an efficient cause of its spreading; it was merely the absence of prevention. Although that failure might

be culpable, yet it neither added to the original force nor gave it new direction and hence, in tracing back the line of causation, it would not be noticed as a potent agency", Dixon, J., p. 252; *Atkinson* v. *Goodrich Transportation Co.*, 60 Wis. 114 (1884), p. 167, negligent failure of fire department to extinguish fire; *Hartley* v. *Mayor of Rochdale*, L. R., 1908, 2 K. B. 594, a water company so laying its pipe as to cause subsidence of highway is not relieved by the omission of road authorities to repair (in England such authorities are under a positive duty to maintain the highways in safe condition for breach of which they are indictable, though no private action lies against them save for misfeasance), *Moon* v. *Northern Pac. R. Co.*, 46 Minn. 106 (1891); and *Teal* v. *American Mining Co.*, 84 Minn. 320 (1901), a failure of a railroad to inspect a defection in cars turned over to it for carriage by the defendant, (a connecting carrier), (or if it knows of its bad condition, its failure to instruct the crew how to operate it carefully, *Hill* v. *Republic Iron & Steel Co.*, 112 Minn. 244 (1910)), "was not an independent cause interrupting the continuous sequence between the (defendants') negligence and the injury of the plaintiff." It was "the failure to interrupt the consequences likely to and which did flow from the defendants' negligent conduct." *Contra*, *Doggett* v. *Richmond & D. R. Co.*, 78 N. Car. 305 (1878), failure of third persons, apparently friendly volunteers, owing no duty to plaintiff, to check spread of fire; held to exonerate defendant negligently starting it; *Kiser* v. *Suppe*, 133 Mo. App. 19 (1908), defendant supplied to a contractor doing work for him on his premises a defective cable to be used by the latter's servants in doing the work, it was held that "defendant's negligence was but a remote cause, since it would have been rendered innocuous had the plaintiff's master performed his subsequent duty of inspection." Johnson, J., p. 1009; *Fowler v. Briggs*, 116 Mich. 425 (1898); *Savannah F. & W. R. Co.* v. *Booth*, 98 Ga. 20 (1895), similar facts; see also, *Ladd* v. *New York &c. R.*, 193 Mass. 359 (1907).

There is a very distinct tendency in some jurisdictions (to which the decisions in *Kiser* v. *Suppe* and *Fowler* v. *Briggs*, may well be due), to hold that no duty will be imposed on a defendant toward a plaintiff already protected from the same source of danger by a duty admittedly due him by another more nearly associated with him, *Glynn* v *Central R. Co.*, 175 Mass. 510 (1900), railroad owes to trainmen of connecting road no duty to inspect its cars before turning them over; *accord: Missouri K. & T. R. Co.* v. *Merrill*, 65 Kans. 436 (1902); *contra: Moon* v. *Northern Pac. R. Co.*, 46 Minn. 106 (1891); *Pennsylvania R. R. Co.* v. *Snyder*, 55 Ohio 342 (1896). See, as to liability of a landlord leasing premises externally dangerous unless tenant takes positive steps to make them safe, *Clifford* v. *Atlantic Cotton Mills*, 146 Mass. 47 (1888); *Coman* v. *Alles*, 198 Mass. 99 (1908); but see *Brown* v. *White*, 202 Pa. 297 (1902) *contra, semble;* and see, on whole subject, Beven, Negligence in Law, 2nd Ed., p. 61 *et seq.*, and the editor's Affirmative Obligations in the Law of Tort, 53 A. L. Reg. (44 N. S.), p. 337 *et seq.*

Part 2.

Duty to Take Positive Action for the Protection or Benefit of Others.

CHAPTER I.

Moral Obligation and Legal Duty.

BUCH *v.* AMORY MANUFACTURING CO.

Supreme Court of New Hampshire, 1897. 69 New Hampshire, 257.

CARPENTER, C. J. On the evidence, the jury could not properly find that the plaintiff was upon the premises of the defendants with their consent or permission. Although there was evidence tending to show that other back-boys had taken their brothers into the room for the purpose of instructing them in the business, there was no sufficient evidence that the fact that they did so was known to the defendants, and there was evidence that on the first occasion brought to their knowledge they objected. Upon this state of the evidence, a license by the defendants—whether material or immaterial—for the plaintiff's presence in the room could not legitimately be inferred. The plaintiff was a trespasser.

The defendants' machinery was in perfect order and properly managed. They were conducting their lawful business in a lawful way and in the usual and ordinary manner. During the plaintiff's presence they made no change in the operation of their works or in their method of doing business. No immediate or active intervention on their part caused the injury. It resulted from the joint operation of the plaintiff's conduct and the ordinary and usual condition of the premises. Under these circumstances, an adult in full possession of his faculties, or an infant capable of exercising the measure of care necessary to protect himself from the dangers of the situation, whether he was on the premises by permission or as a trespasser, could not recover. * * *

Assuming, then, that the plaintiff was incapable either of appreciating the danger or of exercising the care necessary to avoid it, is he, upon the facts stated, entitled to recover? He was a trespasser in a place dangerous to children of his age. In the conduct of their business and management of their machinery the defendants were without fault. The only negligence charged upon or attributed to them is that, inasmuch as they could not make the plaintiff understand a command to leave the premises and ought to have known that they could not, they did not forcibly eject him.

Actionable negligence is the neglect of a legal duty. The defendants are not liable unless they owed to the plaintiff a legal duty which they neglected to perform. With purely moral obligations the law does not deal. For example, the priest and Levite who passed by on the other side were not, it is supposed, liable at law for the continued suffering of the man who fell among thieves, which they might and morally ought to have prevented or relieved. Suppose A, standing close by a railroad, sees a two-year old babe on the track and a car approaching. He can easily rescue the child with entire safety to himself, and the instincts of humanity require him to do so. If he does not, he may, perhaps, justly be styled a ruthless savage and a moral monster; but he is not liable in damages for the child's injury, or indictable under the statute for its death. P. S., *c.* 278, *s.* 8.[1] * * *

"No action will lie against a spiteful man, who, seeing another running into danger, merely omits to warn him. To bring the case within the category of actionable negligence some wrongful act must be shown, or a breach of some positive duty; otherwise, a man who allows strangers to roam over his property would be held answerable for not protecting them against any danger they might encounter whilst using the license." *Gautret* v. *Egerton*, L. R. 2 C. P. 371, 375.

What duties do the owners owe to a trespasser upon their premises? They may eject him, using such force and such only as is necessary for the purpose. They are bound to abstain from any other or further intentional or negligent acts of personal violence—bound to inflict upon him by means of their own active intervention no injury which by due care they can avoid. They are not bound to warn him against hidden or secret dangers arising from the condition of the premises (*Rodigan* v. *Railroad*, 155 Mass. 44, 47, 48), or to protect him against any injury that may arise from his own acts or those of other persons. In short, if they do nothing, let him entirely alone, in no manner interfere with him, he can have no cause of action against them for any injury that he may receive. On the contrary, he is liable to them for any damage that he by his unlawful meddling may cause them or their property. What greater or other legal obligation was cast on these defendants by the circumstance that the plaintiff was (as is assumed) an irresponsible infant?

If landowners are not bound to warn an adult trespasser of

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[1] *Accord*: Field, J., *U. S.* v. *Knowles*, 4 Sawyer, 517 (U. S. Dist. Ct., 1864), "It is undoubtedly the moral duty of every person to extend to others assistance when in danger." "And if such efforts should be omitted by any one when they could be made without imperilling his own life, he would, by his conduct, draw upon himself the just censure and reproach of good men; but this is the only punishment to which he would be subjected by society," p. 519; and Tillinghast, J., *King* v. *R. R.*, 23 R. I. 583 (1902), "That defendant's conduct toward the plaintiff (their employé) in refusing to carry him home after his feet were frozen was highly reprehensible, morally speaking, no one will question. Indeed, it is well-nigh inconceivable that (their agents) could have been guilty of so gross an act of inhumanity. But courts of law can only take notice of legal rights, duties, and obligations, and must decide cases in accordance therewith, regardless of humanitarian questions." p. 591.

hidden dangers—dangers which he by ordinary care cannot discover and, therefore, cannot avoid—on what ground can it be claimed that they must warn an infant of open and visible dangers which he is unable to appreciate? No legal distinction is perceived between the duties of the owners in one case and the other. The situation of the adult in front of secret dangers which by no degree of care he can discover, and that of the infant incapable of comprehending danger, is in a legal aspect exactly the same. There is no apparent reason for holding that any greater or other duty rests upon the owners in one case than in the other.

There is a wide difference—a broad gulf—both in reason and in law, between causing and preventing an injury; between doing by negligence or otherwise a wrong to one's neighbor, and preventing him from injuring himself; between protecting him against injury by another and guarding him from injury that may accrue to him from the condition of the premises which he has unlawfully invaded. The duty to do no wrong is a legal duty. The duty to protect against wrong is, generally speaking and excepting certain intimate relations in the nature of a trust, a moral obligation only, not recognized or enforced by law. Is a spectator liable if he sees an intelligent man or an unintelligent infant running into danger and does not warn or forcibly restrain him? What difference does it make whether the danger is on another's land, or upon his own, in case the man or infant is not there by his express or implied invitation? If A sees an eight year old boy beginning to climb into his garden over a wall stuck with spikes and does not warn him or drive him off, is he liable in damages if the boy meets with injury from the spikes? *Degg* v. *Railway*, 1 H. & N. 773, 777. I see my neighbor's two year old babe in dangerous proximity to the machinery of his windmill in his yard, and easily might, but do not, rescue him. I am not liable in damages to the child for his injuries, nor, if the child is killed, punishable for manslaughter by the common law or under the statute (P. S., *c.* 278, *s.* 8), because the child and I are strangers, and I am under no legal duty to protect him. Now suppose I see the same child trespassing in my own yard and meddling in like manner with the dangerous machinery of my own windmill. What additional obligation is cast upon me by reason of the child's trespass? The mere fact that the child is unable to take care of himself does not impose on me the legal duty of protecting him in the one case more than in the other. Upon what principle of law can an infant by coming unlawfully upon my premises impose upon me the legal duty of a guardian? None has been suggested, and we know of none. * * *

Cases of enticement, allurement, or invitation of infants to their injury, or setting traps for them, and cases relating to the sufficiency of public ways, or to the exposure upon them of machinery attractive and dangerous to children, have no application here.

The law no more compels the owners to shut down their gates and stop their business for the protection of a trespasser than it requires them to maintain a railing about an open scuttle or to fence in their machinery for the same purpose. *Benson* v. *Company*, 77

Md. 535; *Mergenthaler* v. *Kirby*, 79 Md. 182. There was no evidence tending to show that the defendants neglected to perform any legal duty to the plaintiff. *McGuiness* v. *Butler*, 159 Mass. 233, 236, 238; *Grindley* v. *McKechnie*, 163 Mass. 494; *Holbrook* v. *Aldrich*, 168 Mass. 15, 17, and cases cited. *Verdict set aside: judgment for the defendants.*[2]

UNION PACIFIC RAILWAY CO. *v.* CAPPIER.

Supreme Court of Kansas, 1903. 66 Kan. 649.

SMITH, J.: This was an action brought by Adeline Cappier, the mother of Irvin Ezelle, to recover damages resulting to her by reason of the loss of her son, who was run over by a car of plaintiff in error, and died from the injuries received. The trial court, at the close of the evidence introduced to support a recovery by plaintiff below, held that no careless act of the railway company's servants in the operation of the car was shown, and refused to permit the case to be considered by the jury on the allegations and attempted proof of such negligence. The petition, however, contained an averment that the injured person had one leg and an arm cut off by the car-wheels, and that the servants of the railway company failed to call a surgeon, or to render him any assistance after the accident, but permitted him to remain by the side of the tracks and bleed to death. Under this charge of negligence a recovery was had.

While attempting to cross the railway tracks Ezelle was struck by a moving freight car pushed by an engine. A yardmaster in charge of the switching operations was riding on the end of the car nearest to the deceased and gave warning by shouting to him. The warning was either too late or no heed was given to it. The engine was stopped. After the injured man was clear of the track, the yardmaster signaled the engineer to move ahead, fearing, as he testified, that a passenger train then about due would come upon them. The locomotive and car went forward over a bridge, where the general yardmaster was informed of the accident and an ambulance was summoned by telephone. The yardmaster then went back where the injured man was lying and found three Union Pacific switchmen binding up the wounded limbs and doing what they could to stop the flow of blood. The ambulance arrived about thirty minutes later and Ezelle was taken to a hospital, where he died a few hours afterward.

In answer to particular questions of fact, the jury found that the accident occurred at 5.35 P. M.; that immediately one of the railway employees telephoned to police headquarters for help for the injured man; that the ambulance started at 6.05 P. M. and reached the nearest hospital with Ezelle at 6.20 P. M., where he received proper medical and surgical treatment. Judgment against the railway company was based on the following question and answer:

[2] *Contra: Price* v. *Atchison Water Works*, 58 Kans. 551 (1897); Section 701 of the General Statutes of Colorado defines an accessory before the fact as "a person who stands by, without interfering or giving such help as may be in his or her power to prevent a criminal offense from being committed." But a bystander is not bound to interfere at the peril of his own life. *Farrell* v. *People*, 8 Colo. App. 524 (1896).

"Ques. Did not defendant's employees bind up Ezelle's wounds and try to stop the flow of blood as soon as they could after the accident happened? Ans. No."

The lack of diligence in the respect stated was intended, no doubt, to apply to the yardmaster, engineer and fireman in charge of the car and engine.

These facts bring us to a consideration of the legal duty of these employees toward the injured man after his condition became known. Counsel for defendant in error quotes the language found in Beach on Contributory Negligence, third edition, section 215, as follows:

"Under certain circumstances, the railroad may owe a duty to a trespasser after the injury. When a trespasser has been run down, it is the plain duty of the railway company to render whatever service is possible to mitigate the severity of the injury. The train that has occasioned the harm must be stopped, and the injured person looked after; and, when it seems necessary, removed to a place of safety, and carefully nursed, until other relief can be brought to the disabled person."

The principal authority cited in support of this doctrine is *Northern Central Railway Co.* v. *The State, use of Price et al.*, 29 Md. 420, 96 Am. Dec. 545. The court in that case first held that there was evidence enough to justify the jury in finding that the operatives of the train were negligent in running it too fast over a road-crossing without sounding the whistle, and that the number of brakemen was insufficient to check its speed. Such negligence was held sufficient to uphold the verdict and would seem to be all that was necessary to be said. The court, however, proceeded to state that, from whatever cause the collision occurred, it was the duty of the servants of the company, when the man was found on the pilot of the engine in a helpless and insensible condition, to remove him, and to do it with proper regard to his safety and the laws of humanity. In that case the injured person was taken in charge by the servants of the railway company and, being apparently dead, without notice to his family, or sending for a physician to ascertain his condition, he was moved to defendant's warehouse, laid on a plank and locked up for the night. The next morning, when the warehouse was opened, it was found that during the night the man had revived from his stunned condition and moved some paces from the spot where he had been laid, and was found in a stooping posture, dead but still warm, having died from hemorrhage of the arteries of one leg, which was crushed at and above the knee. It had been proposed to place him in the defendant's station-house, which was a comfortable building, but the telegraph operator objected, and directed him to be taken into the warehouse, a place used for the deposit of old barrels and other rubbish.

The Maryland case does not support what is so broadly stated

In *Hardison* v. *Reel*, 154 N. Car. 273 (1911), it was held that no action lies against a notary public, to whom the plaintiff, a bidder for the position of United States mail carrier, had submitted his bond for acknowledgment and whom he had requested not to divulge the amount of his bid, for underbidding the plaintiff. "The plaintiff is the victim of misplaced confidence" but the confidence was unsolicited and gratuitous. Besides an express agreement not to bid would have been void as depriving the government of the benefit of competition and so against public policy.

in Beach on Contributory Negligence. It is cited by Judge Cooley, in his work on Torts, in a note to a chapter devoted to the negligence of bailees (ch. XX), indicating that the learned author understood the reasoning of the decision to apply where the duty began after the railway employees had taken charge of the injured person.[1]

After the trespasser on the track of a railway company has been injured in collision with a train, and the servants of the company have assumed to take charge of him, the duty arises to exercise such care in his treatment as the circumstances will allow. We are unable, however, to approve the doctrine that when the acts of a trespasser himself result in his injury, where his own negligent conduct is alone the cause, those in charge of the instrument which inflicted the hurt, being innocent of wrong-doing, are nevertheless blamable in law if they neglect to administer to the sufferings of him whose wounds we might say were self-imposed. With the humane side of the question courts are not concerned. It is the omission or negligent discharge of legal duties only which come within the sphere of judicial cognizance. For withholding relief from the suffering, for failure to respond to the calls of worthy charity, or for faltering in the bestowment of brotherly love on the unfortunate, penalties are found not in the laws of men but in that higher law, the violation of which is condemned by the voice of conscience, whose sentence of punishment for the recreant act is swift and sure. In the law of contracts it is now well understood that a promise founded on a moral obligation will not be enforced in the courts. Bishop states that some of the older authorities recognize a moral obligation as valid, and says:

"Such a doctrine, carried to its legitimate results, would release the tribunals from the duty to administer the law of the land; and put, in the place of law, the varying ideas of morals which the changing incumbents of the bench might from time to time entertain." (Bish. Cont. § 44.)

Ezelle's injuries were inflicted, as the court below held, without the fault of the yardmaster, engineer or fireman in charge of the car and locomotive. The railway company was no more responsible than it would have been had the deceased been run down by the cars of another railroad company on a track parallel with that of plaintiff in error. If no duty was imposed on the servants of defendant below to take charge of, and care for, the wounded man

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[1] In *Northern Central Railway Co.* v. *The State, use of Price, et al.* (1868), the contention of the plaintiff's counsel on this point was that there had been, not a mere omission only, but an improper "act"—misfeasance in the performance of a voluntary undertaking—"in other words, the simple case of a mandatary or depositary"—citing Lord Holt, *Cogg* v. *Bernard*, 2 Ld. Raym. 909-911, "An action will not lie for not doing the thing, for want of a sufficient consideration; but yet if the bailee will take the goods into his custody, he shall be answerable for them; for the taking the goods into his custody is his own act."

So in Rhode Island, while it was held in *King* v. *R. R.*, 23 R. I. 583 (1902), that a Railway Co. was not bound to carry home an employee whose feet had been frozen, a Railway Co., which did assume the task of conveying home an injured employee, was held to be liable for his death due to its failure to cover and protect him while in transit, *Bresnahan* v. *Lonsdale Co.*, 51 Atl. 624 (R. I., 1900); *Accord: Dyche* v. *R. R.*, 79 Miss. 361 (1901), where a wounded trespasser was placed in a car and, being completely forgotten, was ferried back and forth across the Mississippi instead of being at once taken to a hospital; *Contra*: *Griswold* v. *R. R.*, 183 Mass. 434 (1903), *semble*.

in such a case, how could a duty arise under the circumstances of the case at bar? In Barrows on Negligence, page 4, it is said:

"The duty must be owing from the defendant to the plaintiff, otherwise there can be no negligence, so far as the plaintiff is concerned; . . . and the duty must be owing to plaintiff in an individual capacity, and not merely as one of the general public.

"This excludes from actionable negligence all failures to observe the obligations imposed by charity, gratitude, generosity, and the kindred virtues. The moral law would obligate an attempt to rescue a person in a perilous position—as a drowning child—but the law of the land does not require it, no matter how little personal risk it might involve, provided that the person who declines to act is not responsible for the peril." (See, also, *Kenney* v. *The Hannibal & St. Joseph Railroad Company*, 70 Mo. 252, 257.)[2]

In the several cases cited in the brief of counsel for defendant in error to sustain the judgment of the trial court it will be found that the negligence on which recoveries were based occurred after the time when the person injured was in the custody and care of those who were at fault in failing to give him proper treatment.

The judgment of the court below will be reversed, with directions to enter judgment on the findings of the jury in favor of the railway company.

All the Justices concurring.[3]

[2] In this case (1879) it was held that it was no more the duty of the defendant railway to extinguish a fire, started without their fault on their right of way, than of any other person who saw it; *acc., R. R.* v. *Shipley*, 39 Md. 251 (1874); but see *Beckham* v. *R. R.*, 127 Ga. 550 (1907).

[3] *Accord: Griswold* v. *R. R.*, 183 Mass. 434 (1903); *Allen* v. *Hixson*, 111 Ga. 460 (1900); in *Ollett* v. *P. R. R.*, 201 Pa. 361 (1902), it is held, that there being no obligation on the railroad's part to care for an injured trespasser, the train crew in giving aid were not acting within the scope of their employment and the company was not liable for their conduct therein. *Contra: Whitesides* v. *R. R.*, 128 N. C., 229 (1901), decided against the vigorous dissent of Cook, J., upon *R. R.* v. *State, to use of Price*, 29 Md. 420 (1868), *supra*, as construed by Beach (miscited as "Black") on Contributory Negligence, *supra; Raasch* v. *Elite Laundry Co.*, 98 Minn. 357 (1906), *semble; Scholl* v. *Becker*, 127 Pa. 968 (Oregon 1912) hotel keeper held not liable for failing to care for intoxicated guest who fell from his porch and who died from exposure, compare, *Weymire* v. *Wolfe* and *Depue* v. *Flatau*, note 1 to *London* v. *London, etc., Docks, post.*

By the maritime law not only is the ship bound to furnish medical aid to the seamen at its expense during the voyage and in foreign ports, *Scarf* v. *Metcalf*, 107 N. Y. 211 (1887), and see 28 L. R. A., p. 549 n, and if within reasonable distance of a port, to put into it in order to obtain necessary medical attendance if it is not available on board the ship. *The Iroquois*, 194 U. S. 240 (1903): *The Fullerton*, 167 Fed. 1 (1908), but the master is bound to make reasonable efforts to rescue a seaman from those perils, incidental to the nature of his employment, into which he in any way falls—as by falling overboard. Field, J., *U. S.* v. *Knowles*, 4 Sawy. 517 (U. S. Dist. Ct. 1864), p. 520. So in *O. & M. R. R.* v. *Early*, 141 Ind. 73 (1895), and *Shaw* v. *R. R.*, 103 Minn. 8 (1907), it was held that the agents of an employer, present at the scene of an accident to a servant, are bound to give him such emergency aid as they are able and to bring him into reach of medical assistance: *Contra, King* v. *R. R.*, 23 R. I. 583 (1902). Such duty only arises out of the emergency and ceases with it, *R. R.* v. *Early, supra*, nor does it require the exercise of more than good faith and common humanity, *Shaw* v. *R. R., supra.*

In *Raasch* v. *Elite Laundry Co.*, 98 Minn. 357 (1906), it was held that "those who employ methods or instrumentalities which are naturally dangerous, and are liable to be the means of causing injury to the ignorant and

CHAPTER II.

Duties Attached to the Tenure of Land, Incumbency of Office, and the Exercise of Trades and Professions.

STATHAM—ABRIDGMENT.

(Circa, 1470), Accions sur le cas, 2 pl. 23.

F. Pelham brought a writ of trespass against the Prior of B., inasmuch as the said Prior by reason of his water mill in S. should have repaired a bridge over the water which ran to the said mill, by which bridge the plaintiff, by reason of his manor of F., and all those whose estate, etc. (he had), could pass with their provisions and cattle, etc. And he showed how the said Prior and his predecessors and all those whose estate they had in the said mill had repaired this same bridge, etc., there had the defendant suffered the said bridge to be out of repair so that the plaintiff could not pass for a long time, to the damage, etc.

Skrene. Judgment of the writ since the plaintiff has claimed a road appendant to the manor of F., and has not claimed the road to go to his freehold, and no place, etc., and *non allocutor. Skrene.* Still you should have an assize of nuisance and not this action. HANKFORD. That cannot be for he has raised nothing to the (plaintiff's) nuisance, nor thrown down anything,[1] but he has suffered the bridge to fall, wherefor answer.[2]

FITZ-HERBERT, DE NOVA NATURA BREVIUM.

Fitz-Herbert, De Nova Natura Brevium (1547), *London* 1666, 93 *G.*

And a Man shall have an Action of Trespass upon the Case against his Neighbour who has Lands between him and the Sea, and ought to make Banks; and cleanse certain Ditches and Sewers betwixt him and the Sea, and he doth not cleanse them as he ought to do, by reason whereof his Land is surrounded, etc., he shall have his Action on the Case against him for not mending the Banks, and the cleansing the Ditches and Sewers, etc.

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unfortunate, should be required to take reasonable means to alleviate the suffering occasioned by an accident" "and to prevent further injury," even though not at fault up to this point, and are bound to see that their superintendent has sufficient knowledge of the machinery to accomplish these objects: *contra, Stager* v. *Troy Laundry Co.*, 38 Oregon, 480 (1901); *Allen* v. *Hixson*, 111 Ga. 460 (1900), but see *Bessemer Co.* v. *Campbell*, 121 Ala. 50 (1898), and for whole subject 56 Am. L. Reg. 217, 316.

[1] *Gar rens nê leve a nusans ne prosterne*; compare the formal averments in the assize of nuisance.

[2] Public bridges are repairable by the county and not by the lord of the manor save *ratione tenurae* or by prescription—and where the lord of the manor is so bound to repair, his tenant for years being in possession will be obliged to do so, *per* Holt, C. J., *R.* v. *Bucknall*, 2 Ld. Raym. 804 (1702)—and though the land be divided the whole charge lies upon the owner of each part, though all the owners are contributory among themselves, and a

FITZ-HERBERT'S NATURA BREVIUM.

Writ de Trespass sur le Case, 93 A. & B.

And if the Sheriff doth arrest a man upon a Capias directed unto him sued forth upon a Statute-Merchant, and afterwards set him at liberty, he who sued the Writ shall have a special Action upon the Case against the Sheriff.

And if the Sheriff in a Writ of Account or Debt return upon any, *quod non est inventus, nec habet terras, &c. per qu. distringi poterit, &c.* for which a Capias is awarded against him, and he is arrested thereupon, where he hath sufficient Lands, or Goods and Chattels; then he shall have an Action upon the Case against the Sheriff, directed unto the Coroners, as before is said, &c.[1]

YELDING *v.* FAY.

Trin. 36 Eliz., rot. 948 (1596). Moor. 355.

Action on the case by Yelding against Fay, and declares that the custom of the parish that the parson had kept a bull and a boar for the increase of the cattle of the inhabitants within the parish; and shows that, the defendant being parson and the plaintiff an inhabitant, the defendant did not keep the bull or a boar for four years together to the damage of the plaintiff. The defendant *prist*

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covenant by the lord of the manor discharging his alienee from this duty binds only the lord and does not alter the public remedy, *Regina* v. *Duchess of Bucklugh* (*sic*), 1 Salk. 358 (1704).

[1] Ministerial officers are liable for nonfeasance as well as misfeasance, see Holt, C. J., in *Lane* v. *Cotton*, 1 Ld. Raym. 646 (1701), p. 654, "If a man takes upon himself a public employment, he is bound to serve the public so far as the employment extends; and for refusal an action lies, as against a farrier refusing to shoe a horse, against an innkeeper refusing a guest, when he has room, against a carrier refusing to carry goods, when he has convenience, his wagon not being full. So an action will lie against a sheriff for refusing to execute process." *Accord: Amy* v. *Supervisors*, 11 Wall. 136 (U. S., 1870), p. 138, "where the law requires absolutely a ministerial act to be done by a public officer and he neglects or refuses to do such act, he may be compelled to respond in damages to the extent of the injury arising from his conduct" and this liability arising at common law is not affected by the repeal of an act which specifically enacts that delinquent officers shall be personally liable; *Wright* v. *Shanahan*, 149 N. Y. 495 (1896). But a public officer is liable to a private action for the nonfeasance of his duties as such only where the duty is one in the proper performance of which the individual injured has a private interest, *Gage* v. *Springer*, 211 Ill. 200 (1904), no one citizen has such an interest in efficient public service as to give him a right of action if the state be badly served.

A Sheriff was liable for the misconducts, both of commission and omission, of his deputies, as his bailiffs, *Ackworth* v. *Kemp*, Doug. 40 (1778); or, until the Prisons Act of 1865, 28 & 29 Vic., c. 126, his gaoler, *Brown* v. *Compton*, 8 T. R. 424 (1800)—but in *Lane* v. *Cotton, supra*, it was held that public officers (the Postmasters-General) were not liable for the misconducts of their subordinates, though appointed by them—Lord Mansfield dissenting, emphasized the receipt by the Postmaster of a salary paid out of the profits of the office; *Accord*: *Bainbridge* v. *Postmaster-General*, L. R. 1906, 1 K. B. 178, no liability by negligence of workmen employed to erect and maintain telegraph poles and wires.

le custome per protestation (*protestando* that there is not any such custom [1]) and pleads not guilty. And it is held on demurrer for the plaintiff; since the action lies; and since not guilty is not a good plea when the offense and *tort* is in *non feasance* of a thing; but that there he ought to have shown affirmatively *le feasance* (the performance) of the thing; since the protestation is not good as to the custom, which is the ground and substance of the action, as in Fox and Gresbrokes case in Plowden.

FITZ-HERBERT, NATURA BREVIUM.

Accion sur le cas, 94 *D.*

But if a smith prick my horse with a nail, etc, I shall have my action of trespass upon the case without any warranty by the smith to do it rightly, etc.[1] For it is the duty of every artificer to exercise his art rightly and truly as he ought.

CHAPTER III.

Duties Attached to Relations Voluntarily Entered Into.

COGGS v. BERNARD.

Court of King's Bench, 1703. 2 *Ld. Raym.* 909.

Holt, chief justice. The case is shortly this. This defendant undertakes to remove goods from one cellar to another, and there lay them down safely, and he managed them so negligently, that for want of care in him some of the goods were spoiled. Upon not guilty pleaded, there has been a verdict for the plaintiff, and that upon full evidence, the cause being tried before me at *Guildhall*. There has been a motion in arrest of judgment, that the declaration is insufficient, because the defendant is neither laid to be a common porter, nor that he is to have any reward for his labour. So that the defendant is not chargeable by his trade, and a private person cannot be charged in an action wthout a reward.

I have had a great consideration of this case, and because some of the books make the action lie upon the reward, and some upon the promise, at first I made a great question, whether this declaration was good. But upon consideration, as this declaration is, I think the action will well lie. In order to shew the grounds, upon which a man shall be charged with goods put into his custody, I must shew

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[1] Same case *sub. nom. Yielding* v. *Fay*, Cro. Eliz. 569, in which it is also said that the Court was of the opinion "that it is a good and reasonable custom; and that every inhabitant who hath prejudice by the not keeping the bull or the boar, may well maintain his action." *Accord*: (*semble*) *Waples* v. *Basset*, Skinner 399, 4 Mod. 241 (1693), where however the declaration was bad in that it did not set forth that the parson was bound to keep the animals, either by custom or prescription or "that the defendant being rector of a church ought to find a boar in consideration of paying him tithes."

[1] *Accord*: Y. B. 46 Ed. III, 19 pl. 19 (1491).

the several sorts of bailments. And there are six sorts of bailments. The first sort of bailment is, a bare naked bailment of goods, delivered by one man to another to keep for the use of the bailor; and this I call a *depositum,* and it is that sort of bailment which is mentioned in *Southcote's* case. The second sort is, when goods or chattels that are useful, are lent to a friend *gratis,* to be used by him; and this is called *commodatum,* because the thing is to be restored in specie. The third sort is, when goods are left with the bailee to be used by him for hire; this is called *locatio et conductio,* and the lender is called *locator,* and the borrower *conductor.* The fourth sort is, when goods or chattles are delivered to another as a pawn, to be a security to him for money borrowed of him by the bailor; and this is called in *Latin vadium,* and in *English* a pawn or a pledge. The fifth sort is when goods or chattles are delivered to be carried, or something is to be done about them for a reward to be paid by the person who delivers them to the bailee, who is to do the thing about them. The sixth sort is when there is a delivery of goods or chattles to somebody, who is to carry them, or do something about them *gratis,* without any reward for such his work or carriage, which is this present case. I mention these things, not so much that they are all of them so necessary in order to maintain the proposition which is to be proved, as to clear the reason of the obligation, which is upon persons in cases of trust.

As to the first sort, where a man takes goods in his custody to keep for the use of the bailor, I shall consider, for what things such a bailee is answerable. He is not answerable, if they are stole without any fault in him, neither will a common neglect make him chargeable, but he must be guilty of some gross neglect. There is I confess a great authority against me, where it is held, that a general delivery will charge the bailee to answer for the goods if they are stolen, unless the goods are specially accepted, to keep them only as you will keep your own. But my lord *Coke* has improved the case in his report of it, for he will have it, that there is no difference between a special acceptance to keep safely, and an acceptance generally to keep. But there is no reason nor justice in such a case of a general bailment, and where the bailee is not to have any reward, but keeps the goods merely for the use of the bailor, to charge him without some default in him. For if he keeps the goods in such a case with an ordinary care, he has performed the trust reposed in him. But according to this doctrine the bailee must answer for the wrongs of other people, which he is not, nor cannot be, sufficiently armed against. If the law be so, there must be some just and honest reason for it, or else some universal settled rule of law, upon which it is grounded; and therefore it is incumbent upon them, that advance this doctrine, to shew an undisturbed rule and practice of the law according to this position. But to shew that the tenor of the law was always otherwise, I shall give a history of the authorities in the books in this matter, and by them shew, that there never was any such resolution given before *Southcote's* case. The 29 Ass. 28, is the first case in the books upon that learning, and there the opinion is, that the bailee is not chargeable, if the goods are stole. As for 8 *Edw. 2. Fitz. detinue,*

59. where goods were locked in a chest, and left with the bailee, and the owner took away the key, and the goods were stolen, and it was held that the bailee should not answer for the goods. That case they say differs, because the bailor did not trust the bailee with them. But I cannot see the reason of that difference, nor why the bailee should not be charged with goods in a chest, as well as with goods out of a chest. For the bailee has as little power over them, when they are out of a chest, as to any benefit he might have by them, as when they are in a chest; and he has as great power to defend them in one case as in the other. The case of 9 *Edw.*.4. 40. *b.* was but a debate at bar. For *Danby* was but a counsel then, though he had been chief justice in the beginning of *Ed.* 4. yet he was removed, and restored again upon the restitution of *Hen.* 6. as appears by *Dugdale's Chronica Series.* So that what he said cannot be taken to be any authority, for he spoke only for his client; and *Genney* for his client said the contrary. The case in 3 *Hen.* 7. 4. is but a sudden opinion and that but by half the court; and yet that is the only ground for this opinion of my lord *Coke,* which besides he has improved. But the practice has been always at *Guildhall,* to disallow that to be a sufficient evidence, to charge the bailee. And it was practiced so before my time, all chief justice *Pemberton's* time, and ever since, against the opinion of that case. When I read *Southcote's* case heretofore, I was not so discerning as my brother *Powys* tells us he was, to disallow that case at first, and came not to be of this opinion, till I had well considered and digested that matter. Though I must confess reason is strong against the case to charge a man for doing such a friendly act for his friend, but so far is the law from being so unreasonable, that such a bailee is the least chargeable for neglect of any. For if he keeps the goods bailed to him, but as he keeps his own, though he keeps his own but negligently, yet he is not chargeable for them, for the keeping them as he keeps his own, is an argument of his honesty. *A fortiori* he shall not be charged, where they are stolen without any neglect in him.[1]

[1] *Accord*: Lord Mansfield, *Gibbon* v. *Paynton,* 4 Burrows, 2298 (1769), p. 2300; Sir William Jones, Bailments 46 and Chancellor Kent, 2 Comm. 563; but the tendency of later decisions is *contra, Rooth* v. *Wilson,* 1 B. & Ald. 59 (1817); *Doorman* v. *Jenkins,* 2 A. & E. 256 (1834); *The William,* 6 Ch. Rob. (Adm.) 316 (1806), per Lord Stowell; Story, J., *Tracy* v. *Wood,* 3 Mason, 135 (U. S., 1822).

In *Wallace* v. *Casey Co.,* 116 N. Y. Supp. 394 (App. Div., 1909) it was held that one granting to another a gratuitous benefit is not liable for injuries done to the recipient of his charity by the negligence of his servant assisting therein. The defendant had instructed its servants to give away its empty barrels to the poor of the neighborhood for their use as fuel. In throwing a barrel into the street, one of its servants carelessly threw it upon a small boy who had come with his older brother to the sidewalk in front of the factory to carry away the barrels for fuel.

The more recent cases dealing with the liability of charitable corporations show a tendency to hold that, while they are not liable to the beneficiaries of their charity for the negligence of those employed to administer it, *Powers* v. *Mass. Hospital,* 109 Fed. 294, 47 C. C. A. 122 (C. C. A., 1st Circ., 1901) and cases cited therein, they are liable to the same extent as any other employer of labor, to a servant employed by them, *Hewett* v. *Woman's Hospital,* 73 N. H. 556 (1906); *Bruce* v. *M. E. Church,* 147 Mich. 230 (1907); *contra,*

Agreeable to this is *Bracton, lib.* 3. *c.* 2. 99. *b. J. S. apud quem res deponitur, re obligatur, et de ea re, quam accepit, restituenda tenetur, et etiam ad id, si quid in re deposita dolo commiserit; culpae autem nomine non tenetur, scilicet desidiae vel negligentiae, quia qui negligenti amico rem custodiendam tradit, sibi ipsi et propriae fatuitati hoc debet imputare.* As suppose the bailee is an idle, careless, drunken fellow, and comes home drunk, and leaves all his doors open, and by reason thereof the goods happen to be stolen with his own; yet he shall not be charged, because it is the bailor's own folly to trust such an idle fellow.[2] So that this sort of bailee is the least responsible for neglects, and under the least obligation of any one, being bound to no other care of the bailed goods, than he takes of his own. This *Bracton* I have cited is, I confess, an old author, but in this his doctrine is agreeable to reason, and to what the law is in other countries. The civil law is so, as you have it in *Justinian's Inst. lib.* 3. *tit.* 15. There the law goes farther, for there it is said, *Ex eo solo tenetur, si quid dolo commiserit: culpae autem nomine, id est, desidae ac negligentiae, non tenetur. Itaque securus est qui parum diligenter custoditam rem surto amiserit, quia qui negligenti amico rem custodiendam tradit non ei, sed suae facilitati id imputare debet.* So that a bailee is not chargeable without an apparent gross neglect. And if there is such a gross neglect, it is looked upon as an evidence of fraud. Nay, suppose the bailee undertakes safely and securely to keep the goods, in express words, yet even that won't charge him with all sorts of neglects. For if such a promise were put into writing, it would not charge so far, even then. *Hob.* 34. a covenant, that the covenantee shall have, occupy and enjoy certain lands, does not bind against the acts of wrong doers. 3 *Cro.* 214. *acc.* 2 *Cro.* 425. *acc.* upon a promise for quiet enjoyment. And if a promise will not charge a man against wrong doers, when put in writing, it is hard it should do it more so, when spoken. *Doct. & Stud.* 130. is in point, that though a bailee do promise to re-deliver goods safely, yet if he have nothing for the keeping of them, he will not be answerable for the acts of a wrong doer. So that there is neither sufficient reason nor authority to support the opinion in *Southcote's* case; if the bailee be guilty of gross negligence, he will be chargeable, but not for any ordinary neglect. As to the second sort of bailment, *viz. commodatum* or lending *gratis,* the borrower is bound to the strictest care and diligence, to keep the goods, so as to restore them back again to the lender, because the bailee has a benefit by the ues of them, so as if the bailee be guilty of the least neglect, he will be answerable; as if a man should lend another a horse, to go Westward, or for a month; if the bailee go Northward, or keep the horse above a

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Whittaker v. *St. Lukes Hospital,* 117 S. W. 1189 (Mo. Ct. of App. Mo., 1909); or to a stranger who is injured by a servant employed upon a charitable errand, *Kellogg* v. *Church Charity Foundation,* 128 N. Y. App. Div. 214 (1908).

[2] This, it would seem, is only so if the bailor is aware of the bailee's character or negligently oblivious of it. See Beven on Negligence, 3rd Ed., vol. II, p. 744.

month; if any accident happen to the horse in the Northern journey, or after the expiration of the month, the bailee will be chargeable; because he has made use of the horse contrary to the trust he was lent to him under, and it may be if the horse had been used no otherwise than he was lent, that accident would not have befallen him. This is mentioned in *Bracton ubi supra:* his words are, *Is autem cui res aliqua utenda datur, re obligatur, quae commodata est, sed magna differentia est inter mutuum et commodatum; quia is qui rem mutuam accepit ad ipsam restituendam tenetur, vel ejus pretium, si forte incendio, ruina, naufragio, aut latronum vel hostium incursu, consumta fuerit, vel deperdita, subtracta vel ablata. Et qui rem utendam accepit, non sufficit ad rei custodiam, quod talem diligeetiam adhibeat, qualem suis rebus propriis adhibere solet, si alius eam diligentius potuit custodire; ad vim autem majorem, vel casus fortuitos non tenetur quis, nisi culpa sua interveneriit. Ut si rem sibi commodatam domi, secum detulerit cum peregre profectus suerit, et illam incursu hostium vel praedonum, vel naufragio amiserit non est dubiumquin ad rei resiitutionem teneatur.* I cite this author, though I confess he is an old one, because his opinion is reasonable, and very much to my present purpose, and there is no authority in the law to the contrary. But if the bailee put this horse in his stable, and he were stolen from thence, the bailee shall not be answerable for him. But if he or his servant leave the house or stable doors open, and the thieves take the opportunity of that, and steal the horse, he will be chargeable; because the neglect gave the thieves the occasion to steal the horse. *Bracton* says, the bailee must use the utmost care, but yet he shall not be chargeable, where there is such a force as he cannot resist.

As to the third sort of bailment, *scilicet locatio* or lending for hire, in this case the bailee is also bound to take the utmost care and to return the goods, when the time of the hiring is expired. And here again I must recur to my old author *fol. 62. b. Qui pro usu vestimentorum auri vel argenti, vel alterius ornamenti, vel jumenti, mercedem dederit vel promiserit, talis ab eo desideratur custodia; qualem deligentissimus paterfamilias suis rebus adhibet, quam si praestiterit, et rem aliquo casu amiserit, ad rem restituendam non tenebitur. Nec sufficit aliquem talem diligentiam adhibere, qualem suis rebus propriis adhiberet, nisi talem adhibuerit, de qua superius dictum est.* From whence it appears, that if goods are let out for a reward, the hirer is bound to the utmost diligence, such as the most diligent father of a family uses; and if he uses that, he shall be discharged. But every man, how diligent soever he be, being liable to the accident of robbers, though a diligent man is not so liable as a careless man, the bailee shall not be answerable in this case, if the goods are stolen.

As to the fourth sort of bailment, *viz. vadium* or a pawn, in this I shall consider two things; first, what property the pawnee has in the pawn or pledge, and secondly for what neglects he shall make satisfaction. As to the first, he has a special property, for the pawn is a securing to the pawnee, that he shall be repaid his debt, and to compel the pawner to pay him. But if the pawn be such as it will be the worse for using, the pawnee cannot use

it, as cloaths, *&c.* but if it be such, as will be never the worse, as if jewels for the purpose were pawn'd to a lady, she might use them. But then she must do it at her peril, for whereas, if she keeps them lock'd up in her cabinet, if her cabinet should be broke open, and the jewels taken from thence, she would be excused; if she wears them abroad, and is there robb'd of them, she will be answerable. And the reason is, because the pawn is in the nature of a deposit, and as such is not liable to be used. And to this effect is *Ow.* 123. But if the pawn be of such a nature, as the pawnee is at any charge about the thing pawn'd, to maintain it, as a horse, cow, *&c.* then the pawnee may use the horse in a reasonable manner, or milk the cow, *&c.* in recompense for the meat. As to the second point *Bracton* 99. *b.* gives you the answer. ***Creditor, qui pignus accepit, re obligatur, et ad illam restituendam tenetur; et cum hujesmodi res in pignus data sit utriusque gratia, scilicet debitoris, quo magis ei pecunia crederetur, et creditoris quo magis ei in tuto sit creditum, sufficit ad ejus rei custodiam diligentiam exactam adhibere, quam si praestiterit, et rem casu amiserit, securus esse possit, nec impedietur creditum petere.*** In effect, if a creditor takes a pawn, he is bound to restore it upon the payment of the debt; but yet it is sufficient, if the pawnee use true diligence, and he will be indemnified in so doing, and notwithstanding the loss, yet he shall resort to the pawnor for his debt. Agreeable to this is 29 *Ass.* 28. and *Southcote's* case is. But indeed the reason given in *Southcote's* case is, because the pawnee has a special property in the pawn. But that is not the reason of the case; and there is another reason given for it in the book of *Assize,* which is indeed the true reason of all these cases, that the law requires nothing extraordinary of the pawnee, but only that he shall use an ordinary care for restoring the goods. But indeed if the money for which the goods were pawn'd, be tender'd to the pawnee before they are lost, then the pawnee shall be answerable for them; because the pawnee, by detaining them after the tender of the money, is a wrong doer, and it is a wrongful detainer of the goods, and the special property of the pawnee is determined. And a man that keeps goods by wrong, must be answerable for them at all events, for the detaining of them by him, is the reason of the loss. Upon the same difference as the law is in relation to pawns, it will be found to stand in relation to goods found.

As to the fifth sort of bailment, *viz.* a delivery to carry or otherwise manage, for a reward to be paid to the bailee, those cases are of two sorts; either a delivery to one that exercises a publick employment, or a delivery to a private person. First if it be to a person of the first sort, and he is to have a reward, he is bound to answer for the goods at all events. And this is the case of the common carrier, common hoyman, master of a ship, *&c.* which case of a master of a ship was first adjudged 26 *Car.* 2. in the case of *Mors* v. *Slew. Raym.* 220. 1 *Vent.* 190. 238. The law charges this person thus intrusted to carry goods, against all events but acts of God, and of the enemies of the king. For though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is a politick establish-

ment, contrived by the policy of the law, for the safety of all persons, the necessity of whose affairs oblige them to trust these sorts of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, *&c.* and yet doing it in such a clandestine manner, as would not be possible to be discovered. And this is the reason the law is founded upon in that point. The second sort are bailies, factors and such like. And though a bailie is to have a reward for his management, yet he is only to do the best he can. And if he be robb'd, *&c.* it is a good account. And the reason of his being a servant is not the thing; for he is at a distance from his master, and acts at discretion, receiving rents and selling corn, *&c.* And yet if he receives his master's money, and keeps it lock'd up with a reasonable care, he shall not be answerable for it, though it be stolen. But yet this servant is not a domestick servant, nor under his master's immediate care. But the true reason of the case is, it would be unreasonable to charge him with a trust, farther than the nature of the thing puts it in his power to perform it. But it is allowed in the other cases, by reason of the necessity of the thing. The same law of a factor.

As to the sixth sort of bailment, it is to be taken, that the bailee is to have no reward for his pains, but yet that by his ill management the goods are spoiled. Secondly, it is to be understood, that there was a neglect in the management. But thirdly, if it had appeared that the mischief happened by any person that met the cart in the way, the bailee had not been chargeable. As if a drunken man had come by in the streets, and had pierced the cask of brandy; in this case the defendant had not been answerable for it, because he was to have nothing for his pains. Then the bailee having undertaken to manage the goods, and having managed them ill, and so by his neglect a damage has happened to the bailor, which is the case in question, what will you call this? In *Bracton lib.* 3. 100. it is called *mandatum.* It is an obligation, which arises *exmandato.* It is what we call in *English* an acting by commission. And if a man acts by commission for another *gratis,* and in the executing his commission behaves himself negligently, he is answerable. *Vinnius* in his commentaries upon *Justinian, lib.* 3. *tit.* 27. 684. defines *mandatum* to be *contractus quo aliquid gratuto gerendum committitur et accipitur.* This undertaking obliges the undertaker to a diligent management. *Bracton ubi supra* says, *contrahitur etiam obligatio non solum scripto et verbis, sed et consensu, sicut in contractibus bonae fidei; ut in emptionibus, venditionibus, locationibus, conductionibus, societatibus, et mandatis.* I don't find this word in any other author of our law, besides in this place in *Bracton,* which is a full authority, if it be not thought too old. But it is supported by good reason and authority.

The reasons are, first, because in the case, a neglect is a deceit to the bailor. For when he intrusts the bailee upon his undertaking to be careful, he has put a fraud upon the plaintiff by being negligent, his pretence of care being the persuasion that induced the plaintiff to trust him. And a breach of a trust undertaken volun-

tarily will be a good ground for an action, 1 *Roll. Abr.* 10. 2 *Hen.* 7. 11. a strong case to this matter. There the case was an action against a man, who had undertaken to keep an hundred sheep, for letting them be drown'd by his default. And there the reason of the judgment is given, because when the party has taken upon him to keep the sheep, and after suffers them to perish in his default; in as much as he has taken and executed his bargain, and has them in his custody, if after he does not look to them, an action lies. For here is his own act, *viz,* his agreement and promise, and that after broke of his side, that shall give a sufficient cause of action.

But secondly it is objected, that there is no consideration to ground this promise upon, and therefore the undertaking is but *nudum pactum.* But to this I answer, that the owner's trusting him with the goods is a sufficient consideration to oblige him to a careful management. Indeed if the agreement had been executory, to carry these brandies from the one place to the other such a day, the defendant had not been bound to carry them. But this is a different case, for *assumpsit* does not only signify a future agreement, but in such a case as this, it signifies an actual entry upon the thing, and taking the trust upon himself. And if a man will do that, and miscarries in the performance of his trust, an action will lie against him for that, though no body could have compelled him to do the thing. The 19 *Hen.* 6. 49. and the other cases cited by my brothers, shew that this is the difference. But in the 11 *Hen.* 4. 33. this difference is clearly put, and this is the only case concerning this matter, which has not been cited by my brothers. There the action was brought against a carpenter, for that he had undertaken to build the plaintiff a house within such a time, and had not done it, and it was adjudged the action would not lie. But there the question was put to the court, what if he had built the house unskilfully, and it is agreed in that case an action would have lain. There has been a question made, if I deliver goods to *A.* and in consideration thereof he promise to re-deliver them, if an action will lie for not re-delivering them; and in *Yelv.* 4. judgment was given that the action would lie. But that judgment was afterwards revers'd, and according to that reversal, there was judgment afterwards entered for the defendant in the like case. *Yelv.* 128. But those cases were grumbled at, and the reversal of that judgment in *Yelv.* 4. was said by the judges to be a bad resolution, and the contrary to that reversal was afterwards most solemnly adjudged in 2 *Cro.* 667. *Tr.* 21 *Jac.* 1. in the king's bench, and that judgment affirmed upon a writ of error. And yet there is no benefit to the defendant, nor no consideration in that case, but the having the money in his possession, and being trusted with it, and yet that was held to be a good consideration. And so a bare being trusted with another man's goods, must be taken to be a sufficient consideration, if the bailee once enter upon the trust, and take the goods into his possession. The declaration in the case of *Mors* v. *Slew* was drawn by the greatest drawer in *England* in that time, and in that declaration, as it was always in all such cases, it was thought most prudent to put in, that a reward was to be paid for the carriage. And so it has been usual to put it in the writ, where the suit is by original.

I have said thus much in this case, because it is of great consequence, that the law should be settled in this point, but I don't know whether I may have settled it, or may not rather have unsettled it. But however that happen, I have stirred these points, which wiser heads in time may settle. And judgment was given for the plaintiff.[8]

(a) Torts and Contracts.

20 HEN. VI, 34, PL. 4 (1441).

A Bill of Deceit sued against Joh. Doig(son) in the King's Bench. And he counted how he bargained with the said Jo. such a day and year to buy of him so much land for one hundred pounds to him paid. Of which land he had enfeoffed the said plaintiff within fourteen days after the year; the said J, enfeoffed one A, of the same land, and so deceived him. And the defendant demurred upon this bill in judgment, to the effect that by the matter shown the plaintiff should have a writ of covenant, and not this action. And now in the Exchequer Chamber, *Ascough,* If a carpenter take upon himself to make me a house, and he does not do this, I shall not have a writ of trespass, but only action of covenant, if I have a specialty,[1] but if he makes the house badly, now I shall have an action of Trespass upon the Case: for by this malfeasance is the cause of my action;[2] so in our case, if the defendant had retained the land in his hand without making a feoffment, then the plaintiff shall have merely a writ of covenant, and I think it is all one case when the defendant makes a feoffment to a stranger, and when he retains the land in his hand, wherefore this action does not lie.

PASTON, J. Although a man can have a writ of covenant, still that does not prove that he shall not have a writ of deceit: for it may be that all the covenants are kept, and still it is deceit. As suppose that a carpenter take upon himself to make me a house of such a length, and such a breadth, and such a heighth, which he frames, but he makes a mistake in joining, which is out of all the covenants; now action of covenant fails me, because he has kept all the cov-

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[8] For the English Law of Bailments at the present time, see Beven on Negligence, 3rd Ed., vol. II, 729 *et seq.*

[1] *Accord*: Keilw. 50, p. 4, and see James Barr Ames' History of Assumpsit, 2 Harv. L. R., pp. 10-11.

[2] *Accord*: Y. B. 11 H. IV, 33 pl. 60 (1409); 3 H. VI, 36 pl. 33 (1424); 21 H. VII, Keilw. 77, p. 25 (1505). And so in *Elsee* v. *Gatward,* 5 T. R. 143 (1793), it was held that, while a count which alleged that a carpenter retained to make repairs had failed to do so was bad if no consideration was alleged, a count alleging that instead of using the old material as agreed he had used new and so had increased the expense was good. For other cases where one assuming to perform work for the plaintiff was liable in case, if he performed it badly to the plaintiff's hurt, see James Barr Ames History of Assumpsit, 2 Harv. L. R. 1, pp. 2 to 7, in which the whole subject is most ably discussed and to which the editor is indebted for the cases given in the text and notes. So an action of Trespass on the case lay against a ferryman overloading his barge, Y. B. 22 *Ass.* 94. p. 41 (1347), a barber infecting a customer by use of dirty razor, 14 H. VII, Rast. Ent., 2 b. 1 (1498).

enants, and still I shall have an action upon the Case for this which he has done badly: so here, although I can have a writ of covenant, still because he has disabled himself as above I shall have an action of Deceit. Wherefore. NEWTON, J. If I bail a certain sum of money to Paston to bail to Fortescue, if Paston does not bail this he is chargeable to me in action of Account, and also by action of debt, and it is at my pleasure which I shall choose, but when I have used one of the said actions, then the other is extinct: so in our case, although there are two actions, Covenant and Deceit, still the party can hold to Deceit if he will.[8] Wherefore, etc.

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19 HEN. VI, 49 PL. 5 (1440).

Writ of trespass was brought upon the case against one R. Marshall [probably error in the text for "a farrier"], because the defendant took upon himself at London to cure his horse of a certain disease, and that he there "negligently and carelessly gave him medicine so that the horse, etc. *Portington,* To this we say that at Oxford in the County of Oxford, we undertook to cure the horse of such an infirmity as you speak (of), which we did satisfactorily, without this that we undertook to cure your horse at London, Ready. *Markham.* That is no plea, for I alleged by my writ that that by his negligence he has killed my horse, then that is the effect (gist) of my injury, and of my action, which it is necessary for him to traverse, and not the undertaking, wherefore, etc., As in case a carpenter takes upon himself to make a house for me well and satisfactorily, which he never does; in that case I shall have no action against him, which proves that this misfeasance is the cause of the action, which, to my mind, ought to be traversed.

NEWTON, J. It seems that the plea is good, for it may be that he undertook to cure your horse at Oxford, as is said, which he has done, and that afterwards at London your horse has had the infirmity again, and that he *de son bon gré* (of his good grace) gave the medicines, and afterwards your horse died: now for that which he did *de son bon gré* (of his good grace) you shall have no action, therefore in our case there is no need to traverse that, no more than in this case—my horse is sick, and I go to a farrier, to have his advice, and he says that one of his own horses had such a malady and that he gave a certain medicine to his horse, and so he will (do the same for mine), which he does, and afterwards the horse dies; should the plaintiff now have an action? I say no;[1] then upon that it follows that he shall not have an action in our case, unless he took

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[8] See *Acker, etc., Co.* v. *McGaw,* 106 Md. 536 (1907), action on the case by a principal against an agent who in violation of his obligations as such, had secretly acted antagonistically to the principal's interests in a real estate transaction.

[1] See for case upon very similar facts, *Ray* v. *Burbank & Jones,* 61 Ga. 505 (1878), apothecary asked by a customer for liniment for his horse, recommends and puts up one which he has put up for another customer on the latter's prescription and which has been reported to have had good effect.

upon himself, etc., which should be traversed—whether he had done well.

PASTON, J. to *Markham,* You have not shown that he is a common farrier to cure such horses, in which case, although he killed your horse by his medicines, still you shall have no action against him without an undertaking; which proves well that the "without this" [*sans ceo*] shall be taken upon the undertaking. *Fortescue,* Where *Markham* has said that if a carpenter undertakes to make me a house, which he does not do, that I shall have no action, which proves that the undertaking is not the cause of the action to his mind, and so the traverse shall not be taken upon that; I say that in any case where he undertakes to make a thing and does not do it, that for this nonfeasance I shall have a good action, and the traverse shall come upon the undertaking, which proves that the undertaking is the cause of the action, upon which it follows that the "without this" shall be taken upon the assumption. As suppose that I have a ruinous house and a carpenter takes upon himself to repair the said house before a certain day well and satisfactorily, which he does not do, wherefore my house all falls down; now I shall have an action against him, and the traverse can well be upon the undertaking: so here, although the horse dies by his negligence, still when he undertook to cure the said horse, which he has not done, for that the action shall as well be taken as it shall be where the house falls by his negligence, wherefore it seems that the plea is good enough. *Ascough,* It seems that the undertaking is the gist (force) which gives the action as well as shall by his warranty in this case.—Suppose I sell to you one hundred (garments of wool with warranty that they are good and saleable and then you find the) garments full of moths, now this warranty is as well the cause of an action as the spoiling of the wool, and upon this warranty the "without this" can be well taken. So in this case the undertaking is the cause of the action, wherefore the issue can be well taken upon it. As in action upon the Statute of labourers the retaining can as well be traversed as the departure. *Markham,* The writ is "that he negligently and carelessly gave him medicine", so it seems that he by these wrong medicines killed him, and so the dying of the horse is the reason of his action, which should be traversed to my mind. *Newton, J.,* "Negligently gave" is void. If I have a disease in my hand, and he give medicine to my heel, by which negligence my hand is lost, still I shall not have an action unless he undertook to cure me. *Markham,* Then we will imparl, with your leave.[2]

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[2] The *"super se assumpsit"*, the undertaking to perform was necessary in every case even of misperformance save when the defendant was carrying on some business as Common Carrier, Innkeeper, or Common Farrier, in the course of which he must serve all who offer and was entitled to a reasonable compensation. *Powtuary* v. *Walton,* 1 Roll. Ab. 10, p. 5 (1598), and 2 Harv. L. R., pp. 3 to 7. It is entirely immaterial by whom the defendant is paid, see *Pippin* v. *Shepperd,* 11 Price, 400 (1822), and note 1 to *Marshall* v. *Ry.,* post. p. 148. The tendency of modern cases is to hold that if the defendant is not merely giving friendly advice but assumes charge of the plaintiff, or, presumably, his live stock, as a physician or surgeon, he is bound to exercise reasonable skill as such whether he is paid for his serv-

LOADER *v.* LONDON AND INDIA DOCKS JOINT COMMITTEE.

Court of Appeal, 1891. 8 *Times Law Reports,* 5.

This was an action for damages for personal injuries. The plaintiff was a stevedore employed by a master stevedore in loading a ship in the defendants' docks, the master stevedore being employed by the shipowner. Some days prior to the accident the ship was moored by the defendants to the quay in their docks for the purpose of being loaded. The defendants provided a wooden platform, called a "table top," between the ship and the quay, which was fastened at one end to the ship's gunwale by ropes, the other end resting unfixed upon the quay. In the course of their duty the stevedores would have to go upon this "table top." The gunwale of the ship when unloaded stood high above the level of the quay. As the ship was loaded she gradually sank deeper in the water, and in consequence the ropes holding her to the quay slackened and the ship drifted away from the quay, and while the plaintiff was upon the "table top" the end of the table top slipped off the quay, and the plaintiff fell into the dock and was injured. The action was tried in the City of London Court, when evidence was given that the defendants kept a gang of men called a transporting gang, and that it was a regular thing for this gang to alter the moorings as the ships sank. There is a rule made by the defendants under their Act of Parliament that the masters of vessels and others are cautioned to have their mooring ropes attended to, and that the company will not be responsible for the consequences of any alteration, or neglect of alteration, of the moorings. The ship in question was left in charge of the mate. The jury found that it was the custom of the defendants to alter the moorings as the ship sinks on being loaded, and found for the plaintiff, assessing the damages at £50. The Divisional Court (Mr. Justice A. L. Smith and Mr. Justice Grantham) held that there was no duty on the part of the defendants to the plaintiff, and entered judgment for the defendants (see 7 *The Times* Law Reports, 546). The plaintiff appealed.

Mr. Ruegg appeared for the plaintiff; Mr. George Wallace appeared for the defendants.

The COURT dismissed the appeal.

The MASTER of the ROLLS said that the defendants owed no duty to the plaintiff either by statute or by contract. Was there, then, any relation established between the plaintiff and the defendants such as would render the defendants liable to the plaintiff? Even supposing that the defendants had habitually altered the mooring ropes of the vessels in dock, the highest it could be placed was that defendants took upon themselves to do something which they were not bound to do. At most, the defendants omitted to do some-

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ices or not. *McCandless* v. *McWha,* 22 Pa. 261 (1853), 269; *McNevins* v. *Lowe,* 40 Ill. 209 (1866); *Du Bois* v. *Decker,* 130 N. Y. 325 (1891), p. 332 (*semble*); *Hailes* v. *Raines,* 146 Mo. App. 232 (1910); but see *Duncan* v. *St. Luke's Hospital,* 98 N. Y. S. 867 (1906).

thing which they were not bound to do.[1] The plaintiff would have to prove that he had been induced by the defendants to believe that they were going to do it again (though he doubted whether even that would render them liable). The plaintiff, therefore, had to prove that he thought the defendants were going to alter the moorings before he went upon the table top. The plaintiff gave no evidence of that, and therefore there was no possible evidence of liability in the defendants.

LORD JUSTICE FRY said that it seemed to him that there was some evidence of a course of conduct on the part of the defendants to alter the moorings of vessels in dock. There was no obligation to continue this course of conduct. If this course of conduct had raised an expectation in the mind of the plaintiff that it would be continued, and if on the faith of that expectation he went upon this table top and the accident happened, he (the Lord Justice) declined to say that an action would not lie.[2] But here the plaintiff had no such expectation. The plaintiff knew that the defendants had not altered the moorings, and yet he went upon the table top. The action, therefore, would not lie.

LORD JUSTICE LOPES said that there was no duty towards the plaintiff on the part of the defendants. The defendants, in his opinion, never undertook to watch the moorings of the vessels. Considering the number of vessels in dock it would be unreasonable to expect them to do so. Moreover, the defendants' printed rule was strong evidence to show that they never undertook this obligation. He (the Lord Justice) expressed no opinion as to what would be the case if the plaintiff had been misled; but in this case there was no evidence that he had been misled.

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[1] "If a person undertakes to perform a voluntary act, he is liable if he performs it improperly, but not if he neglects to perform it." Willes, J., *Skelton* v. *L. & N. Ry.*, L. R. 2 C. P. 631 (1867), p. 636. But see *Texas Midland Ry. Co.* v. *Geraldon*, 117 S. W. 1004 (Tex. Ct. of Civil App., 1909), where it is held that a railway company was liable for the act of its station agent in turning the plaintiff, at best a bare licensee out of its station in order to close it for the night, the plaintiff being a woman in delicate health and the night rainy. See also *Weymire* v. *Wolfe*, 52 Iowa, 533 (1879), saloon keeper held liable for turning a patron helplessly drunk, out of his saloon on a bitterly cold night; and *Depue* v. *Flatau*, 100 Minn. 299 (1907), and *Trout* v. *Watkins Livery & Undertaking Co.*, 148 Mo. App. 621 (1910), where a livery stable keeper was held liable in tort for neglect or refusal to carry a palpably ill passenger to his destinations, as agreed by contract.

[2] Where a railroad, though not required to station a flagman or maintain a safety gate at a level crossing, has to the knowledge of the travelling public habitually done so, it is generally held that, until knowledge of their intention to abandon such practice has been brought home to travellers, the latter are entitled to regard the lack of warning from such flagman, or the fact that such gates are open, as an assurance that the track is clear. *Kissenger* v. *R. R.*, 56 N. Y. 538 (1874); *State* v. *B. & M. R. R.*, 80 Me. 430 (1888); *Richmond* v. *R. R.*, 87 Mich. 374 (1891); *Burns* v. *North Chicago Mill Co.*, 65 Wis. 312 (1886); *Dundon* v. *R. R.*, 67 Conn. 266 (1896); but see *Skelton* v. *Ry.*, *supra*, n. 1. And so in *Stapley* v. *Ry.*, L. R. 1 Ex. 21 (1865), foot passenger, crossing line by carriage way, seeing the gates required by statute for the protection of carriage traffic being up, might assume that it was safe to cross; but *cf. R. R.* v. *Eininger*, 114 Ill. 79 (1885).

HAYN, ROMAN & CO. *v.* CULLIFORD.

In the Court of Appeal, 1879. L. R. 4 C. P. D. 182.

BRAMWELL, L.J. This case comes before us in a very unsatisfactory way so far as relates to one of the questions principally argued before us. We are not told how the goods came to be shipped, and are left to guess with whom the plaintiffs made their contract of carriage.[1] We are, however, satisfied that the plaintiffs are entitled to recover. The case is in a dilemma. Either there was a contract between the plaintiffs and the defendants, or there was not. If there was a contract between them. it is the one contained in or evidenced by the bill of lading. Now, it is clear that if that is the contract, the defendants are liable on the ordinary contract of a carrier unless (and there is not) there is some clause in the contract to relieve them; whether the words in other respects would extend to this case we need not say, as there is one respect in which they do not; they extend to the acts of captain, officers, and crew; they do not extend to the acts of the defendants and their other agents and servants, therefore not to the acts and defaults of the stevedore.[2] But it is by these acts and defaults that the goods were damaged. If then there is a contract between the plaintiffs and defendants, the defendants are liable. So also if there is not. For if so, the case is this: The goods were lawfully with the defendants' license in their ship, and they tortiously so dealt with them that the goods were injured. It was found, as a fact, that the loading of the oxide was negligent. It was therefore wrongful, not as a breach of contract, but as a wrongful act in itself. If the defendants had done what was done wilfully, that is to say intentionally, that it would injure the plaintiffs' goods, it is clear they would be liable. But what difference does it make, that they did it ignorantly? It may be asked where is the duty of care? I answer that duty that exists in all men not to injure the property of others. This is not a mere nonfeasance which is complained of, it is a misfeasance; an act and wrongful. Suppose A. lets B. a horse, B., with C.'s license, puts up at C.'s stables for reward to C. from B., C. turns into the stables loose a vicious horse, known to be so, not to injure A.'s horse, but not thinking of the matter; there cannot be a doubt that C. would be liable to A. if the horse was in-

[1] The bill of lading was signed by Pott & Korner, agents, who had chartered the defendants' ship, which, when it arrived at Hamburg, they put up as a general ship; and the plaintiff shipped by it 280 bags of sugar, which were spoiled, owing to certain casks of oxide of zinc being stowed on top of them.

In the court below Denman, J., had held that the bill of lading was in fact signed by Pott & Korner as the defendants' agents and with their authority.

[2] The stevedore was employed by the defendants' agent at Hamburg at the expense of the ship, and it is the duty of the ship and not the charterer to see to the stowage of cargo. Alston v. Herring, 11 Exch. 822, (1856.)

jured. So if he gave the horse bad oats which injured the horse he would be liable, though he would not be to A. if he omitted to feed him; so here justice is done, though indirectly. It is certain that if the charterers sued on the charter in respect of the complaint in this action there would be no defence, and it is certain that they ought to sue if necessary for the benefit of the plaintiffs. The judgment must therefore be affirmed.

Judgment affirmed.[8]

MARSHALL *v.* YORK, NEWCASTLE, AND BERWICK RAILWAY COMPANY.

Court of Common Pleas, 1851. 11 *Common Bench,* 655.

This was an action upon the case brought by the plaintiff to recover from the defendants, the York, Newcastle, and Berwick Railway Company, damages for the loss of a portmanteau containing articles of wearing apparel.

The cause was tried before JERVIS, C. J., at the sittings at Westminster after the last term. It appeared that the plaintiff was valet to Lord Adolphus Vane, that, in the month of September, 1850, he was travelling to London with his master, that the portmanteau in question was placed in the railway train at Darlington, and lost on the road. It appearing, however, upon the evidence of Lord Adolphus Vane, that his lordship had himself taken and paid for the tickets for himself and his servant, it was submitted, on the part of the defendants, that, the action being founded upon contract, and the contract having been made with the master, the master and not the servant should have sued.

The lord chief justice nonsuited the plaintiff, reserving to him leave to move to enter a verdict for 30*l.*,—the agreed value of the portmanteau and its contents,—if the court should be of opinion that the action was well brought.

Knowles and *Hugh Hill* now showed cause.—This is an action founded upon a contract: Newberry *v.* Colvin, 7 Bingh. 190. The declaration alleges that the defendants, in consideration of hire and reward to them (which must necessarily intend *to be paid by the plaintiff*), undertook safely and securely to carry the plaintiff and his luggage; and then alleges a breach of that contract. So much is this in the nature of an action of contract, that, according to Powell *v.* Layton, 2 N. R. 365,—overruling Govett *v.* Radnidge, 3 East, 62,—the non-joinder of the party as defendant would have been pleadable in abatement formerly. Sir JAMES MANSFIELD, in that case says: "The duty of a servant, or the duty of an officer, I understand; but the duty of a carrier I do not understand, otherwise than as that duty arises out of his contract." [WILLIAMS, J.—All the authorities are considered in Pozzi *v.* Shipton, 8 Ad. & E. 963.] Although, at first sight, that would seem to be an authority against the defendants, it will be found upon a closer inspection to have no

[8] *Accord: Dalyell* v. *Tyrer,* E. B. & E. 899 (1858); *Bickford* v. *Richards,* 154 Mass. 163 (1891); *Consolidated Gas Company* v. *Connor,* 114 Md. 140 (1911); *Dominion Gas Company* v. *Collins,* L. R. 1909 A. C. 640.

material bearing here. There was no allegation there, that the goods were delivered at the request of the defendants. The ground of the decision appears from the judgment delivered by PATTESON, J., who says: "The form of the declaration is in case, and differs from that used in Bretherton *v.* Wood, 3 B. & B. 54, in this, that it contains no positive averment that the defendants were carriers; whereas, in Bretherton *v.* Wood, there was an averment that the defendants were proprietors of a stage-coach for the carriage and conveyance of passengers for hire from Bury to Bolton. The present declaration states simply that the plaintiff delivered to the defendants, and the defendants received from the plaintiff, goods to be carried for hire from A. to B. It is therefore consistent with the defendants' being common carriers, or being hired on the particular occasion only." The declaration here is in the same form as in Bretherton *v.* Wood. In that case, the party bringing the action was the party with whom the contract was made, and by whom the goods were delivered to the carrier. Here, the plaintiff had nothing whatever to do with the contract with the company. [WILLIAMS, J.—It was an action upon the custom of the realm, for failure in performance of a public duty. The foundation of the action against a surgeon for negligence, is, not the contract or employment, but the breach of a public duty.] The subject is very much discussed in Ross *v.* Hill, 2 C. B. 877, where the judgment of TINDAL, C. J., shows that the degree of care is different in the case of a gratuitous bailee from that which is required from a bailee for reward. [WILLIAMS, J.—In Pippin *v.* Sheppard, 11 Price, 400, it was held not to be a ground of demurrer to a declaration in an action on the case by a man and his wife against a surgeon, for an injury to the wife by reason of the defendant's improper and unskilful treatment, that it is not stated,—in the averment that the defendant was retained and employed as surgeon for reward to be to him paid,—*by whom* he was so retained, or *by whom* he was to be paid: it is enough to aver that the defendant *was retained* as a surgeon, and *entered upon the cure*. Chief Baron RICHARDS there says: "I am really at a loss to know how any declaration should be framed in this case so as to be right, if this be wrong. The defendant, being a surgeon, undertakes to the public to cure wounds and other ailments of the human system, and professes himself ready to be employed by any one for that purpose. The declaration states that he was as a surgeon employed, for a reasonable reward, to attend and cure this patient, that he entered on the treatment, &c. It is, therefore, I think, sufficiently stated that the defendant undertook the cure. Then, negligence and improper treatment are charged, and the injurious effects of such misconduct are averred. The question then is, to whom was the injury done? If a stranger had sent the defendant as a surgeon to cure this woman, undertaking to pay him for his attendance, *he* would not be entitled to recover or sue for damage and injury done to her, in consequence of the surgeon's negligence and want of skill. From the necessity of the thing, the only person who can properly sustain an action for damages for an injury done to the person of the patient, is, the patient himself; for, damages could not be given on that account to any other person,

although the surgeon may have been retained and employed by him to undertake the cure. The party employing the surgeon can have nothing to do with this action."] No doubt, the servant might maintain an action against the company for a personal injury, such as, the breaking of a leg, or the like. But, here, the master, who may be said to have been intrusted with the portmanteau, and who made the contract, is the only proper person to sue for a breach of it. It may be said that this doctrine would impose undue hardship on the servant; but there are many difficulties arising from the relation of master and servant, for which the law affords no remedy: some of these are illustrated by the cases of Priestly *v.* Fowler, 3 M. & W. 1, and Hutchinson *v.* The York, Newcastle, and Berwick Railway Company, 5 Exch. 343. The allegation in the declaration clearly was not proved.

Humfrey and *Willes*, in support of the rule.—It is difficult to see how the declaration in this case could have been framed otherwise than it is. It is like that in Wyld *v.* Pickford, 8 M. & W. 443. The company undertook safely to carry the plaintiff's portmanteau, for reward,—no matter by whom to be paid; and, in the performance of that duty, they were guilty of negligence. That is exactly the case of Gladwell *v.* Steggall, 5 B. N. C. 733, 8 Scott, 60. There, a declaration in case against a surgeon for negligence alleged that *the plaintiff*, at the request of the defendant, *had employed the defendant* to bestow the care, &c., of him the defendant, in the profession and business of a surgeon and apothecary, &c., and the defendant then accepted and entered upon such employment as such surgeon; and then proceeded to allege the duty resulting from such retainer: and it was held, that it was immaterial *by whom* the defendant was retained, though a distinct issue was taken by the plea upon the retainer; and that, if the allegation of employment *by the plaintiff* was material, it was supported by proof that the plaintiff (a child about twelve years old) submitted to and received the defendant's attendance. And TINDAL, C. J., said: "The declaration is not framed as on a contract, but for breach of a duty resulting from an alleged employment of the defendant by the plaintiff. One observation that naturally suggests itself, is, that none but the present plaintiff could recover damages in respect of the personal suffering inflicted upon her through the defendant's negligence and want of skill. Another observation is, that the form in which the issue is taken does not at all vary the extent of the defendant's duty: he is bound to exercise the same degree of care and skill, by whomsoever he might be called in." [1] The real liability of the defendants

[1] In the same case, p. 737, Erskine, J., says: "The substance of the issue is that the defendant was employed *to cure* the plaintiff; not that he was employed *by* the plaintiff." *Accord*: *Pippin* v. *Shepperd*, 11 Price, 400 (1822), cited at length by Williams, J., *arguendo*, in the principal case; *Du Bois* v. *Decker*, 130 N. Y. 325 (1891), p. 332, inmate of almshouse treated by surgeon employed and paid by the public; and this is so though the physician is employed by another to give an opinion as to plaintiff's health, *Harriott* v. *Plimpton*, 166 Mass. 585 (1896), wrong diagnosis given by surgeon employed by plaintiff's prospective father-in-law to ascertain plaintiff's fitness for marriage, whereby his engagement was broken off; and see Erle, J., in *Dal-*

arises, no doubt, out of their being common carriers. The fallacy is in supposing that "for reward" necessarily means, for reward "to be paid *by the plaintiff*." And if it *were* necessary, a payment by the master, in pursuance of a stipulation tacitly entered into with the servant at the time of hiring, is a payment by the servant. If necessary, the words "for hire and reward" might have been omitted. The declaration alleges that the company received the portmanteau as common carriers; and they would not be the less liable for the negligent loss of it, because they carried it gratuitously. In the case of the surgeon, there would be nothing to prevent the parent from maintaining an action on the contract, and the child from having another action for the breach of duty. Suppose, here, the plaintiff, besides the loss of his portmanteau, had suffered amputation of a limb through the carelessness of the defendants,—by whom would the action for that have been brought? [JERVIS, C. J.—Mr. *Hill* admits that in that case the servant must have sued. *Hill.*—The master could of course maintain no action for the personal suffering of his servant.]

JERVIS, C. J.—I am of opinion that the rule must be made absolute to enter a verdict for the plaintiff for the damages agreed upon at the trial. Three points have been incidentally made in the course of the argument. In the first place, it is said, that, under the circumstances of this case, no action will lie by the plaintiff against these defendants, whatever the form of the declaration. But the admissions made in the course of the argument, and the authorities cited, place the defendants in a difficulty; for, it is conceded,—and indeed the concession could not have been avoided,—that if, under the same circumstances, the plaintiff had sustained the loss of a limb, or any other personal injury, he alone could have sued. It is said that that is because the master could not maintain an action in respect of the personal suffering of the servant, though he might in respect of the loss of service. But, upon what principle does the action lie at the suit of the servant for his personal suffering? Not by reason of any *contract* between him and the company, but by reason of a duty implied by law to carry him safely. If, under the circumstances of this case, the plaintiff could have recovered in respect of a personal injury sustained by him, there is no reason why he should not also recover in respect of the loss of his luggage. The breach of duty is the same in the one case as in the other. The action therefore will lie, if the cause of action be properly alleged in the declaration. But it has been contended, on the part of the defendants, that the form of the declaration in this case so ties up the plaintiff, and restricts the liability of the defendants, that this action cannot be maintained; because the declaration alleges that the defendants received the plaintiff and his luggage to be carried for reward to them in that behalf,—which means, according to the authorities, to be paid *by the plaintiff*. To that argument, there are two answers. In the first place, there is no denial on the record;

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yell v. *Tyrer*, E, B. & E. 899 (1858), p. 904, "If H. [a third party] pays the defendants for the use of their ship to carry the plaintiff, and they do so carry him, are they not retained for hire and reward, to carry the plaintiff?"

for, a traverse *modo et formâ* substantially denies merely the allegation traversed; and therefore the traverse of the receipt of the plaintiff and his luggage, to be carried for hire and reward, by the defendants, did not put in issue *by whom the reward* was to be paid. And, further, if that *were* put in issue, the words of the allegation must be construed with reference to the rest of the declaration. If payment *by the plaintiff* be necessary, the general allegation that the defendants undertook to carry the plaintiff and his luggage for hire and reward, will be understood to mean, to be paid by the plaintiff. But, if the liability of the defendants arises, not from the contract, but from a duty, it is perfectly unimportant by whom the reward is to be paid; for, the duty would equally arise, though the payment was by a stranger. I therefore think, that, upon the proper construction of the declaration, the objection does not arise. It becomes unnecessary to advert to the point suggested by Mr. *Willes,* that the payment by the master on the servant's behalf was a payment by the servant sufficient to sustain the averment, even construing it as it was contended on the part of the defendants it ought to be construed. The rule must be absolute.

WILLIAMS, J.—I am of the same opinion. The case was, I think, put upon the right footing by Mr. *Hill,* when he said that the question turned upon the inquiry whether it was necessary to show a contract between the plaintiff and the railway company. His proposition was, that this declaration could only be sustained by proof of a contract to carry the plantiff and his luggage for hire and reward *to be paid by the plaintiff,* and that the traverse of that part of the declaration involves a traverse of the payment *by the plaintiff.* I am of opinion that there is no foundation for that proposition. It seems to me that the whole current of authorities, beginning with Govett *v.* Radnidge and ending with Pozzi *v.* Shipton, establishes that an action of this sort is, in substance, not an action of *contract,* but an action of *tort* against the company, as carriers.[2] That being so, the question is whether it was necessary to allege any contract at all in the declaration. The earliest instance I find of an action of this sort, is in Fitzherbert's Natura Brevium, *Writ de Trespass sur le Case,*" where it is said (page 94 D.): "If a smith prick my horse with a nail, &c., I shall have my action upon the case against him, without any warranty by the smith to do it well; for, it is the duty of every artificer to exercise his art rightly and truly as he ought." There is no allusion there to any contract. That being so, it seems to me to follow that the allegation of a contract in a case of this kind is altogether unnecessary. Then, the traverse not in terms involving a denial that the payment of hire and reward was to be made by the plaintiff, does not involve a denial that the contract was with the plaintiff, unless that is material to the validity of the declara-

[2] In *Ansell* v. *Waterhouse,* 2 Chitty 1 (1817), it was held that an action for misfeasance by a carrier, in that a coach was negligently overturned, being for a tort, the defendant could not plead in abatement the non-joinder of a co-proprietor, Bayley, J., says, "Declarations against carriers in tort are as old as the law and continued till *Dale* v. *Hall* (1 Wils. 281, 1750), when the practice of declaring in assumpsit succeeded; but this practice does not supercede the old", p. 3.

tion. As, however, that allegation clearly was not material, the traverse *modo et formâ* did not make it necessary for the plaintiff to prove it. Even if the allegation in the declaration means only that the plaintiff and his luggage were to be carried for hire and reward to be paid by him, I am of opinion that the plaintiff was entitled to the verdict, because I think he proved the issue. I incline to think he proved it in the larger sense: the money having been paid on his behalf by Lord Adolphus Vane, his master, may fairly be said to have been paid *by the plaintiff*. But it is not necessary for the disposal of this case to decide that. If the payment *was* put in issue, all that the allegation means, is, that the reward was to be paid by some one: it was unnecessary to prove payment by the plaintiff himself. That is abundantly shown by the case of Pippin *v.* Sheppard, 11 Price, 400, to which I referred in the course of the argument, where the court got rid of the demurrer by holding it to be immaterial by whom the defendant was retained, or by whom he was to be paid for his attendance. Assuming the traverse here to involve a denial of the reward, the allegation was amply proved.

Rule absolute.[8]

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[8] So in *Austin* v. *Gt. Western Ry.*, L. R. 2 Q. B. 442 (1867), a child, carried free under the mistaken belief that it was under three years of age and so entitled under an Act of Parliament to free transportation with its mother, was held entitled to recover; and this, even had the mother intended to defraud the railway, *semble*—[as to the effect of fraud on part of plaintiff himself, see *Fitzmaurice* v. *R. R.*, 192 Mass. 159 (1906) and *St. Louis, etc., R. R. Co.* v. *Brantley*, 168 Ala. 579 (1910).]—*Acc.: Ball* v. *Mobile, etc., Co.*, 146 Ala. 309 (1905); *Littlejohn* v. *R. R.*, 148 Mass. 478 (1889), and *Southern Ry. Co.* v. *Lee*, 30 Ky. Law Rep. 1360 (1907).

So a mail agent or postal clerk carried under the railroad's contract with the Government is a passenger to whom the carrier owes the highest care to secure his safety, *Arrowsmith* v. *R. R.*, 57 Fed. 165 (1893); *Seybolt* v. *R. R.*, 95 N. Y. 562 (1884); and see Elliott on Railroads, 2nd Ed., §§ 1578-1578a. In Pennsylvania it is held that, under the terms of the Act of April 4, 1868 (repealed June 10, 1907, P. L. 523), which enacted that when "any person (except passengers) sustains injury * * * while employed * * * in or about any (railroad) train * * * his recovery shall be the same as though an employe of the road," a mail clerk was not a passenger, *Pa. R. R.* v. *Price* 96 Pa. 256 (1880). See, also, *Smallwood* v. *B. & O. R. R.*, 215 Pa. 540 (1906), and *Rowdin* v. *R. R.*, 208 Pa. 623 (1904). As to persons riding on free passes—see *Phila. & R. R. R.* v. *Derby*, 14 How. 468 (U. S., 1852), and Elliott on Railroads, § 1606.

In *Foulkes* v. *Met. Ry. Co.*, L. R. 5 C. P. D. 157 (1880), it was held that a railway allowing another railway company to use its tracks under a traffic arrangement was liable to a passenger of such other company injured because the platform of its station was in relation to the carriage of the other road unsuitable as a place to alight.

In *Alton* v. *Midland Ry.*, 19 C. B. N. S. 213 (1865), it was held that the plaintiffs, brewers, could not recover for the loss of services of a commercial traveller employed by them who was injured while travelling upon the defendant's line on a ticket purchased by himself; but see criticism of Lindley and Smith, LL. J., *Taylor* v. *Ry. Co.*, L. R. 1895, 1 Q. B. 134, and compare *Taylor* v. *Neri*, 1 Esp. 386 (1795); *acc., Fairmount, etc., Co.* v. *Stutler*, 54 Pa. 375 (1867), mother suing for loss of services of infant son [a husband's right to recover for loss of services of his wife, injured while a passenger, is, however, beyond question. See *Madara* v. *R. R.*, 192 Pa. 542 (1899); *Machen* v. *R. R.*, 13 Pa., S. C. 642 (1900)] *contra, Ames* v. *Union Ry. Co.*, 117 Mass. 541 (1875).

Even when the train on which the plaintiff rides is not being used for the carriage of passengers he is, if invited to ride thereon by an agent of

TURNER *v.* STALLIBRASS.

In the Queen's Bench Division, 1897. *L. R.* (1898), 1 *Q. B.* 56.

APPEAL from an order of a judge at chambers as aftermentioned.

The action was brought to recover damages in respect of injury to a horse belonging to the plaintiff. The statement of claim alleged that the plaintiff delivered to the defendants a horse, the property of the plaintiff, to be agisted, kept, and taken care of by the defendants in consideration of a payment of one shilling a day by the plaintiff to the defendants; and the defendants promised the plaintiff in consideration of the premises to safely keep, agist, and take care of the said horse; and that in breach of the said contract the defendants did not safely keep, agist, and take care of the said horse, but negligently erected in the field in which the said horse was turned out a low wire fence, and negligently permitted the grass to grow so as to hide the said wire fence, whereby the plaintiff's horse was injured. Alternatively, the statement of claim alleged that the defendants in breach of their contract negligently allowed the said horse to be kept and to remain in a field containing the said wire fence so concealed as aforesaid, whereby the plaintiff's horse was injured.

It appeared at the trial that the plaintiff had delivered the horse in question to the defendants for agistment, and that the horse had been placed in a field where there was a barbed wire fence concealed by long grass, through which injury had been occasioned to the horse. The learned judge left it to the jury to say whether it was negligent on the part of the defendants to put the horse in a field where there was such a fence as that in question. The jury found for the plaintiff for 30*l.* damages. The master held on taxation that the plaintiff was entitled to the costs of the action on the High Court scale; but on appeal the judge reversed his decision, holding that the action was one founded on contract within the meaning of s. 116 of the County Courts Act, 1888, and therefore the plaintiff was only entitled to costs on the county court scale.

A. L. SMITH, L. J. I am of opinion that this is an action founded on tort within the meaning of s. 116 of the County Courts Act, 1888.[1]

COLLINS L. J. I am of the same opinion. I think some confusion may possibly arise from the expression of the rule on this subject as being that the test is whether the plaintiff is obliged, in order to maintain his action, to rely on a contract. The relation of bailor and bailee must arise out of some agreement of the minds of

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the company empowered to give such an invitation, entitled to the exercise of ordinary care for his safety and to a full disclosure of all latent risks known to defendants, *Harris* v. *Perry & Co.*, L. R. 1903, 2 K. B. 219;—if, however, the agent has and is known to have no such authority the plaintiff accepting his invitation is a mere trespasser, *Purple* v. *R. R.*, 114 Fed. 123 (C. C. A. 8th Cir., 1902); *Lygo* v. *Newbold*, 9 Exch. 302 (1854).

[1] A portion of this opinion and a short opinion by Rigby, L. J., are omitted.

the parties to it; but that agreement of minds is not the contract contemplated by that mode of expressing the rule to which I refer. Such an agreement of minds is presupposed in the case of any relation which brings about the common law liability of a bailee to his bailor. Where such a relation is established, the result of the cases appears to be that, if the plaintiff can maintain his action by shewing the breach of a duty arising at common law out of that relation, he is not obliged to rely on a contract within the meaning of the rule; but, if his cause of action is that the defendant ought to have done something, or taken some precaution, which would not be embraced by the common law liability arising out of the relation of bailor and bailee, then he is obliged to rely on a contract within the meaning of the rule. A distinction has been drawn between acts of misfeasance and non-feasance which has given rise to some difficulty; but it seems to me that, whether the matter complained of is one of misfeasance or non-feasance, the question really is whether it is embraced within the ambit of the common law liability arising out of the relation between bailor and bailee. If it is, then the plaintiff is not driven to rely on a contract within the meaning of the rule on the subject of costs. But, if it is not, then the plaintiff must rely on a contract in order to shew a cause of action, and the action is therefore one founded on contract. In the present case it is quite clear that the duty upon a breach of which the action was founded was one which arose at common law simply out of the relation of bailor and bailee, and therefore the plaintiff was not driven to rely on the contract. I quite agree that this question does not depend on the form of the pleadings; but the case of *Corbett* v. *Packington* (1827) 6 B. & C. 268, which was decided at a time when it was essential that the pleader should accurately state the cause of action, illustrates what I have said with regard to the distinction between the liability arising at common law out of the relation of bailor and bailee, and any further liability arising on the terms of the contract of bailment. It was held in that case that a count alleging that the plantiff had delivered certain boars and pigs to the defendant to be taken care of for reward, and that the defendant had in consideration thereof agreed with the plaintiff to take care of them, and redeliver the same to the plaintiff on request, was a count in assumpsit, and could not therefore be joined with counts in case, because the alleged obligation to redeliver the pigs went beyond the common law duty of the defendant as bailee, and could only arise out of the contract.

Appeal allowed.[2]

[2] "Where it is only necessary to refer to the contract to establish the relationship between the parties, and the claim goes on to aver a breach of duty arising out of that relationship, the action is one of tort." Henn Collins, M. R., *Sachs* v. *Henderson*, L. R. 1902, 1 K. B. 612, p. 616; it is, perhaps, doubtful whether this principle was correctly applied to the facts of that case, it being held that an action against a vendor of a house for removing part of the fixtures therein before giving the vendee possession was, in substance, an action of tort. See Phillimore, J., in *Steljes* v. *Ingram*, 19 T. L. R. 534 (K. B., 1903), p. 536, where he held that an action against an architect for a failure to exercise due care and skill in supervising the erection of a building was founded on contract, and see *Rich* v. *R. R.*, 87 N. Y. 382 (1882), and *cf. Masters* v. *Stratton*, 7 Hill, 101 (N. Y., 1845); but see, as to liability in

(b) Voluntary Assumption of Risk.

Assumption of risk has, until recently, generally been treated as a matter of defence, displacing an existing *prima facie* liability, identical with contributory negligence or at most merely a species or variant thereof. The tendency of modern decision is, however, to recognize that the two are distinct and separate and that the plaintiff's knowledge of a danger which he deliberately chooses to encounter may avail the defendant in one of two distinct ways under different circumstances and conditions.

First.—Where the plaintiff without legal right in himself other than the defendant's consent chooses, with full knowledge of the conditions which he will encounter and the danger incident thereto, to go upon the defendant's premises, use his chattels or otherwise associate himself with him.

Second.—Where the plaintiff has a legal right, independent and irrespective of the defendant's consent, to go upon the premises, use the chattels or otherwise associate himself with the defendant.

In the first class of case, where the plaintiff, having no right to come on the defendant's premises, etc., the defendant, being under no duty to allow him to do so, may annex such conditions to his consent as he may please and is bound merely to make known the actual conditions under which such privilege is allowed, the plaintiff being then put to his choice to take it or leave it. The plaintiff's knowledge of the real condition of affairs or the fact that it is obvious to him if he use his senses, renders the giving of notice unnecessary and so, since no further duty is owed him by the defendant, relieves the latter of even *prima facie* liability.

In such case it is the fact that the plaintiff knows the true conditions and appreciates the danger incident thereto, that releases defendant from any duty toward him, it is immaterial how great or small the risk may be or how important or valuable to the plaintiff may be the object to be gained by encountering it.

In the second class of case, the defendant, having no right to exclude the plaintiff from his premises, etc., cannot dictate the terms on which he may come thereon and does not discharge his full duty by giving notice of the true conditions there existing. The mere fact that the plaintiff knows the danger which he must face in order to exercise his right does not relieve the defendant from liability. It is, however, important as bearing upon the amount of care which the plaintiff must use in the exercise of his right, which must of course be proportionate to the danger, or where the danger is so great that it would be reckless and unreasonable for a prudent man to insist, in the face of it, upon his extreme legal rights.

While such assumption of risk differs from contributory negligence, the

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tort of an agent or servant for breach of his duty to serve his principal or employer faithfully, loyally and exclusively, *The Acker, Merrall and Condit Co.* v. *McGaw,* 106 Md. 536 (1907), and note in 56 Am. L. Reg. 201 (Mar. 1908).

Whether an action by a shipper or passenger against his carrier is founded substantially in tort, or contract depends on the nature and cause of his injury. If the goods or passenger are injured or destroyed by the active negligence of the company, the action is one substantially of tort, *Taylor* v. *M. S. & L. Ry. Co.,* L. R. (1895), 1 Q. B. 134, per Lindley, L. J., p. 138—and probably, also, if they are injured by a failure to take reasonable precautions to secure their safe carriage, but not if the only default is a failure to deliver them at their destination—tho' it be alleged to be due to the carrier's negligent custody of them, *Fleming* v. *Manchester,* S. & L. Ry. Co., L. R. 4, Q. B. D. 81 (1878)—but see *Tattan* v. *Gt. Western Ry. Co.,* 2 E. & E. 844 (1860).

See as to whether a verdict against one of several persons, jointly carrying on the business of carriers, is good, *Govett* v. *Radnidge,* 3 East, 62 (1802); *Powell* v. *Layton,* 2 B. & P., N. S. 365 (1806), and *Pozzi* v. *Shipton,* 8 Ad. & E. 963 (1838); *Smith* v. *Seward,* 3 Pa. 342 (1846), per Gibson, C. J.

difference is one of degree[1] rather than of kind, and its legal effect is the same—it operates as a defense which, while admitting the defendant's duty and its breach, sets up the plaintiff contributory misconduct, for being deliberate it cannot properly be termed contributory negligence,[2] to relieve the defendant from an admitted *prima facie* liability.

So whenever the plaintiff has an independent right to come into contact with conditions under the control of the defendant, while he does not from his mere knowledge of their actual nature and the incidental danger take on himself the risk of injury, the defendant may always release himself from liability by showing that the risk was so great that to encounter it was to court almost certain harm and so, reckless, or that the plaintiff failed to take those precautions which the known danger demanded from a prudent man.

It is, however, only where the plaintiff is reduced to the alternative of running the risk of a known danger or of abandoning the exercise of a legal right, that his subjection of himself thereto is deemed involuntary. If his right may be exercised, though less conveniently, without risk; if, rather than put himself to a little trouble or endure mere inconvenience, he chooses to encounter a known danger, he will be taken to have voluntarily assumed the risk thereof.

It seems well, therefore, to divide the cases which deal with voluntary assumption of risk and, at this point, to treat of those which discuss the voluntary or involuntary nature of the association, whether it is one which the one associate is free to allow or refuse at his pleasure and which the other is or is not entitled of his right to enter into, and the effect thereof upon the duties of the parties to such association, leaving those cases which deal with knowledge of danger attendant upon the exercise of an independent legal right for later consideration, together with contributory negligence and other matters of defense and justification and excuse.

THOMAS *v.* QUARTERMAINE.

In the Queen's Bench Division, 1887. *L. R.* 18 *Q. B. D.* 685.

BOWEN, L. J.

Two alternative views have been submitted to us as to the effect of the Employers' Liability Act, 1880. Is the true conclusion that the Act has removed certain special obstacles to a workman's right to sue which would not have existed in the case of other persons, and which had been held previously to arise by implication out of the relation of master and servant; and that the Act has only placed an injured workman (as regards his remedies) in the same position (with specified exceptions) as he would have occupied if he had not been in the master's employ? Or has the Act gone further, and im-

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[1] See per Holmes, J., *Schlemmer* v. *B. R. & P. R. R.*, 205 U. S. 1 (1907), p. 12.

[2] *Indiana Oil Co.* v. *O'Brien*, 160 Ind. 266 (1902), p. 273, "Carelessness in regard to a matter is not the same as the exercise of deliberate choice in the matter." See also, *Gregory* v. *Elmira R. R. Co.*, 190 N. Y. 363 (1907) and *Cattano* v. *Metropolitan R. R. Co.*, 173 N. Y. 565 (1903), passenger on the running board of an open street car spoken of as assuming the risk of usual but not of exceptional dangers incident to their position, and see *Smith, J., dissenting* in *Thayne* v. *Traction Co.*, 8 Pa. S. C. 448 (1898). Often, while speaking of a deliberate choice to encounter a known danger as contributory negligence, it is evident that such act is regarded as a voluntary assumption of the risk incident thereto. So in *Musselman* v. *Hatfield*, 202 Pa. 489 (1902), the court, while it holds that it is contributory negligence to use a highway known to be defective, says, p. 491, that it is so "because the danger is obvious and the risk voluntarily and unnecessarily assumed." For a discussion of the differences between contributory negligence and voluntary assumption of risk, see 21 Harv. L. R., pp. 245-247 and 249, and Jaggard, J., *Rase* v. *Ry. Co.*, 120 N. W. 360 (Minn. 1909).

posed on masters new duties and liabilities towards their servants which the masters would not be under towards the general public or the servants of anybody else. This is the first question we have to solve.[1]

For his own personal negligence a master was always liable and still is liable at common law both to his own workmen and to the general public who come upon his premises at his invitation on business in which he is concerned. But in the case of injuries arising out of another servant's negligence, the workmen stood before recent legislation at a disadvantage as compared with the world outside. For damage done by the negligence of his servants acting within the scope of their employment, the master, on the principle of respondeat superior, was responsible to strangers. But a workman injured by the negligence of a fellow-workman had no such redress. By entering into a contract of service the common law inferred that he had taken on himself the ordinary risks incident to such business as was lawfully carried on upon his master's premises; and the much-canvassed case of *Priestley* v. *Fowler*, 3 M. & W. 1, and a series of decisions following in its train, had engrafted on this doctrine the grave corollary that the negligence of a fellow-servant in the common employ of the master was one of such ordinary risks. The corollary gave rise to much apparent hardship and to much debate. In the year 1880 the legislature passed the Employers' Liability Act, which we have to construe, and it is now necessary to decide to what extent legislation has altered as between master and servant the common law, as by virtue of the decisions of the Courts it stood prior to this date.

Sect. 1 of the statute provides that: "Where personal injury is caused to a workman by reason of any defect in the condition of the employer's works," and in four specified instances by reason of negligence of others in the employer's service, "the workman shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer nor engaged in his work." Does this language do more than remove such fetters on a workman's right to sue as had previously been held to arise out of the relation of master and workman? The express words of the section seem to permit of only one answer to this inquiry. An enactment which distinctly declares that the workman is to have the same rights as if he were not a workman, cannot, except by violent distention of its terms, be strained into an enactment that the workman is to have the same rights as if he were not a workman, and other rights in addition. It cannot in the case of a defect in the employer's works be distorted into the meaning that a new standard of duty is to be imposed on the employer as regards a workman, which would not exist as regards anybody else. * * *

The true view in my opinion is that the Act, with certain exceptions, has placed the workman in a position as advantageous as but no better than that of the rest of the world who use the master's premises at his invitation on business. If it has created any further or other duty to be fulfilled by the master I do not know what it is, how it is to be defined, or who is to define it.

[1] The reporter's statement of facts and the opinions of Lord Esher, M. R., and Fry, L. J., are omitted.

In the present instance the injured person has fallen into a more or less unfenced vat open to view, in a room in which he had been at work for many months; the full danger and risk of which were as well known to himself as to his master or to any one else upon the premises. The county court judge has found that the plaintiff knew, but has added a further finding that the plaintiff was guilty of no contributory negligence. We have to apply the Employers' Liability Act of 1880 to this simple state of facts. Treat the plaintiff as freed from all fetters that would have arisen by implication out of his contract of service, view him on the hypothesis prescribed by the Act, as if he were not a workman, place him in the category, most favoured by the law, of a visitor invited by the employer to come upon premises on business of the employer's own: what, on the above findings and on the undisputed facts, would be his legal position as regards redress for the accident that has happened to him?

He would, on the prescribed hypothesis in the case of such an accident, have to prove two things in order to succeed. The first, that the defendant had been guilty of some negligence, that is to say, of some breach of duty towards the plaintiff himself. The second, that the defendant's negligence had been the proximate cause of such accident; that there had not merely been incuria, but incuria dans locum injuriæ. Whether there has or has not been contributory negligence is, to speak precisely, only a branch of this second inquiry. Contributory negligence in a plaintiff only means that he himself has contributed to the accident in such a sense as to render the defendant's breach of duty no longer its proximate cause.

In order to answer the first inquiry, whether the defendant had been guilty of negligence, the first step to be taken must be to consider what is the duty towards the plaintiff that it is alleged the defendant has broken—for the ideas of negligence and duty are strictly correlative, and there is no such thing as negligence in the abstract, negligence is simply neglect of some care which we are bound by law to exercise towards somebody. The common law imposes on the occupier of premises no abstract obligation at all as to the state in which he is to keep them—provided that he carries on no unlawful business and is guilty of no nuisance. In the case of premises that contain an element of danger, a duty arises as soon as there is a probability that people will go upon them: but it is a duty only towards such people as actually do go. It is not a duty in the air, but a duty towards particular people. The occupier is bound to use all reasonable care to prevent such persons from being hurt. It is obvious that this duty must vary according to the character of the danger, and the circumstances under which the premises are to be visited. It differs in the case of hidden dangers, and the case of dangers that are palpable and visible: it may vary according to the age and comprehension of the visitor: in the case of bare licensees, and of those who come on the premises on the occupier's business and at his invitation. The only obligation on the occupier is to take such precautions as are reasonable in each instance to prevent mischief, and this is but the adaptation to

a special case of the general doctrine sic utere tuo ut alienum non lædas.

In the absence of any further act of omission or commission by the occupier of the premises, or his servants, or of any disregard of statutory provisions, or of individuals' rights, can it properly be said that there has been upon his part any breach of duty towards a person who, knowing and appreciating the danger and risk, elects voluntarily to encounter them. I employ a builder to mend the broken slates upon my roof, and he tumbles off. Have I been guilty of any negligence or breach of duty towards him? Was I bound to erect a parapet round my roof before I had its slates mended? In the case now before us the negligence relied on by the plaintiff is that a vat in the room in which he worked was left without a railing. Let us suppose that the defendant, impressed with the danger, had actually sent for a builder to put one up, and the builder had fallen in while executing the work. Would the defendant have been guilty of a breach of duty towards the builder? The duty of an occupier of premises which have an element of danger upon them reaches its vanishing point in the case of those who are cognisant of the full extent of the danger, and voluntarily run the risk. Volenti non fit injuria.

This is not new law; it is as old as the Roman Digest,[2] and has been accepted by the Courts of this country.[3] * * *

It is plain that mere knowledge may not be a conclusive defence. There may be a perception of the existence of the danger without comprehension of the risk: as where the workman is of imperfect intelligence, or, though he knows the danger, remains imperfectly informed as to its nature and extent. There may again be concurrent facts which justify the inquiry whether the risk though known was really encountered voluntarily. The injured person may have had a statutory right to protection as where an Act of Parliament re-

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[2] Paulus, Sent. Rec. 1, 15, § 3, *"Ei, qui irritatu suo feram bestiam vel quamcumque aliam quadrupedem in se proritaverit, eaque damnum dederit neque in ejus dominum neque in custodem actio datur; cf. Lynch* v. *McNally,* 73 N. Y. 347 (1878), and *Muller* v. *McKesson,* 73 N. Y. 195.

Among other instances of the application of the maxim, *volenti non fit injuria,* occurring in the civil law are the case of a slave struck, while walking across the Campus Martius, by a javelin thrown by a soldier at exercise, D. 9, 9, 4, and the case of a customer of a barber having his chair in the market place, where people are accustomed to play ball, who has his throat cut by reason of a ball striking the barber's arm while he is being shaved, D. 9, 2, 31. Where a son *in patria potestate* was sold with his own consent as a slave, while the father has his action for *injuria, "filii vero nomine non competit, quia nulla injuria est quae in volentem faciam",* D. 47, 10, 1, § 5. *Volens* here means actually consenting, the instances given above more nearly correspond to the use of the maxim in the English law. In the Canon law the maxim appears in this form, *Scienti et consentienti non fit injuria necque dolus* Sext. V, *De Regulis Juris,* 28. See Beven, Negligence, 3rd ed., p. 632.

[3] The maxim first appears in 1305, Y. B. 33, ed. 1, p. 8 (Horwood's translation). The question was whether in an action for wrongful taking of beasts, the defendant was bound by the verdict of the assise in a writ of *Novel Disseisin. Hunt, Arg. "Volenti non fit injuria;* and you yourself purchased the writ of *Novel Disseisin* and sued on it till the assise passed in the form, etc. (that you were never so seised thereof that you could be disseised). judgment if in opposition to that verdict, etc."

quires machinery to be fenced. The case of *Clarke* v. *Holmes,* 7 H. & N. 937, is a case of that sort, and has been so explained subsequently by judges of authority. Or again the plaintiff may have a common right or individual right at law to find these particular premises free from danger, as in the case of lands on which a market or fair has been held: *Winch* v. *Conservators of the Thames,* Law Rep. 9 C. P. 378; *Lax* v. *Corporation of Darlington,* 5 Ex. D. 28. The defendant in such circumstances does not discharge his legal obligation by merely affecting the plaintiff with knowledge of a danger which but for a breach of duty on his own part would not exist at all. But where the danger is one incident to a perfectly lawful use of his own premises, neither contrary to statute nor common law, where the danger is visible and the risk appreciated, and where the injured person, knowing and appreciating both risk and danger, voluntarily encounters them, there is, in the absence of further acts of omission or commission, no evidence of negligence on the part of the occupier at all. Knowledge is not a conclusive defence in itself. But when it is a knowledge under circumstances that leave no interference open but one, viz., that the risk has been voluntarily encountered, the defence seems to me complete.

In finding that the defendant was guilty of no contributory negligence, the county court judge has left untouched the above defence, which is outside the principle of contributory negligence altogether. Contributory negligence arises when there has been a breach of duty on the defendant's part, not where ex hypothesi there has been none. It rests upon the view that though the defendant has in fact been negligent, yet the plaintiff has by his own carelessness severed the causal connection between the defendant's negligence and the accident which has occurred; and that the defendant's negligence accordingly is not the true proximate cause of the injury. It is for this reason that under the old form of pleading the defence of contributory negligence was raised, in actions based on negligence, under the plea of "not guilty." It was said, and said rightly, in *Weblin* v. *Ballard,* 17 Q. B. D. 122, that in an inquiry whether the plaintiff has been guilty of contributory negligence, the plaintiff's knowledge of the danger is not conclusive. Obviously such knowledge may have even led him to exercise extraordinary care. But the doctrine of volenti non fit injuria stands outside the defence of contributory negligence and is in no way limited by it. In individual instances the two ideas sometimes seem to cover the same ground, but carelessness is not the same thing as intelligent choice, and the Latin maxim often applies when there has been no carelessness at all. A confusion of ideas has frequently been created in accident cases by an assumption that negligence to the many who are ignorant may be properly treated as negligence as regards the one individual who knows and runs the risk, and by dealing with the case as if it turned only on a subsequent investigation into contributory negligence. In many instances it is immaterial to distinguish between the two defences,[4] but the importance of the distinction was pointed

[4] Where a plaintiff is injured by an animal, *ferae naturae* or known to be vicious, kept by defendant, he, while not barred by contributory negligence,

out both by Erle, C.J., in his summing up to the jury in *Indermaur* v. *Dames,* Law Rep. 1 C. P. at p. 277, and by Cockburn, C.J., in *Woodley* v. *Metropolitan District Ry. Co.,* 2 Ex. D. 384. To prove negligence it is not enough to shew that the defendant has been negligent to others, the plaintiff must shew that there has been a breach of duty towards himself. These two defences, that which rests on the doctrine volenti non fit injuria and that which is popularly described as contributory negligence, are quite different, and both, in my opinion, are left open to an employer, if sued under the Employers' Liability Act of 1880. Neither of these is a defence that merely arises by implication out of the workman's contract of service. A confusion in applying the first of these two broad principles to the special case of master and servant has at times arisen out of the fact that by the contract of service the workman was deemed to have taken upon him the ordinary risk of a business lawfully carried on upon his master's premises, and it has been assumed as an â fortiori case that he took upon himself such risks as were visible or known. This is one way of putting such a defence, and may in many cases be sufficient, but there is another way of stating it and another principle wholly independent of contract on which a similar defence arises. The law is full of instances where duties assume a double aspect and may be viewed concurrently as arising by implication out of a contract, or as created by some wider principle of law which happens to take effect and to receive apt illustration in the particular instance of some particular contract. It is in most cases a barren and metaphysical inquiry to discuss whether such duties are best treated as arising by implication from the contract or from the general law outside; and down to the Employers' Liability Act, 1880, it may have been less important in the case of visible and apparent risks, which explanation of the master's immunity was given. The Employers' Liability Act of 1880 makes precision on this point necessary, and renders it important to remember that quite apart from the relation of master and servant, and independent altogether of it, one man cannot sue another in respect of a danger or risk, not unlawful in itself, that was visible, apparent, and voluntarily encountered by the injured person. The county court judge in the case now under appeal, while negativing contributory negligence, has found the issue of "knowledge" against the plaintiff. In what sense must this finding be read, having regard to the undisputed facts? Knowledge, as we have seen, is not conclusive where it is consistent with the facts that, from its imperfect character or otherwise, the entire risk, though in one sense known, was not voluntarily encountered, but here, on the plain facts of the case, knowledge on the plaintiff's part can mean only one thing. For many months the plaintiff, a man of full intelligence, had seen this vat—known all about it—appreciated its danger—elected to continue working near it. It seems to me that legal language has no meaning unless it were held that knowledge such as this amounts to a

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cannot recover if with full knowledge of the nature of the animal he deliberately chooses to put himself within its reach, *Muller* v. *McKesson* and *Lynch* v. *McNally, supra, n.* 2.

voluntary encountering of the risk. There was, therefore, in my opinion, no evidence of negligence on which the county court judge could act, and therefore the appeal should be dismissed with costs. I gather indeed that the view of the law which I have taken is that which the Court below, and certainly Wills, J., would have acted upon had they not considered themselves hampered by the authority of *Weblin* v. *Ballard,* 17 Q. B. D. 122. As to that case I will only remark that the Court really appear to have assumed negligence against the employer and to have directed their attention to the inquiry as to contributory negligence. If the decision, however, really conflicts, and I am not sure that it may not in fact conflict, with the view of the law which I have expressed, I think *Weblin* v. *Ballard,* 17 Q. B. D. 122, ought to be overruled.[5]

POMEROY *v.* WESTFIELD.

Supreme Judicial Court of Massachusetts, 1891. 154 *Mass.* 462.

HOLMES, J. These are actions for personal injuries alleged to have been caused by a defect in the highway. There was evidence that the travelled part of the way, at the point where the plaintiffs left it, was thirteen or fourteen feet wide, and that more than half of this part, on the plaintiffs' left as they were driving, was made impassable, or at least was in such a condition that it was prudent to avoid it, by reason of a deep mud-hole, so that there was left barely room for one team to pass; that the plaintiffs kept to the right in the effort to avoid the hole, and, it being dark, went off the travelled part of the way, and were upset by a ditch or rock within the limits of the way. The question is whether the judge should have directed a verdict for the defendant, on the ground either that there was no evidence of a defect, or that there was no evidence of due care on the part of the plaintiffs.

The jury were warranted in finding that the mud-hole was a defect, and that under the circumstances the injury to the plaintiffs was a natural consequence of a proper attempt to keep out of the hole. The intervention of a prudent act of this sort on the plaintiffs' part would not prevent their recovery. *Flagg* v. *Hudson,* 142 Mass. 280. *Hayes* v. *Hyde Park,* 153 Mass. 514.

The strongest argument for the defendant would be, that, although there is evidence of a defect, and although the conduct of the plaintiffs at the instant was prudent, yet they, or at least the plaintiff Phelon, the driver, had taken the risk upon themselves at an earlier moment by electing to travel upon the road, inasmuch as Phelon was well acquainted with the road and understood its dangers. *Miner* v. *Connecticut River Railroad,* 153 Mass. 398. Perhaps this argument might be met by saying that it was a question for the jury in this case whether Phelon did understand the dangers

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[5] The maxim while not exclusively, or even peculiarly applicable to the particular voluntary relation of master and servant, (see *Brown* v. *Rome Mach. &c. Co.,* 5 Ga. App. 142. (1908), p. 150), is of vast importance therein. The effect of its application thereto will be dealt with in the Appendix, in which the duties and rights of the parties to such relation are considered.

fully. *Ferren* v. *Old Colony Railroad,* 143 Mass. 197, 200. In one sense, the event proves that he did not, since he undoubtedly expected to get through safely. *Thomas* v. *Western Union Telegraph,* 100 Mass. 156, 158. *Mahoney* v. *Metropolitan Railroad,* 104 Mass. 73, 75. *Dewire* v. *Bailey,* 131 Mass. 169, 171.

But, further, in determining the right of a plaintiff to recover, there are two elements to be considered; first, how far he is chargeable with knowledge of the danger which he incurred, and then under what exigency he acted. That is to say, the exigency legitimately may affect not only the question how far he appreciated or ought to have appreciated the danger, but also how far he could run a risk known to be greater than prudently could be incurred under ordinary circumstances without losing his right to recover in case he was hurt. Especially is this true in cases like the present, where the parties are not in an equal position. The plaintiffs were away from home, and had to get back. They depended on the defendant for safety in doing so, and it was the defendant's power and duty to keep the way free from defects.

In such a case, even if it were found that the plaintiffs knew that they were attempting a dangerous drive, it could not be said, as matter of law, that they were not warranted in doing so. The decisions have carried this principle much further than is necessary for the purposes of the case at bar. *Linnehan* v. *Sampson,* 126 Mass. 506. *Eckert* v. *Long Island Railroad,* 43 N. Y. 502. *Pennsylvania Co.* v. *Langendorff,* 48 Ohio St. 316. *Donahoe* v. *Wabash, St. Louis, & Pacific Railway,* 83 Misso. 560. *Maus* v. *Springfield,* 101 Misso. 613, 618.

Exceptions overruled.[1]

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[1] *Accord: Altoona* v. *Lotz,* 114 Pa. 238 (1886). "It is not the law that a resident in a city must remain continuously on his property, when the city grossly neglects the repair of its streets, under pain that if he ventures on the streets or walks and suffers injury resulting from the city's default, he can recover nothing. Nor is the resident bound under like pain to abstain from going to church in the evening, or other places which he may be moved to go by a sense of duty or love of pleasure. On his part it is enough if he takes the ordinary care which ought to be exercised by a prudent man, under the circumstances. This sidewalk had all along been in use, was generally used by many people and, though unsafe, very few persons had received injury. What we have said applies to such walk or street; not to one where a prudent man in the exercise of due care would not travel." Trunkey, J., p. 246. "Even if the muddy street was safer for pedestrians than the sidewalk, it could not be expected that persons would shun the walk and wade the street," p. 245. As to the effect of the plaintiff's knowledge of and failure to take a somewhat safer but more indirect road, see *Mellor* v. *Bridgeport,* 191 Pa. 562 (1899); *Haven* v. *Bridge Co.,* 151 Pa. 620 (1892), and *Musselman* v. *Hatfield Boro.,* 202 Pa. 489 (1902). See also Elliott, J., in *T. W. & W. R. R.* v. *Brannagan, Adm.,* 75 Ind. 490 (1881), p. 492, "Knowledge of the existence of a dangerous defect in a highway does not require a traveller to keep off the highway altogether. If the danger of passing is so great that a man of ordinary prudence, possessing knowledge of its existence, would not attempt to pass it, then it might perhaps be contributory negligence for one acquainted with the location and character of the dangerous spot to attempt to pass in close proximity. * * * Knowledge of the existence of a dangerous place does, however, make it incumbent upon the traveller to use care and caution proportionate to the danger which he knows lies in his way." *Accord: Indianapolis* v. *Cook,* 99 Ind. 10 (1884), and *R. R.* v. *Sutton,* 148 Ind. 169

THRUSSELL *v.* HANDYSIDE.

In the Queen's Bench Division, 1888. *L. R.* 20 *Q. B. D.* 359.

HAWKINS, J. This action is brought to recover damages for personal injury, which the plaintiff alleges to have been caused by the negligence of the defendants or their servants. The case was remitted to the Westminster County Court under s. 10 of the County Courts Act, 1867, and was tried before the judge of that court and a jury. A verdict was found for the plaintiff for £200 damages, and a motion is now made to set aside that verdict and enter judgment for the defendants, on the grounds that no duty was imposed upon the defendants to protect the plaintiff from dangers which he might encounter in the course of his work, that the plaintiff contributed to the accident by his own negligence, and that the plaintiff took upon himself the risk incidental to his employment, so that the maxim "Volenti non fit injuria" applies.

I am of opinion that the defendants' appeal must be dismissed.

The circumstances were these: some time before the accident a large building in Kensington called Olympia was in course of being prepared for certain public entertainments. The contractors for the iron-work were the defendants; the contractors for the wood-work were Messrs. Lucas, the plaintiff's employer.

The defendants had erected a large stage upon which their workmen had for a considerable time worked without accident, such rivets as fell being stopped by the stage; but just before the accident the stage was removed at the request of Messrs. Lucas and a small stage substituted. Thereafter rivets, some red hot, frequently fell, and though the workmen working below complained to the defendant's foreman no precautions, such as stretching a tarpaulin below the stage (which could easily have been done), were taken to prevent the fall of rivets, bolts, etc.—one of which struck and injured the plaintiff while at work below in the employment of Messrs. Lucas.

The question is whether, on these facts, the plaintiff is entitled to recover.

Mr. Lush in his very able argument contended in the first place that no duty was imposed upon the defendants which could make them responsible for the injury suffered by the plaintiff, even assuming the existence of negligence on the part of the defendants or their servants; secondly, that the plaintiff by his own negligence contributed to the accident; and, thirdly, that, even if there was no contributory negligence on the part of the plaintiff, still the maxim "Volenti non fit injuria" applied to the case.

My view is this. The rule applicable to this case—I do not say to all cases, for each case must depend on all its circumstances—is that where a man is employed to do certan work, and knows that

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(1897); *Harris* v. *Clinton,* 64 Mich. 447 (1887). In all these cases no distinction is drawn between assumption of risk and contributory negligence, but in *Indiana Oil Co.* v. *O'Brien,* 160 Ind. 266 (1902), the two are held to be "independent and separate defenses."

the work which he is doing is dangerous to others, and that accidents are likely to happen, and knows that other persons are lawfully engaged in other work, and are under an obligation to perform such work, the person engaged in the dangerous work is subject to the duty of using reasonable care, and taking precautions to prevent accidents arising from the work in whch he is engaged. * * *

The next question is whether there was any evidence for the jury of negligence on the part of the defendants or their servants; I think there was. It is impossible to read the county court judge's notes without coming to the conclusion that the defendants' servants knew that there was danger of bolts falling on the men who were working below. I think the circumstances shew abundant evidence of negligence.

But this does not determine the case, for the plaintiff may fail on one of two grounds, either that he contributed to the accident by his own negligence, or that the case comes within the maxim "Volenti non fit injuria."

As to the first of these grounds I cannot find any evidence which proves negligence on the part of the plaintiff.

The only remaining question is whether the plaintiff took the risk upon himself, so that the maxim "Volenti non fit injuria" applies. That question, as is shewn by the judgments in *Yarmouth* v. *France,* was for the jury. The plaintiff was altogether unconnected with the defendants or their workmen, but was an independent workman employed by Messrs. Lucas, and it is difficult to say, where a man is lawfully working, subject to the orders of his employers, and to the risk of dismissal if he disobeys, that if, after asking for and failing to obtain protection from the danger caused by other people's work, he suffers injury, the maxim "Volenti non fit injuria" applies. It is true that he knows of the danger, but he does not wilfully incur it. "Scienti," as was pointed out in *Thomas* v. *Quartermaine* and in *Yarmouth* v. *France,* is not equivalent to "volenti." It cannot be said, where a man is lawfully engaged in work, and is in danger of dismissal if he leaves his work, that he wilfully incurs any risk which he may encounter in the course of such work, and here the plaintiff had asked the defendants' men to take care. It is different where there is no duty to be performed, and a man takes his chance of the danger, for there he voluntarily encounters the risk. If the plaintiff could have gone away from the dangerous place without incurring the risk of losing his means of livelihood, the case might have been different; but he was obliged to be there; his poverty, not his will, consented to incur the danger. * * *

The case of *Woodley* v. *Metropolitan District Ry. Co.,* 2 Ex. D. 384, was relied on by Mr. Lush as an authority in favour of the defendants, and at first sight it looks somewhat like the present case, but when the facts of the two cases are compared there is a clear distinction. The plaintiff in that case was in the employment of a contractor and was injured by a passing train while he was working in a tunnel on the Metropolitan District Railway, and he brought an action against the railway company. It was proved that there was a very small space between the wall of the tunnel and the

passing train, but still the space was enough, if a workman was careful, to enable him to stand in safety while a train passed. It is true that the jury found that there was negligence on the part of the company in not having taken precautions for the protection of the workman, but the plaintiff having it in his power to protect himself, and knowing that the danger existed, the majority of the Court of Appeal held that he was not entitled to recover. He was injured not owing to an inevitable cause, but owing to a danger which by the use of proper care he might have avoided. In the present case the plaintiff could not have avoided the danger, unless he had disobeyed the orders of his employers, and incurred the risk of dismissal.[1]

For these reasons I am of opinion that the question was for the jury, and they have found that the defendants were guilty of negligence in not taking proper precautions, that there was no contributory negligence on the part of the plaintiff, and that he did not voluntarily incur the risk. This verdict must therefore be supported, and the appeal will be dismissed.

GRANTHAM, J. I am of the same opinion. I think a simple statement of the facts is sufficient to shew that the jury have given a right verdict. The plaintiff's work was not dangerous to himself or to others, while the work on which the defendants' workmen were employed were clearly proved to be extremely dangerous to those who were engaged in work below, and it is impossible to come to any other conclusion than that the defendants were bound to take precautions to obviate that danger. The decision in *Thomas* v. *Quartermaine* is not in point, for the question in that case arose between master and servant. In the present case if it had been impossible for the defendants to take precautions against the danger it might perhaps have been suggested that the plaintiff was bound

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[1] It would seem that the true distinction between the two cases is this: Thrussell was not upon the premises of the defendant nor was his right to work where he did dependent upon the defendant's invitation or consent, while Woodley had no right to come upon the defendant's line save by virtue of the Company's invitation to him as a workman in the service of a contractor employed by them to do work thereon. "That which would be negligence in a company, with reference to the state of their premises or the manner of conducting their business, so as to give a right to compensation for an injury resulting therefrom to a stranger lawfully resorting to their premises in ignorance of the existence of the danger, will give no such right to one, who, being aware of the danger [*and held*, the plaintiff knew, not only that the work was to be done while the line was in operation, but also the manner in which the traffic was carried on and the danger attendant thereon] voluntarily encounters it." Cockburn, C. J., L. R. 2 Ex. D. (1877), p. 390. So in *Wood* v. *Locke*, 147 Mass. 604 (1888), where a brakeman of a railroad company having by contract the right to use the defendant's tracks and yard was injured by a switch thereon, known by him to be defective. W. Allen, J., said: "The plaintiff, in going to work upon the tracks at the invitation of the defendant contained in the contract with his employer, assumed, as against the defendant, the obvious and known risks of the employment arising from the defective construction or condition of the road, as fully as if he had gone upon the tracks under a contract with the defendant as his servant," p. 606. See also *Membery* v. *Ry.*, L. R. 14 A. C. 179 (1889); *Stevens* v. *Gas Co.*, 73 N. H. 159 (1905), and *Wagner* v. *Boston Elev. Ry.*, 188 Mass. 437 (1905).

to take his chance, but the evidence shews that the facts were the other way.

Appeal dismissed.[2]

OSBORNE *v.* LONDON & NORTH WESTERN RAILWAY CO.

Queen's Bench Division, 1888. *L. R.* 21 *Q. B. D.* 220.

The plaintiff was injured by falling on steps leading to the defendants' railway station, which the defendants had allowed to be slippery and dangerous. There was no contributory negligence on the part of the plaintiff, but there were other steps which he might have used, and he admitted that he knew that the steps were dangerous, and went down carefully holding the handrail.[1]

The County Court Judge was of opinion that the accident was primarily caused by the worn and defective state of the steps, which was aggravated by the frosty weather, which made them slippery in addition, that the steps had not been properly and efficiently swept and cleaned from the caked snow, which, added to the worn condition of the steps, caused the plaintiff to fall, and that there was no contributory negligence on the part of the plaintiff, and gave judgment for the plaintiff for 25*£*., the amount being agreed.

WILLS, J. It seems to me to follow that in such a case as the

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[2] So a landowner is not bound to abandon the ordinary use of his pasture land because of the neglect of a railroad to perform its statutory duty to fence its adjoining right of way. *Rogers* v. *Newburyport R. R.*, 1 Allen, 16 (Mass. 1861); *Shepard* v. *R. R.*, 35 N. Y. 641 (1866); *McCoy* v. *R. R.*, 40 Cal. 532 (1871); *Donovan* v. *R. R.*, 89 Mo. 147 (1886); but see *Krum et al.* v. *Anthony*, 115 Pa. 431 (1886) where, however, the duty to fence alleged was not statutory or common law, but one arising out of an agreement with the defendant, the owner of the adjoining land.

So "while a person confines himself to a lawful employment on his own premises, his position, however injudicious or imprudent it may be, is not therefore wrongful, * * * so as to deprive him of redress for wrongs done him by others." Beardsley, J., *Cook* v. *Champlain Transp. Co.*, 1 Denio, 91 (N. Y. 1845), frame mill built near steamboat landing; *Vaughan* v. *Taff Vale Ry.*, 3 H. & N. 742 (1858), inflammable material left near railway right of way; *Kellogg* v. *C. & N. W. R. R.*, 26 Wis. 223 (1870); *Flynn* v. *R. R.*, 40 Cal. 14 (1870); *Phila. & R. R. R.* v. *Hendrickson*, 80 Pa. 182 (1876); *R. R.* v. *Schultz*, 93 Pa. 341 (1880), similar facts, but see *contra*, *Post* v. *R. R.*, 108 Pa. 585 (1885), and *Confer* v. *R. R.*, 146 Pa. 31 (1891), *semble*.

Where the landlord of an apartment, retaining in his possession and under his control the stairways and approaches thereto, is bound to repair them, neither the tenant nor one using the approaches in his right assumes the risk of their known or obviously bad condition; *Looney* v. *McLean*, 129 Mass. 33 (1880); *Dollard* v. *Roberts*, 130 N. Y. 269 (1891); *Idel* v. *Mitchell*, 5 N. Y. App. Div. 268 (1896); *Marwedel* v. *Cook*, 154 Mass. 235 (1891). Where the landlord, having covenanted to repair the premises leased to a tenant and in the latter's exclusive possession and control, fails to make such repair, a different question is presented, the landlord's duty is wholly contractual and the covenant is taken to relate to the cost and burden of making the repairs and not to the protection of the tenant or his guests from injury—the tenant's only remedy is to repair himself and deduct the expense from the rent or to leave the premises, but see Mathew, L. J., *Cavalier* v. *Pope*, L. R. 1905, 2 K. B., pp. 766-767.

[1] The facts are as stated in the head note.

present, where the existence of negligence on the part of the defendants, and the absence of contributory negligence on the part of the plaintiff, are specifically found as matters of fact, if the defendants desire to succeed on the ground that the maxim "Volenti non fit injuria" is applicable, they must obtain a finding of fact "that the plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it." I agree with Mr. Wills that this is a question of fact, and, this being so, it follows that defendants could not succeed unless either they had a finding of fact in their favour, or we had all the facts before us, so that we were in a position to decide the question. * * *

In the present case the plaintiff may well have misapprehended the extent of the difficulty and danger which he would encounter in descending the steps; for instance, he might easily be deceived as to the condition of the snow; I know quite enough about ice and snow to know how easy it is to make such a mistake, and it is one that has cost many a man his life. In order to succeed the defendants should have gone further in cross-examination, for, unless the question of fact had been found in their favour, the application of the maxim on which they relied could not be established. The County Court Judge has not found the fact the defendants need; and upon the present materials I certainly am not prepared to supply the deficiency.

For these reasons, the onus of proof being on the defendants, I think that on the evidence as it stands their defence is not made out, and therefore their appeal must be dismissed.

GRANTHAM, J. I am of the same opinion.

I think that the judgment of Bowen, L. J., in *Thomas* v. *Quartermaine* (18 Q. B. D. 685) confirms the view which I take, that the maxim "Volenti non fit injuria", does not apply to such a case as the present. If it did it would go to the root of the liability of all persons who would otherwise be liable to provide safe premises or safe machinery. For instance, in the case of a stage coach, if a passenger sees that one of the horses is vicious, is he bound to stay at home and give up his journey, or if he does not do so, and suffers injury, is he to lose all remedy?[2] The same considerations would

[2] In England until the Railway and Canal Act of 1834 a common carrier might by notice to the shipper or passenger relieve itself from liability for its own or its servant's negligence, Hutchinson on Carriers, 3rd ed., §§ 390-398. See also 20 Harv. L. R., pp. 23-24. But in the great majority of American jurisdictions it is held that even an express agreement by the passenger or shipper to such effect is against public policy and void, Hutchinson on Carriers, 3rd ed., §§ 450-458. While the reason sometimes given is that such exemptions tempt the carrier to carelessness that may imperil others than the particular shipper or passenger, *Quimby* v. *R. R.*, 150 Mass. 365 (1890), p. 370, the reason usually given is that the carrier and his customer do not stand on a footing of equality and that the latter has no real freedom of choice. He has no alternative but to submit to the carrier's terms or abandon his right to the performance by the carrier of its duty to accommodate him as one of the public in the line of its employment. *Railroad Co.* v. *Lockwood*, 17 Wall. 357 (1873), p. 379.

Where, however, the carrier is not performing its duty as a common carrier and the passenger or shipper is not asserting his right as one of the public to accommodation upon payment of fare or freight, but on the contrary

apply in the case of a railway. It seems to me that the whole difficulty in the present case arises from the answer of the plaintiff to a question put to him in cross-examination being too much relied on. What he meant was that he knew there was some danger in going down the steps, and that it was necessary to be careful, but he thought he could get down safely with the assistance of the handrail. The only chance for the defendants was to shew contributory negligence on the part of the plaintiff, and this they have failed to shew.

Appeal dismissed; leave to appeal refused.[a]

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he or his goods are carried not for hire, but gratuitously, a service which is entirely outside the carrier's public duties and to which the public are not of right entitled, the passenger "is not in the power of the company and obliged to accept its terms. They stand on a perfectly even footing. He freely and voluntarily chooses to accept the privilege offered, and having accepted the privilege he cannot repudiate the conditions." Brewer, J., *N. P. Ry. Co.* v. *Adams*, 192 U. S. 440 (1903), p. 453 (the cases accord and contra are cited, p. 452). So when the passenger or shipper is given a special service outside the railroad's duties as common carrier and which it is free to grant or refuse as it may please, *B. & O. R. R.* v. *Voigt*, 176 U. S. 498 (1899, citing numerous decisions to the same effect), employee of express company whose cars were carried by defendant under a special agreement.

[a] But see *Goldstein* v. *R. R.*, 46 Wis. 404 (1879), where it was held that a plaintiff, who in order to get freight shipped to him by the defendant's road, drove along a narrow unguarded passage to the freight station, "did this voluntarily and must have known the peril to which he was exposing his property and person," and could not recover for injuries received thereby. The plaintiff's statement, however, left it uncertain whether there was not another though less convenient mode of access and the passage which was safe for one team was narrowed and so made dangerous by a temporary obstruction, another team standing in the passage. See 20 Harv. L. R. 19, n. 5, and see *Miner* v. *R. R.*, 153 Mass. 398 (1891).

Where a train overshoots the platform at the passenger's destination so that it is obviously somewhat dangerous to alight, it was held in *Rose* v. *N. E. Ry.*, L. R. 2 Ex. D. 248 (1876), that "if the passenger is satisfied that the train is going on, and there is apparently no alternative but to get out, he must do as best he can." "Can it be said that he was to sit still and be carried on to the next station, perhaps forty or fifty miles off, and then be liable to be called upon to pay the full fare for the whole distance, and to be exposed to various inconveniences—can that be seriously contended?" Cockburn, C. J., p. 251. *Accord: Robson* v. *N. E. Ry.*, L. R. 2 Q. B. D. 85 (1876); *Staines* v. *R. R.*, 72 N. J. L. 268 (1905). But see Bramwell and Martin, B. B., in *Siner* v. *Ry.*, L. R. 3 Ex. 150 (1868), who were of opinion that the passenger "should sit in the carriage and be carried beyond where he wants to go and then bring his action against the company for not affording him proper accommodation to get out," L. R. 5 Ex. D., p. 35. In fact, in Siner's case the passenger had a third alterative, which she did not choose to adopt. She might have at least asked that the train be put back. Pigott, B.

So in *Filer* v. *R. R.*, 49 N. Y. 47 (1872), it was held that a passenger, who, being informed that a train, which had merely slowed down at her destination, would not stop again and that she had better get off, being "put to her choice whether to obey the advice of the defendant's servant or to remain on the car and be carried beyond her destination," might recover for injuries received in the attempt to alight, if she used care in the attempt proportionate to the danger and if the cars were not moving so fast that to alight would obviously lead to almost certain injury.

ECKERT *v.* LONG ISLAND RAILROAD COMPANY.

Court of Appeals of New York, 1871. 43 N. Y. 502.

GROVER, J. The important question in this case arises upon the exception taken by the defendant's counsel to the denial of his motion for a nonsuit, made upon the ground that the negligence of the plaintiff's intestate contributed to the injury that caused his death. The evidence showed that the train was approaching in plain view of the deceased, and had he for his own purposes attempted to cross the track, or with a view to save property placed himself voluntarily in a position where he might have received an injury from a collision with the train, his conduct would have been grossly negligent, and no recovery could have been had for such injury. But the evidence further showed that there was a small child upon the track, who, if not rescued, must have been inevitably crushed by the rapidly approaching train. This the deceased saw, and he owed a duty of important obligation to this child to rescue it from its extreme peril, if he could do so without incurring great danger to himself. Negligence implies some act of commission or omission wrongful in itself. Under the circumstances in which the deceased was placed, it was not wrongful in him to make every effort in his power to rescue the child, compatible with a reasonable regard for his own safety. It was his duty to exercise his judgment as to whether he could probably save the child without serious injury to himself. If, from the appearances, he believed that he could, it was not negligence to make an attempt so to do, although believing that possibly he might fail and receive an injury himself. He had no time for deliberation. He must act instantly, if at all, as a moment's delay would have been fatal to the child. The law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness in the judgment of prudent persons. For a person engaged in his ordinary affairs, or in the mere protection of property, knowingly and voluntarily to place himself in a position where he is liable to receive a serious injury, is negligence, which will preclude a recovery for an injury so received; but when the exposure is for the purpose of saving life, it is not wrongful, and therefore not negligent unless such as to be regarded either rash or reckless. The jury were warranted in finding the deceased free from negligence under the rule as above stated. The motion for a nonsuit was, therefore, properly denied. That the jury were warranted in finding the defendant guilty of negligence in running the train in the manner it was running, requires no discussion. None of the exceptions taken to the charge as given, or to the refusals to charge as requested, affect the right of recovery. Upon the principle above stated, the judgment appealed from must be affirmed with costs.

CHURCH, Ch. J., PECKHAM and RAPALLO, JJ., concur.[1]

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[1] *Accord: Gibney* v. *State*, 137 N. Y. 1 (1893), parent drowned while attempting to rescue his child, who had fallen through an unguarded hole in a bridge; *Miller* v. *R. R.*, 191 N. Y. 77 (1908), *semble; Corbin* v. *City*, 195 Pa.

ALLEN, J. (dissenting). The plaintiff's intestate was not placed in the peril from which he received the injury resulting in his death, by any act or omission of duty of the defendants, its servants, or agents. He went upon the track of the defendant's road in front of an approaching train, voluntarily, in the exercise of his free will, and while in the full possession of all his faculties, and with capacity to judge of the danger. His action was the result of his own choice, and such choice not compulsory. He was not com-

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461 (1900), plaintiff's decedent suffocated by gas in trench into which he had descended to rescue a boy also overcome by gas therein; *Linnehan* v. *Sampson*, 126 Mass. 506 (1879), bystander gored while attempting to assist man attacked by bull; *Donahoe* v. *R. R.*, 83 Mo. 560 (1884), mother attempting to rescue child from approaching engine; *Peyton* v. *Tex. Pac. R. R.*, 41 La. Ann. 861 (1889); *Pa. Co.* v. *Langendorf*, 48 Ohio, 316 (1891), similar facts; *Mobile & Oh. R. R.* v. *Ridley*, 114 Tenn. 727 (1905), employee of railroad trying to rescue a boy standing on track with his back to approaching engine; *Pa. Co.* v. *Roney*, 89 Ind. 453 (1883), engineer staying upon engine in effort to avert collision; *Cottrill* v. *R. R.*, 47 Wis. 634 (1879), similar facts; *Condiff* v. *R. R.*, 45 Kans. 256 (1891), section foreman, struck while attempting to remove hand car from track and so avert collision; *Maryland Steel Co.* v. *Marney*, 88 Md. 482 (1898), workman attempting to stop escape of molten metal which threatened serious injury to his fellow workmen; *a fortiori*, this is so where the plaintiff occupies some position making it his duty to act for the protection of others, *Muhs* v. *Ins. Corps.*, 89 N. Y. App. Div. 389 (1903), policeman injured while stopping runaway patrol wagon.

While the question has never been decided in England, Sir Frederick Pollock, in his work on Torts cites *Eckert* v. *R. R.*, with approval, 8th ed., 481, and see Beven, Negligence, 3rd ed., p. 156 *et seq.*, and *Wilkinson* v. *Kinneil Co.*, 24 Rettie, 1001 (Scot. 1897), a boy who had jumped from a wagon toward which another was rapidly approaching and was in a place of safety was injured while attempting to stop the oncoming car, which threatened a fellow workman who had remained on the wagon; Lord Young was of opinion that, it being his duty to attempt to save his companion, he was not precluded from recovery by putting himself again in peril for that purpose, Lords McLaren, Moncreiff and Kinnear held that the plaintiff, who was himself originally imperilled, could not be said to have failed to exercise reasonable care for his own safety because he paid regard to his companion's safety as well as his own, while Lords Justice Clerk, Trayner and Adam were of opinion that, though the boy's proceedings were well intentioned and deserving of reward, "his action was, in the strictest sense, voluntary, and *volenti non fit injuria.*"

The plaintiff is not entitled to recover merely because injured in a meritorious or even heroic effort to save human life; he must show that the person whose rescue he attempted was imperilled by some misconduct of the defendant, *Evansville, etc., R. R.* v. *Hiatt*, 17 Ind. 102 (1861); *Donahoe* v. *R. R.*, *supra; Gramlich* v. *Wurst*, 86 Pa. 74 (1878); or that the defendant has been guilty of some negligence toward the plaintiff after his attempt to rescue the imperilled person is discovered, *Donahoe* v. *R. R.*, *supra*. Nor can the plaintiff recover if he by his own fault has contributed to put in peril the person whose rescue he attempts, *Walker* v. *Shreveport Gas Co.*, 120 La. Ann. 68 (1907); *Miller* v. *R. R.*, *supra*. But the fact that the person whose rescue is attempted could himself, if injured, not have recovered against the defendant, because his own fault has contributed to his peril, will not defeat the plaintiff himself innocent of any contributory misconduct, *Ridley* v. *R. R.*, *supra*. In *Saylor* v. *Parsons*, 122 Iowa, 670 (1904), it was held that a plaintiff injured while attempting to prop up a wall, which threatened to fall upon the defendant who had carelessly undermined it, could not recover against the defendant, since the defendant's duty to protect himself from harm being moral only and not legal, his conduct exposing himself to danger was not negligence.

pelled, or apparently compelled, to take any action to avoid a peril, and harm to himself, from the negligent or wrongful act of the defendant, or the agents in charge of the train. The plaintiff's rights are the same as those of the intestate would have been, had he survived the injury and brought the action, and must be tested by the same rules; and to him and consequently to the plaintiff, the maxim *volenti non fit injuria* applies. It is a well established rule, that no one can maintain an action for a wrong, when he consents or contributes to the act which occasions his loss. One who with liberty of choice, and knowledge of the hazard of injury, places himself in a position of danger, does so at his own peril, and must take the consequences of his act. This rule has been applied to actions for torts as well as to actions upon contract, under almost every variety of circumstance.

Whenever there has been notice of the danger, and freedom of action, the injured party has been compelled to bear the consequences of the action irrespective of the character and degree of negligence of other parties. (*Gould* v. *Oliver*, 2 Scotts. N. R., 257; *Ilott* v. *Wilkes*, 3 B. & Ald., 311; *Slagan* v. *Slingerland*, 2 Caines, 219; Per MARVIN, J., in *Corwin* v. *N. Y. and E. R. R. Co.*, 3 Ker., 42; per COWEN, J., in *Hatfield* v. *Roper*, 21 W. R., 620.) The doctrine applicable to voluntary payments of money not recoverable by law grows out of this rule of law, and the rules governing in cases of contributing negligence of the injured party is nearly allied to, if not an outgrowth of the maxim *volenti non fit injuria*.

Whether the defendant was or was not guilty of negligence, or whatever the character and degree of the culpability of the defendant and its servants is not material. The testator had full view of the train and saw, or could have seen, the manner in which it was made up, and the locomotive attached, and the speed at which it was approaching, and, if in the exercise of his free will, he chose for any purpose to attempt the crossing of the track, he must take the consequence of his act. The defendant may have been running the train improperly, and perchance illegally, and so as to create a legal liability in respect to any one sustaining loss solely from such cause, but the company is not the insurer of, or liable to those who, of their own choice and with full notice, place themselves in the path of the train and are injured.

It is not the law that the co-operating act of the injured party must be culpable or wrong in intention. It may be merely negligence or the result of the free exercise of the will. (Per BEARDSLEY, J., *Tonawanda R. R. Co.*, v. *Munger*, 5 Denio, 255.) The rescue of the child from apparent imminent danger was a praiseworthy act and entitled the plaintiff to the favorable consideration of the court and to a lenient and liberal interpretation and application of the rules of law in her behalf. But the principles of law cannot yield to particular cases.

The act of the intestate in attempting to save the child was lawful as well as meritorious, and he was not a trespasser upon the property of the defendant, but it was not in the performance of any duty imposed by law, or growing out of his relation to the child, or the result of any necessity. There is nothing to relieve it from

the character of a voluntary act, the performance of a self-imposed duty, with full knowledge and apprehension of the risk incurred.[2] *Evansville R. R. Co.* v. *Hyatt* (17 Ind., 102), is in circumstance somewhat like the case before us, and the decision is in accord with the views herein expressed.

I am of the opinion that the judgment of the Supreme Court and of the City Court of Brooklyn should be reversed and new trial granted, costs to abide event.

FOLGER, J., concurred in the foregoing opinion.

Judgment affirmed.

LIMING *v.* ILLINOIS CENTRAL RAILWAY COMPANY.

Supreme Court of Iowa, 1890. 81 *Iowa*, 246.

ROBINSON, J.—The allegations of the petition which the demurrer admits to be true are substantially as follows: On the third day of November, 1888, William Ortman owned, and with plaintiff and his family occupied, a certain farm in O'Brien county. Ortman owned some horses, which were kept in a barn on the farm, and plaintiff owned some hogs, which were kept in a pen outside the barn. On the day named, an engine on the railway of defendant set fire to grass and weeds on its right of way at a point opposite the premises of Ortman. A high wind was blowing at the time, which spread the fire rapidly, driving it in the direction of the barn. Plaintiff and Ortman saw the fire immediately after it started, and went to it, and tried to put it out. Failing in that, they retreated to a traveled way which crossed the prairie between the fire and the barn, and attempted to stop the fire by sprinkling water on the grass. Their efforts were ineffectual, and they then started to save the horses and hogs. They first entered the barn, the plaintiff believing that there would be ample time in which to remove the horses before the fire, which was more than one hundred feet away, could reach the building. Prior to that time the head fire had been running towards a point at one side of the barn, but at that time it reached higher ground, and, catching full force of the wind, was driven directly towards the barn. When the horses were unfastened, and were being taken from the barn, plaintiff discovered that the fire had reached the door which afforded the only means of escape, and that, in order to escape, he was compelled to and did pass through the fire; that in doing so both his legs, his right hip, both hands, and his right elbow were badly burned, his face was badly burned and disfigured, and his eyes injured. By reason of the injuries so received, plaintiff was confined to his bed nine weeks, and suffered greatly in mind and body, and his health has been seriously and permanently impaired. The first count of the petition also alleges that the fire was caused by negligence on the part of defendant, and that plaintiff was free from negligence. The demurrer is as follows:

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[2] See *accord:* Mitchell, C. J., *diss.*, in *Corbin* v. *City*, *supra*, *n.* 1, and Lords Justice-Clerk, Trayner and Adam in *Wilkinson* v. *Kinneil Co.*, *supra*, *n.* 1.

"Defendant demurs to the first count of plaintiff's petition for the following reasons: *First.* The allegations set out in the first count for personal injury to plaintiff do not show that the negligence of defendant was the proximate cause of the injury complained of. *Second.* The said count shows that the injury complained of was received by plaintiff while he was engaged in trying to save the property of one Ortman, and that said injury was not directly or approximately caused or contributed to by the negligence of defendant."

Section 1289 of the Code provides that "any corporation operating a railway shall be liable for all damages by fire that is set out or caused by operating of any such railway." It is admitted that the damages in question were caused by a fire which the defendant set out in operating its railway, but it is said that the fire was not the proximate cause of the injuries sustained by plaintiff. It is further said that but for the intervention of his own voluntary act he would have sustained no injury, and, therefore, that his own act was the proximate cause of his injuries.

The question presented for our determination is not free from difficulty. Defendant is not liable unless its wrongful act was the proximate cause of the damages in suit. * * *

But it often happens that the wrongful act or negligence of a party would be harmless but for the voluntary act of the person injured, as in cases of injuries from defects in streets, sidewalks, roads and bridges; yet in a case of that kind the act of the person injured in traveling the defective way is not regarded as a new or independent cause of the accident which follows. If he be free from negligence he is entitled to recover for the injuries he sustains, for he was doing only what the law authorized, and what the corporation, responsible for the condition of the way, was bound to anticipate and provide for while the way remained open for travel. The negligence of the corporation is the proximate, although the act of the person injured is the more immediate, cause of the injury. 1 Suth. Dam. 62. One who, acting with reasonable prudence, voluntarily exposes himself to danger for the purpose of protecting the person of another, may recover for the consequent injuries he receives from the person whose wrong caused the injury to himself, and the danger to the person he sought to aid. *Linnehan v. Sampson,* 126 Mass. 506; *Cottrill v. Railway Co.,* 47 Wis. 634; 3 N. W. Rep. 376; *Railway Co. v. Crosby,* 74 Ga. 737; *Eckert v. Railway Co.,* 43 N. Y. 502. The same has been held to be true of one who under similar conditions is injured in an attempt to protect his own property. *Wasmer v. Railway Co.,* 80 N. Y. 212; *Rexter v. Starin,* 73 N. Y. 601.[1] In *Eckert v. Railway Co., supra,* it was said, in effect, that a person might expose himself to greater danger without negligence in attempting to save human life than he could in attempting

[1] In *Rexter* v. *Starin* the owner of a boat moored at a wharf, with which defendant's steamer threatened to collide, went upon it to, if possible, avert the impending collision and was injured. It was held that "he had the right to do so, almost a duty"; in *Wasmer* v. *R. R.* the plaintiff ran in front of a moving train to take charge of his horse frightened by defendant's negligence.

to save property. It is not claimed that the right to recover in such cases depends in any respect upon the legal liability of the person injured to do that which he was attempting to do when the injuries were received, but rather upon his moral obligation and right to do it.

In this case the plaintiff did not receive the injuries of which he complains in any attempt to protect human life, nor in trying to save his own property. So far as we are advised by the record, he was under no legal obligation to protect the property of his neighbor; yet his attempt to do so was entirely lawful, and was most praiseworthy. If he had failed to make a reasonable effort to save it, he would have merited the censure and contempt of his neighbors; and this would have been so notwithstanding the fact that defendant may have been liable for all loss which could occur, and that what he accomplished would inure to its benefit. It is the duty of everyone, according to the requirements of an enlightened and just public sentiment, to use reasonable efforts to preserve the property of others from threatened destruction; and, as is well known, it is a duty which people generally are quick to discharge. The defendant could have foretold, with almost absolute certainty, when it set the fire in question, that plaintiff, being near, would use every reasonable means in attempting to save Ortman's horses from the flames, and there was nothing surprising or unusual in the attempt he made. Under the circumstances of the case, it was the natural and probable result of the wrong of defendant. A person would not be justified in exposing himself to as great danger in saving property as he would in saving human life,[2] and whether the person injured acted with reasonable prudence would, in most cases, be a question of fact depending upon the circumstances under which the act was done. In *Harris v. Township of Clinton*, 64 Mich. 447; 31 N. W. Rep. 425, it was said that "it is not a universal rule that the defendant is excused from liability merely because the plaintiff, knowing of the danger caused by the defendant's negligence, voluntarily incurs that danger. If the defendant has so acted as to induce the plaintiff, acting with reasonable prudence, to incur the danger, * * * the defendant is liable."[3]

The case of *Seale v. Railway Co.*, 65 Tex. 274; S. C., 57 Am. Rep. 602, is relied upon by appellee, and in some respects it seems to support the ruling of the district court. In that case the court says that the defendant should have anticipated that its negligence would endanger the property of plaintiff, and that she and perhaps others would attempt to extinguish the fire, but that it could not have

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[2] In *Pa. Co.* v. *Langendorf*, 48 Ohio, 316 (1891), it is said that a plaintiff may brave a very high degree of danger where human life is at stake.

[3] So where a passenger tried to jump from a runaway trolley car it was held that the company by its negligence having put her to a choice of perils could not complain of the alternative which she selected, *Lehner* v. *Ry. Co.*, 223 Pa. 208 (1909); *Palmer* v. *Ry. Co.*, 206 Pa. 574 (1903), "in trying to save herself, the plaintiff was, at the same time, unconsciously trying to save the company from the consequences of its negligence, and of her effort to do so it ought to be the last to complain, unless it is manifest that she acted rashly and imprudently," and see *Aspell* v. *R. R.*, 23 Pa. 147 (1854).

anticipated that, in that attempt, life would have been lost without negligence on the part of the person killed. The conclusion of the court seems to rest upon the theory that the petition showed that the death of the deceased was the result of her own negligence. But, under the facts of this case as admitted by the demurrer, the plaintiff was not negligent. It is true that but for the voluntary act of plaintiff he would not have been injured. As we have seen, however, that act, although voluntary in one sense, was invited and induced by the wrong of defendant, and the consequent injuries were the natural and direct result of that wrong. The order of the district court is REVERSED.[4]

CHAPTER IV.

Duties Created by Legislative Enactments and Municipal Ordinances.

BOTT *v.* PRATT.

Supreme Court of Minnesota, 1885. 33 Minnesota, 323.

VANDERBURGH, J. The charter of the city of St. Paul empowers the city council by ordinance, to compel persons to fasten their horses or other animals attached to vehicles, while standing in the streets; such ordinance to have the force of law within the municipal jurisdiction, and to be enforced by the proper penalties. In pursuance of this provision the following ordinance was passed, and was in force when the accident out of which this action arose, occurred: "It shall not hereafter be lawful for any teamster or driver or owner, or any person or persons having in charge any team attached to any vehicle within the city of St. Paul, to leave the same standing in or along any public street in said city, without being securely hitched

[4] See *accord: Ill. Cent. R. R.* v. *Siler*, 229 Ill. 390 (1907), owner of dwelling house injured while trying to extinguish fire which threatened to reach it; *Berg* v. *G. N. R. R.*, 70 Minn. 272 (1897), owner injured while trying to save his property negligently set on fire by defendant: *Contra, Cook* v. *Johnston*, 58 Mich. 437 (1885), woman burned while trying to rescue her husband's horses from a burning shed, and *Logan* v. *Wabash R. R.*, 96 Mo. App. 461 (1902), plaintiff burned while trying to save his hay negligently set on fire by defendant. In *Glanz* v. *R. R.*, 119 Iowa, 611 (1903), it was held that a woman could recover for the injurious consequences of overexerting herself in her efforts to save her husband's property. In *Page* v. *Bucksport*, 64 Me. 51 (1874), it was held that one whose horse breaks through the defective flooring of a bridge is bound to attempt to save it and would be guilty of negligence if he failed to make all reasonable attempts to do so and may recover for injuries received while attempting its rescue; *acc., Cooper* v. *Richland Co.*, 76 S. C. 202 (1907); *contra, Crowley* v. *City of West End*, 149 Ala. 613 (1907).

So in *Mason* v. *Yockey*, 103 Fed. 265, 43 C. C. A. 228 (1900), it was held that where an engineer who discovers, while running an engine, that it is dangerously defective, being unable to avoid the danger without abandoning the engine and blocking traffic and subjecting the persons in the trains to danger of collision, does not assume the risk of injury therefrom by continuing to perform his duty as engineer.

or fastened, or without being held by someone securely." The defendants left a team of horses, attached to a wagon loaded with wood, in a public street, standing unhitched, and for the time without being held or in the charge of any one; the driver, the defendants' servant, having temporarily left them, to make inquiry in reference to the place of delivery of the wood. In his absence the team started and ran down Wabasha street, one of the most public thoroughfares in the city, across the bridge over the Mississippi river, and, colliding with the plaintiff's wagon, caused the injury complained of. There was no evidence showing the particular circumstances which caused the horses to take fright and run away. But the plaintiff's case rests upon the facts above stated, which are undisputed.

The questions of fact as to the character and extent of plaintiff's injuries, and whether he was guilty of contributory negligence in the premises, and also whether the fact that the team was left unfastened and unguarded in a public street was the proximate cause of the injury, were settled by the verdict. *Milwaukee & St. Paul Ry. Co.* v. *Kellogg*, 94 U. S. 469.

The only question, then, remaining for our consideration, is the question of the liability of the defendants in a civil action for the natural and probable consequences of the unexecused omission of their servant to fasten the team. We say unexcused, because, in view of the language and purpose of the charter and ordinance, it is manifestly no sufficient excuse that the horses were believed to be gentle, and not vicious, and had never been known to run away. If the action were simply an ordinary action for negligence, in the absence of any statutory duty, these circumstances, with others, might have been considered by the jury in determining the question of negligence,—*Griggs* v. *Fleckenstein*, 14 Minn. 62, (81,)—though, in such an action, the fact that the horses ran away, and were not properly hitched, would be evidence of negligence in not fastening them. *Strup* v. *Edens*, 22 Wis. 432; *Courtenier* v. *Secombe*, 8 Minn. 264, (299.) But in refusing defendants' instructions to the jury, the court rested the action upon the breach of the ordinance, and in substance charged them that the fact of so leaving the horses unattended, and of the runaway and injury to the plaintiff in consequence,[1] if

[1] The plaintiff must show not merely the wrong, the violation of the statute or ordinance, but also that his injury is the legally proximate result thereof. *Stacey* v. *Knickerbocker Ice Co.*, 84 Wis. 614 (1893), the barriers required by the statute "would have been but gossamer" before the onrush of plaintiff's frightened horses; *Brown* v. *Siegel Cooper Co.*, 90 Ill. App. 49 (1899); *Weinberger* v. *Kratzenstein*, 71 N. Y. Supp. 244 (1901), failure to supply required trap door which even if provided would have been open when injury was received; *Gt. Southern R. R.* v. *Chapman*, 80 Ala. 615 (1886), failure to stop train as required by statute on observing presence of trespassing cattle when seen so late as to make stopping of no avail; *Kidder* v. *Dunstable*, 11 Gray, Mass. 342 (1858), a collision with sleigh unprovided with required bells.

Whether the violation of a statute is the cause of the plaintiff's injury is determined by the same rules and principles which govern liability for the results of any other species of wrongful act or omission. *R. R.* v. *Barnes*, 2 Ind. App. 213 (1891); *True & True* v. *Woda*, 164 Ill. App. 15 (1902).

the jury should so find, established a case against the defendants. The case turns upon the correctness of these instructions.

Highways are dedicated to the use of travellers, and hence it is held to be the law that where horses are unlawfully turned loose or permitted to be at large in a public street by the owner, he is liable for any resulting injury or trespass, without reference to the question of previous knowledge of their vicious disposition or character. *Barnes* v. *Chapin*, 4 Allen, 444; *Goodman* v. *Gay*, 15 Pa. St. 188, 193.[2] In *Barnes* v. *Chapin* the court say, (p. 446:) "It has long been regarded as inconsistent with the safety and convenience of travellers to permit horses to go at large on the highway, and such an act is an offence against our statutes." The difference between that case and this is that while the defendants' horses were rightfully on the public street, they were unlawfully left unguarded. The breach of duty arising from the violation of the statute in one case, and the ordinance in the other, is of the same nature, and the consequences the same, as relating to the safety of a person using the streets. Travellers on a highway would have a right to assume that the statutes referred to were made for their protection, and that they were therefore entitled to the benefit thereof in enforcing a claim for damages against persons through whose neglect to observe the requirements of such statutes they have suffered injury. And so it is insisted by the plaintiff in this action that this ordinance is binding as law upon the inhabitants of the city; that it was lawfully made for a similar purpose, and involves like duties and responsibilities, as respects persons within the municipal jurisdiction. This point will be further considered in the course of the opinion.

Wherever a statute creates a duty or an obligation, then, though it has not in express terms given a remedy, the remedy which is by law properly applicable to that obligation follows as an incident. Addison on Torts, § 58; *Parker* v. *Barnard*, 135 Mass. 116; *Patterson* v. *Detroit, etc., R. Co.*, 22 N. W. Rep. 260. But whether a liability arising from the breach of a statutory duty accrues for the benefit of an individual specially injured thereby, or whether such liability is exclusively of a public character, must depend upon the nature of the duty enjoined, and the benefits to be derived upon the performance.[3] *Taylor* v. *Lake Shore & M. S. R. Co.*, 45 Mich. 74; *Hayes* v. *Mich. Central R. Co.*, 111 U. S. 228, 240; Cooley on Torts, 658.

To illustrate: *Patterson* v. *Detroit, etc., R. Co., supra,* was an action for damages by a traveller, against defendants, for obstructing

[2] See *contra, Marsh* v. *Koons*, 78 Ohio 68 (1908).

[3] "The nature of the duty and the benefits to be accomplished through its performance, must generally determine whether it is a duty to the public in part or exclusively or whether individuals may claim that it is a duty imposed wholly or in part for their especial benefit", Cooley, C. J., *Taylor* v. *R. R.*, 45 Mich. 74, 77 (1881). Where "the duty is due not to the city as a municipal body, but to the public considered as composed of individual persons; each person specially injured by the breach of the obligation is entitled to his individual compensation and to an action for its recovery", Matthews, J., *Hayes* v. *R. R.*, 111 U. S. 228, 240 (1883). "The present general, if not universal, trend of American authorities, is to construe legislative enactments of this type as creating a duty to both the public and to private individuals, and to liberally interpret the class of persons for whose benefit the law was made;" Jaggard, J., *Anderson* v. *Settergren*, 100 Minn. 294 (1907), p. 297; plaintiff, who was shot by a boy of thirteen, was held entitled to re-

a highway in violation of the provisions of a statute prohibiting railway companies from obstructing a street-crossing longer than five minutes. *Parker* v. *Barnard* was an action for damages by a person injured through defendant's omission, in disregard of a statute, to protect a hatchway by a railing. *Hayes* v. *Mich. Central R. Co.* is a case where, as in this case, an action for damages was predicated upon the negligent omission to comply with an ordinance which a city had passed under legislative authority, and which was intended as a protection to persons from injuries. In *Salisbury* v. *Herchenroder*, 106 Mass. 458, plaintiff recovered damages occasioned by the falling of a sign (in an extraordinary gale) which had been suspended by defendant over a street, contrary to a city ordinance, and defendant was not otherwise negligent. In *Owings* v. *Jones*, 9 Md. 108, 117, the defendant was held liable for consequent damages to a party injured through a negligent omission to comply with the provisions of a city ordinance which provided the mode in which vaults in public streets should be protected. In *Devlin* v. *Gallagher*, 6 Daly, (N. Y.) 494, a failure to comply with the provisions of an ordinance requiring certain precautions in blasting, was held *prima facie* evidence of negligence, sufficient to support an action by one injured through such default. In *Baltimore City Ry. Co.* v. *McDonnell*, 43 Md. 534, under a city ordinance limiting the speed of cars to six miles an hour, the defendant was held liable if the jury believed from the evidence that the accident would have been avoided if the cars had not been moving at a greater speed. *Johnson* v. *St. Paul & Duluth R. Co.*, 31 Minn. 283; *Carroll* v. *B. C. R. & M R. R. Co.*, 38 Iowa, 120; *Siemers* v. *Eisen*, 54 Cal. 418.

The city ordinance under consideration was undoubtedly intended for the benefit of persons travelling on the streets, and all such persons while so travelling would have the right to expect the ordinance to be observed and to govern themselves accordingly. *Wright* v. *Malden & M. R. Co.*, 4 Allen, 283; *Lane* v. *Atlantic Works*, 111 Mass. 136.

On the other hand, where the duties enjoined are due to the municipality or to the public at large, and not as composed of individuals, a different rule is intended to apply.[4] This is well illustrated by

cover against the vendor of the gun and cartridges under an act making it unlawful for a child under fourteen to have possession of firearms and making it a misdemeanor to violate the act.

Acts prohibiting child labor are generally construed to be passed, in part at least, to protect the children from injury, and if employed while under legal age they may recover for injuries received while at work. *Stehle* v. *Jaeger Automatic Machine Co.*, 220 Pa. 617 (1908), but where the child is over the age at which he is permitted to work, a failure to file the affidavit of age required by the statute will not give the boy a right to recover for injuries received while at work, *Platt* v. *Southern Photo Material Co.*, 4 Ga. App. 159 (1908).

[4] *Atkinson* v. *Newcastle Water Works*, L. R., 2 Ex. D. 441 (1877), failure to supply water as required by act sufficient for use at fires, plaintiff's house burned in consequence. The act in effect was as Lord Cairns said, p. 448, "Not an act of public and general policy but rather in the nature of a private legislative bargain with a body of undertakers as to the manner in which they would keep up certain public works", see *acc. Clegg, Parkinson & Co.* v. *Earby Gas Co.*, L. B. (1896), 1 Q.B. 592, Wills, J., p. 594, "Where there is an obligation created by statute to do something for the benefit of the public generally, or of such a large body of persons that they can only be dealt with practically *en masse*, as it were, and where the failure to comply with

the cases of *Kirby* v. *Boylston Market Assn.*, 14 Gray, 249, and *Flynn* v. *Canton Co.*, 40 Md. 312, 323, in which it was held that the owners of land abutting on streets were liable to the city alone for the breach of ordinances requiring such owners to keep sidewalks clear of snow and ice, and in good repair, and that they were not liable in damages to persons injured by their neglect to perform the duties enjoined by such ordinances. This proceeds upon the ground that it is the sole duty of the city to keep the streets in good repair, and clear of snow and ice. The work done, and fines or taxes collected in such cases, to the extent thereof, are to be considered as so far in aid of the city in the discharge of its duty.[5] See, also, *Taylor* v. *Lake Shore & M. S. R. Co., supra; Heeney* v. *Sprague,* 11 R. I. 456. And so, also, generally of ordinances or statutes relating specially to duties due strictly to the corporation or state.

The analogy between statutes and the ordinances of cities is, of course, not to be extended beyond the proper limits of municipal jurisdiction. But in matters properly of local cognizance it is neces-

the statutory obligation is liable to affect all such persons in the like manner, though not necessarily in the same degree; there is no separate right of action to every person injured, by breach of the obligation in no other manner than the rest of the public"; here plaintiff's business was injured by insufficient supply of inferior gas.

Where an ordinance or statute authorizes, ratifies or regulates the terms of a contract between a municipality and a public service corporation supplying public necessities, such as water or gas, there is generally no private right of action recognized throughout the United States. *Boston Safe Deposit Co.* v. *Salem Water Co.*, 94 Fed. 238 (1899); *Lovejoy* v. *Bessemer Water Works Co.*, 146 Ala. 374 (1906), and cases cited, *contra, Paducah Lumber Co.* v. *Paducah Water Co.*, 89 Ky. 340 (1889); *Gorrell* v. *Water Co.*, 124 N. C. 328 (1899), and *Mugge* v. *Tampa Water Co.*, 42 So. R. 81, Fla. 1906, and *Cf. Trust Co.* v. *Fisher*, 200 U. S. 57 (1905).

So when the object of the statute or ordinance is the promotion of public order and not the advantage of individuals, as in the case of the so-called Sunday laws, *Tingle* v. *R. R.*, 60 Iowa 333, 1882; see, violations of similar acts as contributory negligence, *Sutton* v. *Wauwatosa*, 29 Wis. 21 (1871), and *Platz* v. *Cohoes*, 89 N. Y. 219 (1882), and cases cited therein; but see, *contra Bosworth* v. *Swansey*, 10 Metc., Mass. 363 (1845), and *Johnson* v. *Irasburgh*, 47 Ver. 28 (1874). So in *Berry* v. *Sugar Notch Boro.*, 191 Pa. 345 (1899), plaintiff struck by falling tree not barred by fact that when struck he was driving a trolley car at a speed prohibited by ordinance. So one violating an act of Parliament designed to prevent obstruction of traffic is not liable to wayfarers whose property is injured in consequence unless some injury of this sort was under the circumstances probable from the nature or manner of the violation. *Sharp* v. *Powell*, L. R. 7 C. P. 253 (1872; 49 Am. L. Reg. p. 84. See also, as to public nuisances, *Fairbanks* v. *Kerr*, 70 Pa. 86 (1871), p. 91. "The nuisance and the civil injury are different things." A street speaker collected a crowd, some of whom stood on and injured plaintiff's property; *Allegheny* v. *Zimmerman*, 95 Pa. 287 (1880), p. 294. "Conceding that the city might have been indicted for suffering the pole (a Liberty pole in the middle of the street), to remain * * * it does not necessarily follow that this action for damages (for injuries received by its fall) would lie"; *Burbank* v. *Bethel Steam Mill Co.*, 75 Maine 375 (1883), p. 381; fire set by steam engine operating without license required by statute; so even where the nuisance is private the injury must be of the sort threatened by it, *Bowden* v. *Lewis*, 13 R. I. 189 (1881); see also, *Bosch* v. *R. R.*, 44 Ia. 402 (1876), defendant's cars blocked the plaintiff's way to a river, so that firemen could not get water to put out a fire which burned his house.

[5] The reason why the duty created by statutes and ordinances requiring lot owners to keep sidewalks in repair and clear of obstruction is regarded as public only, is stated more fully and with greater accuracy in *Rochester* v.

sary and eminently proper that such powers should be committed to the municipality, to be exercised through ordinances which shall be subordinate to and consistent with the general laws, or in proper cases be authorized to take their place. Cooley, Const. Lim. *199. An ordinance which a municipal corporation is authorized to make, is as binding on all persons within the corporate limits as any statute or other laws of the commonwealth, and all persons interested are bound to take notice of their existence. *Heland* v. *City of Lowell*, 3 Allen, 407; *Vandine's Case*, 6 Pick. 187; *Gilmore* v. *Holt*, 4 Pick. 257; *Johnson* v. *Simonton*, 43 Cal. 242, 249.

As respects the ordinance in question, it was, as we have seen, anthorized by the charter, was within the proper sphere of municipal legislation, and not inconsistent with or in contravention of general laws, and, though local in its application, it was obligatory upon persons within the limits of the city; and there is no reason why it should not be held to impose a legal duty, such that a civil action for damages might be maintained for a breach thereof, as in the case of like statutory duties. *Hayes* v. *Mich. Central R. Co. supra; Mason* v. *City of Shawneetown* 77 Ill. 533; *Flynn* v. *Canton Co.*, 40 Md. 312; *Jackson* v. *Shawl*, 29 Cal. 267. Some courts, however, deny the application of the rule in case of city ordinances, and insist that it is applicable solely to laws enacted by the legislature. *Heeney* v. *Sprague*, 11 R. I. 456; *Vandyke* v. *City of Cincinnati*, 1 Disney, (Ohio,) 532; *Philadelphia & R. R. Co.* v. *Ervin*, 89 Pa. St. 71. These were cases arising out of a failure to comply with ordinances similar in character to the one considered in *Flynn* v. *Canton Co.*, and might have been disposed of on the same ground, and were rightly determined without necessarily involving the question we are considering.[6]

A different view is also suggested in *Chambers* v. *Ohio Trust Co.*, 1 Disney, (Ohio,) 327, 336; and in *Knupfle* v. *Knickerbocker Ice Co.*, 84 N. Y. 484, it was held by a divided court that the result of the decisions in New York is that a breach of a municipal ordinance is evidence of negligence merely, to be considered with other facts in the case.[7] But we do not regard the case of much value as

Campbell, 123 N. Y. 405 (1890), p. 415 *et seq.* and *Manchester* v. *Hartford*, 30 Conn. 118 (1862).

Accord: *Manchester* v. *Hartford*, 30 Conn. 118 (1861); *Hartford* v. *Talcott*, 48 Conn. 525 (1881); *Kirby* v. *Boylston Market Assoc.*, 14 Gray 249 (Mass. 1859), "Work under such ordinances relieves to the extent of its cost or value from charges to which otherwise it would be necessarily in discharge of its municipal duties subjected to;" *Keokuk* v. *Keokuk*, 53 Iowa 352 (1880), such ordinances are "simply a method of exercising its (the city's) power of taxation by which he (the lot owner) is made the agent of the city to expend the amount of the tax and the responsibility for the performance of the work remains where the power to control it is found."

[6] While *Heeney* v. *Sprague* and *Vandyke* v. *Cincinnati* might have been decided on this ground neither *P. & R. R. R.* v. *Erwin* nor *Chambers* v. *Trust Co.* are capable of being so explained nor in the latter case is anything said of the admissibility of an ordinance as evidence of negligence to be considered with other facts.

[7] Violation of an ordinance is held to be negligence *per se* in *Toledo, Wabash, etc., R. R.* v. *O'Connor*, 77 Ill. 391 (1875); *United States Brewing Co.* v. *Stoltenberg*, 211 Ill. 531 (1904); *Correll* v. *R. R.*, 38 Iowa 120 (1874);

an authority. The rule is to be regarded as a common-law rule, and it would hardly be consistent or reasonable to hold that it might be applicable to an act of the legislature, and inapplicable where the legislature, instead of itself enacting a law, should, in a proper case, expressly authorize a municipal corporation to make the same law for the local jurisdiction. Suppose, for instance, that the legislature had itself expressly enacted the substance of the ordinance in question in the charter, instead of authorizing the city council to enact it: could it be said that in the former case an injured party would be entitled to indemnity, and in the latter not? In this class of cases, therefore, proof of a breach of the ordinance will make a case of negligence; but, of course, the plaintiff must make it appear, as the court properly charged the jury in this case, that the injury complained of resulted from the alleged neglect of the duty thereby imposed; and so defendant may show, as matter of defence, that the accident occurred without his fault, or that the observance of the ordinance was immaterial as respects the plaintiff; as, for instance, in the case of the omission to ring the bell of an engine, of the approach of which the plaintiff otherwise had notice.

Order affirmed.

KELLY *v.* HENRY MUHS COMPANY.

Supreme Court of New Jersey, 1904. 71 N. J. L. 358.

GUMMERE, CHIEF JUSTICE. The plaintiff sues to recover compensation for injuries received by him by falling through an unguarded elevator shaft in the defendant's factory.

The declaration avers that the plaintiff was a fireman in the employ of the fire department of the city of Passaic and at the time of the accident, which occurred in the night-time, was in the defend-

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Comereth v. *M. P. R. R.*, 96 Mo. 509 (1888); *Brannock* v. *Elmore*, 114 Mo. 55 (1892); and *R. R.* v. *Brown*, 11 Tex. Civ. App. 503 (1895).

It has been held *prima facie* evidence in the following cases: *Briggs* v. *N. Y. etc. R. R.*, 72 N. Y. 26 (1878); *Wabash R. R.* v. *Kamradt*, 109 Ill. App. 203 (1903); *True and True* v. *Woda*, 104 Ill. App. 15 (1902) [but cf. *R. R.* v. *O'Connor, supra*].

In some cases it is said that the violation of an ordinance is a fact admissible as having "a direct bearing upon the question of the use of due care by the defendant." *Wright* v. *Malden etc. R. R.*, 4 Allen 283 Mass. (1862); *U. P. R. R.* v. *Rassmassen*, 25 Neb. 810 (1889); *Beck* v. *R. R.*, 25 Oregon 32 (1893). See also Sherman & Redfield, Negligence, 5th Ed., sec. 467.

If it appear that the defendant neither caused nor could have prevented the state of things prohibited by ordinance or even statute he is not responsible for the resulting harm, *Hanlon* v. *R. R.*, 129 Mass. 310 (1880); so if under all the circumstances the purpose of the ordinance or statute will best be served by not obeying its letter, *Wakefield* v. *R. R.*, 37 Vt. 330, p. 335 (1864).

The defendant is not necessarily relieved from liability by compliance with an ordinance or statute—*Grand Trunk R. R.* v. *Ives*, 144 U. S. 408 (1892), statutory precautions at level crossing; such statutes prescribe the minimum rather than the maximum care required—*Thompson* v. *R. R.* 110 N. Y. 636 (1888); see also cases given in Sherman and Redfield, Negligence, sec. 467, n. 11.

ant's factory in the performance of his duties as a member of the fire department to aid in extinguishing a fire which had broken out in the building.

The liability of the defendant is predicted upon the fifth section of the statute entitled "A general act relating to factories and workshops, and the employment, safety, health and work hours of operatives." *Gen. Stat., p.* 2345. The first section of this act imposes a penalty upon any employer, engaged in manufacturing, for discharging an employe without notice; the second section requires that accidents to employes in any workshop, factory, or mine, shall be reported to the labor inspector; the third section requires all machinery, shafting, belting, &c., in factories and workshops, when so placed as to be dangerous to employes, to be securely guarded, when practicable; the fourth section prohibits the employment of minors or women in the cleaning of machinery; the *fifth section* requires that all hoistways and elevators in factories shall be protected by trap doors or guard rails.

(The sixth to the fourteenth sections make further provisions for the health, safety and comfort of employes.)

The fifteenth and last section imposes a penalty upon the owner, lessee or occupant of any factory, mine, workshop, or store, for violating any of the provisions of the act.

Both the title and the body of the statute make it plain that the sole purpose of its enactment was to provide for the protection and comfort of employes. The duties imposed thereby are exclusively for their benefit. Neither firemen nor any other class of persons, except the one named in the act, come within its provisions, and for injuries resulting from failure to perform any of those duties the employer is answerable to his operatives alone. In an action based upon a neglect of duty it is not enough for the plaintiff to show that the defendant neglected to perform a duty imposed by statute for the benefit of a third person, and that he would not have been injured if the duty had been performed, he must show that the duty was imposed for his benefit, or was one which the defendant owed to him for his protection. *Hamilton* v. *Minneapolis Desk Manufacturing Co., 78 Minn.* 3.

The declaration failing to disclose that the injuries received by the plaintiff were due to the failure of the defendant to perform any duty which the latter owed to the former, the demurrer should be sustained.

The defendant is entitled to judgment on the demurrer.[1]

[1] *Accord*: *Gibson* v. *Leonard*, 143 Ill. 182 (1892); *Hamilton* v. *Desk Co.*, 78 Minn. 3 (1899). Where the language of a similar act or ordinance does not restrict its operation to any particular class of persons, a licensee may recover for injuries received by reason of its violation—*Sheyer* v. *Lowell*, 134 Cal. 357 (1901), but not a trespasser—*Flanagan* v. *Sanders*, 138 Mich. 253 (1904), an intending customer attempting to avoid the crowd at a bargain sale by using a private entrance. When the language of a statute is general in its terms the court will not speculate as to the intention of the Legislature in order to restrict its operation to a particular class of beneficiary—*Rosse* v. *R. R.*, 68 Minn. 216 (1897) overruling *Fitzgerald* v. *R. R.*, 29 Minn. 336, child injured through railroad's failure to obey fencing act. When the act is designed to protect the public or some class thereof in some particular right or interest or from some particular injury, no recovery can be had, even by a member of the class for whose benefit it was enacted, unless the breach injures him in such right or interest or brings such

PHILADELPHIA AND READING RAILROAD CO. *v.* ERVIN.

Supreme Court of Pennsylvania, 1879. 89 Pa. 71.

Mr. Justice Gordon delivered the opinion of the court.

In the determination of this case it is of no kind of consequence whether the wharf of the defendant below was a public or private one, since the plaintiff was there not as a trespasser nor by mere license, but upon not only his own business but also that of the company. It was engaged in the transportation and sale of coal, and he was engaged in delivering it to the company's customers, so that whilst he was not employed directly by the defendant, yet, it profited by his employment. The company then in this manner inviting and making it necessary for carters to come upon its premises, was bound to provide ways for horses and vehicles which were reasonably safe. It was, however, not bound to do more than this; if such ways were reasonably safe, if an ordinarily prudent man could drive along them without danger, the obligation of the defendant was fully discharged; it was not liable for extraordinary accidents, neither was it liable for results arising from a want of judgment or prudence on part of the plaintiff. Was the place where the plaintiff's carts stood unsafe?

We turn now to the second specification of error, and we are induced to consider it more because of our desire to relieve the case from doubt upon the retrial than because of any error in the ruling. That assignment embraces the defendant's objection to the introduction in evidence of the city ordinance requiring the owners of wharves, on the Schuylkill and Delaware Rivers, to put and maintain cap-logs upon them of a height not less than eight inches. The plaintiff, in one of the counts of his *narr.*, declared upon the ordinance as raising a duty which the defendant was bound to observe, and laid the damages, resulting from the loss of his horse and cart, as a consequence of the neglect of such duty. This count could not have stood the test of a demurrer; or had the Court been asked to charge that upon this count the plaintiff could not recover, and also that upon the remaining counts the ordinance could not be regarded as evidence, it would have been bound so to charge.

For, let us suppose that these wharves were so constructed that, *extra* the ordinance, no charge of negligence could arise, and hence no common-law action would lie; would disobedience to this regulation, of itself, subject the company to such charge and action? This question would seem almost to answer itself; for if it be affirmed, then may civil duties and civil remedies be given or taken away by ordinances; a power as yet quite beyond the reach of municipal legislation.

The national or state legislature may do this, for it is the supreme power, and as such can make that immoral which was before indifferent, and that neglect which was before prudence, but the city of Philadelphia has no such power. Its ordinances are but police regulations enforceable by penalties, *recoverable by actions of debt or otherwise* as may be prescribed, but if not so enforced they come

particular injury upon him, *Gorris* v. *Scott*, L. R. 9 Ex. 125 (1874); *Hocking Valley R. Co.* v. *Phillips*, 81 Ohio St. 453 (1910); *Bischof* v. *Illinois Southern R. Co.*, 232 Ill. 446 (1908); but see, *contra*, *Stanley* v. *Atchison, T. & S. F. R. Co.*, 88 Kans. 84 (1913).

to nothing. An ordinance may forbid the maintenance, by my neighbor, of a cesspool upon his premises, and it may, by penalty, compel him to abate it, but whether it does so or not, I may, if I am damaged thereby, have my common-law action against him, but if I am not damaged I am without remedy; in this the ordinance neither helps nor hinders. This matter is well stated by Spencer, J., in the case of Vandyke *v.* The City of Cincinnati, Disney's Rep. 532, thus: "I conclude, then, that the ordinance imposed upon Harrison a public duty alone, which can only be enforced by the penalty prescribed, and non-performance of which does not subject him to a civil action at the suit of a person injured." In arriving at this conclusion the learned justice uses the argument I have thought proper to adopt; *that is, an ordinance cannot create a civil duty enforceable at common law.* For if a City Council has power so to do—if it has the power to create such obligation, it must also have the power to restrict it, in other words to prescribe the sole consequences arising therefrom, but it will, we apprehend, be conceded that a power, like the one here indicated, is wholly beyond the province of such a body.

There are indeed cases where such ordinances have been received in evidence in common-law actions for negligence, but they are generally such as enter into the case itself or enforce a common-law duty. Such are ordinances regulating the speed of railroad trains when passing through towns or cities. Here the ordinance may, and usually does, enter into the question of negligence, for the rate of speed to be anticipated has much to do with the care to be exercised by those crossing the tracks. So, on the other hand, those in charge of trains are not only subject to the common-law duty of passing through towns slowly and cautiously, but they must know that persons depending upon the observance of the municipal regulations will not take all that care which would be required in the open country. The case in hand, however, involved no such duties. Whether the defendant should or should not have had cap-logs upon its wharves was a matter which addressed itself to the judgment of those having its affairs in hand. The omission of these caps did not, *per se,* involve the company in any responsibility beyond the penalty of the ordinance. Neither could the plaintiff have placed any dependence upon the observance of such ordinance, for he knew that if it applied at all to the defendant's wharves it had not been observed; he knew that he must depend for the preservation of his property upon his own care and skill, and, these failing, he then had his common-law remedy for compensation.

Judgment reversed, and a new *venire* ordered. [1]

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[1] *Accord*: *Chambers* v. *Ohio Life Ins. & T. Co.,* 1 Disney (Ohio) 327 (1857); *Vandyke* v. *Cincinnati & Harbeson,* 1 Disney 532 (1857); *Heeney* v. *Sprague,* 11 R. I. 456 (1878). The two latter cases could have been so decided on the point that the ordinance in question imposed a duty for the public benefit exclusively in that it transferred to the lot owner the cost of performing an admitted municipal duty, *cf. Rochester* v. *Campbell,* 123 N. Y. 405 (1890). In Pennsylvania an ordinance if valid may be given in evidence but its violation is not alone a sufficient *prima facie* case—*Lederman* v. *P. R.*

PARKER *v.* BARNARD.

Supreme Judicial Court of Massachusetts, 1883. 135 *Mass.* 116.

Tort, against the owners and the occupants of a building in Boston, for personal injuries sustained by the plaintiff therein. Trial in this court, without a jury, before Field, J., who found for the defendants, and reported the case for the consideration of the full court.

The Court found that the plaintiff, who, as a policeman in the course of his duty to see that the doors of dwellings and stores were properly secured, entered the defendant's premises and fell into an unfenced elevator shaft, was within the protection, as one lawfully on the premises, of the Statute of 1872, c. 260, which, "to provide * * * for the better preservation of life and property in Boston," enacts that the openings of every elevator shall be provided with "a good and substantial railing," and imposes a penalty of one hundred dollars for each violation. [1]

DEVENS, J. The fact that there was a penalty imposed by the statute for neglect of duty in regard to the railing and protection of the elevator well does not exonerate those responsible therefor from such liability. The case of *Kirby* v. *Boylston Market,* 14 Gray, 249, cited by one of the defendants, does not decide otherwise. It holds only that an ordinance of the city of Boston, requiring abutters, under a penalty, to clear their sidewalks from snow and ice, still left the remedy, under the St. of 1850, *c.* 5, § 1, for all damages sustained by an accumulation of snow and ice, exclusively against the inhabitants of the city in their corporate capacity.

As a general rule, where an act is enjoined or forbidden under a statutory penalty, and the failure to do the act enjoined or the doing of the act forbidden has contributed to an injury, the party thus in default is liable therefor to the party injured, notwithstanding he may also be subject to a penalty. *Kidder* v. *Dunstable,* 11 Gray, 342. *Salisbury* v. *Herchenroder,* 106 Mass. 458. *Hyde Park* v. *Gay, ubi supra.*

New trial ordered. [2]

R. Co., 165 Pa. 118 (1895); it is a mere official expression of municipal opinion as to what is proper conduct—*Ubelmann* v. *American Ice Co.,* 209 Pa. 398 (1904), and the jury may find that a prudent man would not under the circumstances have considered it necessary to obey it, *Riegert* v. *Thackery,* 212 Pa. 86 (1905); if void for any reason it may not be shown at all, *Burns* v. *Co.,* 210 Pa. 90 (1904). Since an ordinance creates a public duty enforceable by the municipality—every one may depend on its being obeyed and may regulate his own conduct accordingly; it may therefore be shown as part of the circumstances of the case in the light of which the propriety of the conduct of the plaintiff or defendant is to be determined, *Connor* v. *Traction Co.,* 173 Pa. 602 (1896); *Foote* v. *Am. Produce Co.,* 195 Pa. 190 (1900).

[1] The facts are restated and part of the opinion omitted.

[2] *Accord: Couch* v. *Steel,* 3 El. & Bl. 402 (1854); *Love* v. *Fairview,* 10 Brit. Columbia 330 (1904); *Kelly* v. *Glebe Sugar Refining Co.,* 20 Rettie (Scot) 833, (1893); *Salisbury* v. *Herschenroder,* 106 Mass. 458; *Marino* v.

Lehmaier, 173 N. Y. 530 (1903); *Westervelt* v. *Dives*, 231 Pa. 548 (1911); *Stehle* v. *Jaeger Automatic Machine Co.*, 220 Pa. 617 (1908); but see *Mack* v. *Wright*, 180 Pa. 472 (1897), with which compare *Shields* v. *Pugh*, 107 N. Y. S. 604; *Aldrich* v. *Howard*, 7 R. I. 199 (1862), *contra*, *Mack* v. *Wright*, 180 Pa. 472 (1897), and see for criticism of *Couch* v. *Steel* (*supra*), Beven, Negligence in Law, 3rd Ed., p. 305, *et seq.* Where the statute provides a forfeiture or penalty recoverable by the individual aggrieved by its violation, the recovery of such forfeiture or penalty is generally construed to be the sole private remedy—*Stevens* v. *Jeacocke*, 11 Q. B. (A. & E. N. S.) 731 (1848), interference with fishing rights—forfeiture of fish caught and money penalty held exclusive remedy. But see *Groves* v. *Wimborne*, L. R. 1898, 2 Q. B. 402, where it is held that a penalty though recoverable for the benefit of the injured individual was not, in view of the object and provisions of the act, intended to be the sole remedy.

Part 3.

Duties and Liabilities of Persons Occupying Certain Specific Relations.

CHAPTER I.

Owners, Occupiers and Users of Real Estate.

SECTION 1.

Toward Persons and Property Outside the Boundaries of the Premises.

GILES *v.* WALKER.

In the Queen's Bench Division, 1890. *L. R.* 24 *Q. B. D.* 656.

Appeal from the Leicester County Court.

The defendant, a farmer, occupied land which had originally been forest land, but which had some years prior to 1883, when the defendant's occupation of it commenced, been brought into cultivation by the then occupier. The forest land prior to cultivation did not bear thistles; but immediately upon its being cultivated thistles sprang up all over it. The defendant neglected to mow the thistles periodically so as to prevent them from seeding, and in the years 1887 and 1888 there were thousands of thistles on his land in full seed. The consequence was that the thistle seeds were blown by the wind in large quantities on to the adjoining land of the plaintiff, where they took root and did damage. The plaintiff sued the defendant for such damage in the County Court. The judge left to the jury the question whether the defendant in not cutting the thistles had been guilty of negligence. The jury found that he was negligent, and judgment was accordingly entered for the plaintiff. The defendant appealed.

Toller, for the defendant. The facts of this case do not establish any cause of action. The judge was wrong in leaving the question of negligence to the jury. Before a person can be charged with negligence, it must be shewn that there is a duty on him to take care. But here there is no such duty. The defendant did not bring the thistles on to his land; they grew there naturally. [He was stopped by the Court.]

R. Bray, for the plaintiff. If the defendant's predecessor had left the land in its original condition as forest land the thistles would never have grown. By bringing it into cultivation, and so disturbing the natural condition of things, he caused the thistles to grow, thereby creating a nuisance on the land just as much as if he had intentionally grown them. The defendant, by entering into occupation of the land with the nuisance on it, was under a duty to prevent damage from thereby accruing to his neighbour. The case

resembles that of *Crowhurst* v. *Amersham Burial Board*, 4 Ex. D. 5, where the defendants were held responsible for allowing the branches of their yew trees to grow over their boundary, whereby a horse of the plaintiff, being placed at pasture in the adjoining field, ate some of the yew twigs and died.

LORD COLERIDGE, C. J. I never heard of such an action as this. There can be no duty as between adjoining occupiers to cut the thistles, which are the natural growth of the soil. The appeal must be allowed.

LORD ESHER, M. R. I am of the same opinion.

Appeal allowed.[1]

DOMINA REGINA *v.* WATTS.

Court of Queen's Bench, 1703. 1 *Salkeld*, 357.[1]

Indictment for not repairing a house standing upon the highway, ruinous and like to fall down, which the defendant occupied and ought to repair *ratione tenure suae*. The defendant pleaded not guilty; and the jury found a special verdict, *viz.* That the defendant

[1] See Wood on Nuisance (1875), § 119: "In order to create a *legal* nuisance, *the act of man* must have contributed to its existence. Ill results, however extensive or serious, that flow from natural causes, cannot become a nuisance, even though the person upon whose premises the cause exists could remove it with little trouble and expense." *Accord: Gulf, C. & S. F. R. Co.* v. *Oakes*, 94 Tex. 155 (1900), no liability for the spread of bermuda grass planted on the defendant's right of way.

See the discussion of the principal case in *Clerk* v. *Lindsell*, Law of Torts, 2nd Ed., 367.

"In order to create a *legal* nuisance, *the act of man* must have contributed to its existence. Ill results, however extensive or serious, that flow from natural causes, cannot become a nuisance, even though the person upon whose premises the cause exists could remove it with little trouble and expense;" Wood on Nuisance (1875), § 119. So neither a natural pond of stagnant water, *Roberts* v. *Harrison*, 101 Ga. 773 (1897), nor a swamp, *Woodruff* v. *Fisher*, 17 Barb. 224 (N. Y., 1853), though emitting gases injurious to the health of the neighborhood, is a nuisance; *accord, Mohr* v. *Gault*, 10 Wis. 513 (1860), overflow caused by bar in stream formed by natural accumulation of silt, etc.; *Livesey* v. *Schmidt*, 16 Ky. L. R. 596 (1895), natural surface drainage. The injurious condition must be due not only to the act of man, but to some act of the occupier or his predecessor in possession, *Brown* v. *McAllister*, 39 Cal. 573 (1870), flow of offensive water from upper tenements over defendant's land to that of plaintiff.

But when the natural state of the land is changed by some act of the owner or possessor, he is liable if the resulting condition is one which injuriously affects neighboring lands or endangers travel on adjacent highways, whether it be strictly speaking an artificial condition, *Bird* v. *Elwes*, 18 L. T. N. S. 727 (1868), an artificial ornamental lake; or an altered natural condition, *Crowhurst* v. *Burial Board*, L. R. 4 Ex. D. 5 (1878), yew trees planted so near the line of the adjacent property that, by their growth, they project over on to it and poison the owner's cows pasturing thereon. And this is so though the defendant did not himself create the condition, but has merely maintained the land in the condition in which it passed to him from a prior occupier, *Smith* v. *Giddy*, L. R. 1904, 2 K. B. 448, trees, evidently long planted, projecting over adjacent land and cutting off the sun from fruit, etc., growing there; *aliter*, however, if the injurious condition is itself wholly within the defendant's land and is caused by an act "necessary in order to enable the owner to have the natural use of his own land," Brett, L. J., *West Cumberland Co.* v. *Kenyon*, L. R. 11 Ch. D. 782 (1879), p. 787, that use for which the character of the land marks it as by nature fitted; see *Peck* v. *Herrington*, 109 Ill. 611 (1884), diversion of surface drainage, necessarily incidental to the farming of arable land, held no nuisance.

[1] S. C. 2 Ld. Raym. 856.

occupied, but was only tenant at will, and whether he was liable was the question. *Et per Cur.* The *ratione tenuræ* is only an idle allegation; for it is not only charged, but found, that the defendant was occupier, and in that respect he is answerable to the public; for the house was a nuisance as it stood, and the continuing the house in that condition is continuing the nuisance. And as the danger is the matter that concerns the public, the public are to look to the occupier, and not to the estate, which is not material in such case as to the public. And POWELL, J. held, That there might be such a tenure, and that tenures being chargeable upon the land by the staute of avowries, it is not material, even in an avowry, what estate the occupier has i.. the premises liable.[2]

WOLF *v.* DES MOINES.

Supreme Court of Iowa, 1905. 126 Iowa, 659.

BISHOP, J.—Defendant is engaged in the business of buying and shipping grain at Avoca, Pottawattamie county, and in that connection owns and operates a grain elevator situate on the station grounds of the Chicago, Rock Island & Pacific Railway Company in said city. The building is located on the north side of the railway tracks, and in close proximity thereto. The building does not abut on any regularly laid out street, but the grounds are open to permit of free access to all buildings situate thereon. Running past the east end of defendant's building their is a traveled way across the station grounds, which connects with the streets of the city, and it appears that such way has been generally used for many years by the traveling public having occasion to pass that way. In the operation of defendant's elevator some form of power is essential, and in October, 1900, defendant installed in the engine room—which is an addition built on the north side of the main building—a gasoline

[2] So where a wall falls and injures one rightfully on adjacent premises, *Kinney* v. *Morley*, 2 U. C. C. P. 226 (1851); *cf. St. Joseph Ice Co.* v. *Bertch*, 33 Ind. App. 491 (1904), fall of wall injuring plaintiff's property not alleged to be on adjacent land by authority of its owner.

So an occupier of land may not make a use of his property, the effect of which extends beyond his own premises and injuriously affects his neighbor's property. *Mayhew* v. *Burns*, 103 Ind. 328 (1885), excavation on defendant's premises causing adjacent land to cave in; *Barnes* v. *Masterson*, 38 N. Y. App. Div. 612 (1899), plaintiff's wall overthrown by sand piled against it by lessee of adjoining premises: but the occupant does not insure the adjacent owner against injury accidentally caused by work done on his premises, lawful in itself, not inherently dangerous and carefully done; *Ulshowski* v. *Hill*, 61 N. J. L. 375 (1898), plaintiff injured by wall which adjacent owner is pulling down and a part of which falls in the opposite direction from that in which it is being pulled. In *Defiance Water Co.* v. *Olinger*, 54 Ohio, 532 (1896), it was held that an occupant of a house, whether as tenant or not, or on what terms did not appear, on defendants' property, might recover for injury to his property by the bursting of a tank negligently maintained by the defendant; see also, *Ingwersen* v. *Rankin*, 47 N. J. L. 18 (1885), one leasing flat in tenement liable to tenant for flooding caused by defective plumbing in upper flat, which defect existed when upper flat was leased.

One erecting upon his land a building so constructed that snow and ice will fall upon the highway, *Smethurst* v. *Barton Square Church*, 148 Mass. 261 (1889), or upon adjoining property, *Ferris* v. *Board of Education*, 122 Mich. 315 (1899), is liable for the resulting injury to travellers or adjacent owners.

engine. The exhaust pipe from such engine extends up through the roof of the engine room, and the location thereof is about forty feet distant from the traveled way referred to. When the engine is working, loud, sharp puffs or explosions are given off through such exhaust pipe, at more or less irregular intervals. There was evidence on behalf of plaintiff tending to prove that the muffler in use by defendant—a muffler being, as we understand it, a device attached to the exhaust pipe, and through which the exhaust passes, and intended to muffle the sound of the exhaust—was ineffective for the purpose intended. There was also evidence tending to prove that, without interfering with the effective operation of the engine, the exhaust pipe could be carried to the rear of the building, or the exhaust could be conducted into a tube or vat of water, by either of which means the noise as heard from the street would be materially lessened. At the time of his accident plaintiff was driving a team of horses down the traveled way mentioned, when his team took fright from the exhaust explosions produced by defendant's engine, and ran away, resulting in the injury of which he complains.

The claim made by plaintiff for damages is predicated upon the theory that defendant was negligent in the matter of the use and operation of its elevator, and the engine therein located, thereby creating a nuisance, and that his injury was the proximate result thereof. The right to recover upon the claim as thus made is put squarely in issue by the motion to direct a verdict. The doctrine is well settled that it is not negligence *per se* to establish, in nearby proximity to a public thoroughfare, a factory, shop, or other industrial plant, in the necessary and reasonable operation of which loud or discordant noises are produced. The demand of the present day conditions are such that the establishment and operation of such plants not only subserve the convenience of our people, but, in the larger part, they are matters of necessity. Thus in a recent case it is well said:

It certainly cannot be said to be *per se* negligence to erect and operate a sawmill within sixty feet of a county road. If this be not true, then it would be hazardous to erect any manufacturing establishment on a highway or public street, because, if a horse should become frightened, and injure some one, then the owners or proprietors would be liable to damages therefor. * * * To hold that the erection of a sawmill or a manufacturing establishment near a public highway or street is *per se* negligence would be to circumscribe the business affairs of life, and retard the progress of the age. The usual noises which attend the operation of machinery in mills and manufacturing establishments situated on public highways and streets are such to which the traveling public must submit.

Goodin v. Fuson, 22 Ky. Law, 873 (60 S. W. Rep. 293). On the other hand, it is to be said that the traveling public is entitled to make free use of highways and streets, and an adjoining property owner has no right to so use his property as to interrupt or interfere with the exercise of such right by creating or maintaining conditions unnecessarily dangerous, either in the way of producing unusual noises calculated to frighten horses ordinarily tractable and subject

to control, or otherwise. *Parker v. Union Woolen Co.*, 42 Conn. 402; *Smethurst v. Ind. Cong. Church*, 148 Mass. 263 (19 N. E. Rep. 387, 2 L. R. A. 695, 12 Am. St. Rep. 550); *Island Coal Co. v. Clemmitt*, 19 Ind. App. 21 (49 N. E. Rep. 38). Such, as we think, is also the doctrine of the cases cited and relied upon by counsel for appellant, wherein is involved the liability of a railway company for damages where a team becomes frightened and runs away as the result of the sudden noise incident to the escape of steam from a standing locomotive. *Louisville, etc., Ry. v. Schmidt*, 134 Ind. Sup. 16 (33 N. E. Rep. 774); *Scaggs v. Railway*, 145 N. Y. 201 (39 N. E. Rep. 716); *Howard v. Railway*, 156 Mass. 159 (30 N. E. Rep. 479).

The basic principle upon which the doctrine of all the cases is bottomed is found in the maxim old as the books—in substance, that no man shall make use of his own property in such manner as to unreasonably interefere with the enjoyment on the part of others of the rights conferred upon them by law. Of necessity it follows that in each individual case the question must resolve itself to this: Was the use being made of the adjacent property such in character as to be an unnecessary interference with or unnecessarily dangerous to persons making lawful use of the street or highway? And whether or not improper use amounting to negligence has been made to appear in any given case is generally a question to be determined by the jury. Taking the facts as shown by the record in the instant case, we think it cannot be doubted but that the elevator was located at a place where it might properly be. So, too, as we think, the usé of a gasoline engine in connection with the operation of such elevator was proper and lawful, and cannot therefore be said to have been *per se* negligent. The use of gasoline in the creation of motive power has become general throughout the country, not only in the operation of mills and factories, but as well for the purposes of locomotion, and there can be no grounds upon which to predicate at this time a holding that such use is in and of itself wrongful. As in the use of steam and electricity, it becomes wrongful only when the use is attended with negligence. Accepting such to be the law, there is no escape, in our view, from the conclusion that, under the facts disclosed, the question whether there was negligence in the matter of the use and operation of defendant's engine should have been submitted under proper instructions to the jury for a verdict.[1]

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[1] *Accord: Ft. Wayne Cooperage Co.* v. *Page*, 82 N. E. 83 (Ind. App. 1907), steam emitted in clouds over highway; *Howser* v. *R. R.*, 80 Md. 146 (1895), cars of railroad running along a highway negligently loaded so that part of the freight fell on traveller; *Truex* v. *So. Penn Oil Co.*, 62 W. Va. 540 (1907), whistle of boiler situated near highway blown when plaintiff, riding thereon, was known to be nearby; but see, as to blowing of whistles by railway engine drivers, *Farley* v. *Harris*, 186 Pa. 440 (1898) and *Webb* v. *Railway Co.*, 202 Pa. 511 (1902), and cases cited therein; so if persons on adjacent property, or public highway or place, are injured by the careless methods of occupier, *Weitzmann* v. *Asphalt Co.*, 190 N. Y. 452 (1908), child on public float struck by barrels conveyed over it on a cable.

An occupant of premises abutting on a highway is liable to a traveller injured thereon only if he uses his premises in a manner, or maintains a structure upon it of a sort reasonably likely to render travel unsafe. *Davis*

ROBBINS *v.* JONES.

Court of Common Pleas, 1863. 15 C. B. N. S. 221.

ERLE, C. J.,[1] now delivered the judgment of the court.

This was an action brought by the administratrix of one Robbins, to recover damages under Lord Campbell's Act, 9 & 10 Vict. c. 93, for the intestate's death.

That death took place in consequence of the giving way of a portion of the east side of the public way leading to the south end of Waterloo Bridge, by the default, as it is alleged, of the defendant. The part which gave way consisted of flagging and a grating over the area of one of the houses at the side of the road.

The material facts are as follows:—Waterloo Bridge was constructed under acts of parliament passed in the 53d, 56th, and 58th years of G. 3, and was finished in 1817. It was necessarily constructed so that the roadway should be at a level much higher than the river banks, and, in order to give access to the roadway of the bridge so constructed, the road leading to the south end of the bridge approaches it upon a high causeway springing at a considerable distance. For some distance from the bridge persons passing along the causeway were protected against the danger of falling over the side by a parapet-wall or continuation upwards of the retaining wall of the causeway. This wall is continued up to a row of houses of which the defendant is the lessee, and then ceases. This row of houses stands upon the original level of the ground, and runs parallel to the causeway and road leading to the bridge,—leaving a gulf or space of more than seven feet wide between the houses and the retaining wall of the causeway. That space belongs to the owner of the houses; and the bottom of it is used for areas.

The houses are divided, or capable of being divided, into two distinct dwellings, having separate outer doors. The outer door of the lower part of each building opens into a street or court upon the lower level. The outer door of the upper part of each house opens upon the level of the causeway towards the road leading to the bridge; and the inhabitants of the upper part of the house go in and out by that door, and get to and from the road by walking upon the structure part of which gave way under the deceased.

That structure consisted of flag-stones resting at one end for about four inches in and upon the walls of the houses, and at the other end for about six inches upon the retaining wall of the causeway, so as to bridge over the areas. At intervals there were gratings fixed by means of horns into the flags, and forming with them one continuous footway. The gratings were not attached to the houses, but were fixed in the centre of the flagging, and served the double

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v. *P. R. R.*, 218 Pa. 463 (1907), railroad piling on its premises freight covered with tin, the glare from which frightens a horse; *O'Sullivan* v. *Knox*, 81 N. Y. App. Div. 438 (1903), horse frightened by a high wind blowing down a sign erected a hundred feet from highway; *Grogan* v. *P. R. R.*, 213 Pa. 340 (1906), fence falling on highway under weight of crowd of trespassers trying to witness an arrest.

[1] The pleadings and the arguments are omitted.

purpose of being walked upon and of letting through light to the back part of the tenements below. The part of this structure lying straight between the doors and the roadway was flagging, so that it was not necessary to walk upon the gratings in order to get to the houses. There was a flagged foot-pavement between the edge of the flagging and grating and the carriage-way, on the same level with the flagging and grating over the areas. Between it and the flagging and grating there was a narrow strip of gravel. The end houses of the row had no flagging and grating; and the space over their areas was enclosed. The road on the causeway was a common highway, to be repaired by the parish.

In the course of time, before the General Highway Act of 5 & 6 W. 4, c. 50, the flagging and grating had been dedicated to the public and used by them as part of the highway for foot-passengers; and it so continued up to the time of the accident.

The fee-simple of the houses was in Lord Salisbury. The defendant was tenant under him for a term of years created in 1830, and assigned to the defendant before and vested in him at the time of the accident. Whilst he was in possession, the flagging and grating either became or at least were out of repair and insufficient, whether considered as a passage to the houses or as part of a public way, having regard to the tendency of persons to collect in crowds in or near such ways upon the occasion of a fire or the like.

It did not appear that any substructure was out of repair, but only that the flagging and gratings forming the surface were out of repair. It became necessary, in order to effectually sustain the flagging and grating as a way, in the state to which time and wear and tear had reduced them, to make an entirely new work, viz. to turn an arch under them, and so to make them safe. The defendant had notice of this from the parish in 1859, some time before the accident, whilst he was in possession: but no repairs were done between that time and the time of the accident.

The defendant afterwards underlet to two persons named Jeffs, who again underlet to a person who let the rooms out to lodgers. The rent due from the lessees fell into arrear, and a distress was put in upon the lodgers, who having paid their own rent, barred out the bailiff, who had gone out for refreshment. The bailiff proceeded to regain possession by force, and a crowd collected and stood thick upon one of the gratings. The deceased was passing by at the time, and being beckoned to by one of the lodgers, he tried to get through the crowd to the door, and in doing so stepped on to the grating. Scarcely had he set foot upon it when the grating and the flagging resting upon the house wall, and a portion of that resting upon the retaining wall of the causeway, gave way, and the deceased fell, with about thirty others, down into the area, and so met his death.

The fall of the flagging and grating was caused by their insufficiency and by the extraordinary crowd pressing upon them at the time.

The cause was tried at the sittings after last Michaelmas Term. There was conflicting evidence upon the question of repairs and sufficiency: but the above must be taken to be the result of the

evidence, as established by the verdict. Under the direction of the judge, a verdict was found for the plaintiff, for 280*l.* damages, subject to the opinion of the court as to the defendant's liability. No question was raised upon the pleadings; nor could any usefully have been raised, as the court has power to amend: and the question has been treated as arising upon the general issue. Probably it arises also upon the record.

A rule was obtained to enter the verdict for the defendant, or a nonsuit, which was well argued in last Easter Term before my Brothers Willes, Byles, and Keating, and myself, when we took time to consider of our judgment.

It is for the plaintiff to make out that the defendant has been guilty of the breach of some duty which he owed to the deceased, and that thereby the accident was occasioned. Whether he has done so, may be considered under the following heads:—

1. If the passage over the area be considered as a private way to the houses, then the reversioner is not liable, but the occupier. A landlord who lets a house in a dangerous state is not liable to the tenant's customers or guests for accidents happening during the term; for, fraud apart, there is no law against letting a tumble-down house; and the tenant's remedy is upon his contract, if any. In this case there was none,—not that that circumstance makes any difference in our opinion.

2. If it be considered as a public way, then the defendant is not answerable for the area as for a hole made at the side of the highway, because there was no hole made by the defendant. The gulf at the side of the causeway was the result of its being raised by the makers of it, not by the land at the side being excavated by the proprietor of it. The alleged hole was coeval with the highway, and a consequence of the making thereof. In Barnes *v.* Ward, 9 C. B. 392, there was a hole made by the defendant, and it was made after the dedication of the road.

3. As for the suggested liability to repair, upon the ground that the construction was beneficial to the proprietor of the houses, that benefit was only retained by, not conferred upon him. It is familiar law, that a bridge made by a private individual for his own benefit at an ancient ford, if useful to the public, is to be repaired by them, and not by the builder.[2] The liability to repair a highway has not been made to depend upon the quantum of benefit. If it were so, a man who drove a flourishing trade in the house ought to pay for the benefit from passers by, but not a musician or the inventor of the calculating machine.

4. The flagging and grating were not, like a door, under the control of the occupier, but fixed. They were not worked, used, or worn out by the proprietor of the houses, otherwise than as one of

[2] Where, however, a bridge is built not over a natural stream, but over an artificial waterway or ditch constructed by the defendant for his own private benefit, the defendant is bound to keep it in repair, *Heacock* v. *Sherman*, 14 Wend. 58 (N. Y., 1835); *Dygert* v. *Schenck*, 23 Wend. 446 (N. Y., 1840). See however, *Maine* v. *Gorham*, 37 Me. 451 (1854), under the Revised Statutes, c. 25, s. 57, a town is bound to repair a bridge used as part of the highway constructed by a railroad over its tracks.

the public uses a public highway on the side of which his house stands. The passage of light and air through the grating does not wear it out any more than the wind wears out the surface of the road.

5. The more or less artificial character of the flagging and grating does not make it more or less a way to be repaired by the parish. Whether it be stone, iron, wood or composition, as it is a public way, the public are to keep it in repair, and not the person who dedicated it. Hitherto, the exceptions to the liability of the parish have been known. They are custom, prescription, tenure, and enclosure whilst it lasts. Have we authority to add flagging and grating?

6. The case is not the same as that of an open cellar-flap, which may be considered as a trap in its nature and essence, unless it be kept shut. Besides, that is worn out by use for the benefit of the occupier of the cellar to which it is the door. The present case is nearer to that of a mine propped up, and a way dedicated upon the surface. In such a case, will any one venture to suggest that the owner of the mine and surface, or either of them, must renew the props when they rot and the road threatens to sink into the mine?

7. This does not fall within the law as to keeping buildings adjoining a highway in such a state, by repair or otherwise, as not to endanger passers by. What was insufficient here, was part of the highway itself. Such law may apply to the arches of a cellar under a footway,—though this we conceive to be worthy of argument, and open to distinctions as to the state of things at the time of the dedication, and other circumstances. It cannot apply to the footway itself. We may refer, by way of illustration only, to the case of one of the squares, where the footway at one side consists of large flags reaching from the outer wall of the area to the outer wall of the cellar. There, the upper part of the flags forms the way, and the lower part of the same flags forms, as we are told, the ceiling of the cellar. Who is to maintain and repair the flagged way? We apprehend, the public, who walk upon it and wear it out, without which it might last an indefinite time.

It is to be observed, that, in cases of liability under this head, the building need not be repaired, but only prevented from causing injury by its fall; which implies that there is a power to remove: and such power does not exist in this case.

8. It has been suggested, in addition to the grounds relied upon in argument, that the fact of the flagging and grating concealing danger, was a special cause of lability. To this we answer,—first, that the flagging and grating did not prevent the existence of the deep area from being known to everybody passing, and there was no fraud,—secondly, that there would have been no danger, if the parish had properly maintained and repaired the flagging and grating,—thirdly, that the defendant did not erect, and, as it was a highway, could not have removed, the structure. Moreover, concealment is relative; and every such danger is more or less concealed. If a highway is dedicated, with a dangerous obstruction on it, such as would have been a nuisance if placed upon an ancient way,—for instance, a flight of steps, or a projecting flap,—no action can be maintained for

injury caused thereby, whether by day, when it can be seen, or by night, when it is visible. In such case, it was held by the Court of Queen's Bench, in Fisher *v.* Prowse, 31 Law J., Q. B. 212, 2 Best & Smith 770, that the public adopting a highway must take it in statu quo, and that no obligation is imposed upon the dedicator to remove projections or fill up holes which may be dangerous to passers by. In that leading case, which explained and overruled several out of which vague notions of liability have sprung up, my Brother Blackburn, delivering the judgment of the court, expounded with clearness and force the law applicable to this supposed ground of liability, as follows:—"But the question still remains, whether an erection or excavation already existing, and not otherwise unlawful, becomes unlawful when the land on which it exists or to which it is immediately contiguous is dedicated to the public as a way, if the erection prevents the way from being so convenient and safe as it otherwise would be; or whether on the contrary, the dedication must not be taken to be made to the public, and accepted by them, subject to the inconveniences or risk arising from the existing state of things. We think that the latter is the correct view of the law. It is of course not obligatory on the owner of land to dedicate the use of it as a highway to the public. It is equally clear that it is not compulsory on the public to accept the use of a way when offered to them. If the use of the soil as a way is offered by the owner to the public under given conditions, and subject to certain reservations, and the public accept the use under such circumstances, there can be no injustice in holding them to the terms on which the benefit was conferred. On the other hand, great injustice and hardship would often arise, if, when a public right of way has been acquired under a given state of circumstances, the owner of the soil should be held bound to alter that state of circumstances to his own disadvantage and loss, and to make further concessions to the public altogether beyond the scope of his original intention. More especially would this be the case when public rights of way have been acquired by mere use. For instance, the owner of the bank of a canal or sewer may, without considering the effect of what he is doing, permit passengers to pass along until the public have acquired a right of way there. It is often hard upon him that the public right should have been thus acquired: it would be doubly so if the consequence was, that he was bound to fill up or fence off his canal." In this statement of the law we heartily concur. It is in accordance with the general law as to gifts, which, in the absence of fraud, must be taken as they are, without redress against the donor in respect of vice apparent or secret, and all expenses in respect of which, for repairs or otherwise, are to be borne by the donee.

9. This conclusion is also in accordance with the law as to grants of a right of way or other easement, whether for valuable consideration or not, to the effect that the grantee and not the grantor is to maintain and repair the subject of the easement, with a corresponding duty to do so if by his neglect the grantor may suffer damage, and a corresponding right to enter upon the grantor's land and to do all acts necessary for such maintenance and repair.

The authorities to this effect in our own law, the Civil law, and the Code Civil, will be found in Gale on Easements, edition by Mr. Willes, 424 et seq.

It thus appears to us, that, to hold this action to be maintainable, whilst it would for the first time impose a heavy burthen upon reversioners, would violate well-established principles of law.

The rule to enter a nonsuit must therefore be made absolute.

Rule absolute.[a]

MINTZER *v.* HOGG.

Supreme Court of Pennsylvania, 1899. 192 Pa. 137.

STERRETT, C. J.[1] The question of defendants' neglect of duty, in not keeping the pavement in front of their "house in such order and condition as to permit persons traveling over and along said pavement, ... to do so safely, etc., was fairly submitted to the jury with instructions so full and adequate that no just exception can be taken thereto.

The subject of complaint in the first specification is that "the court erred in entering judgment in favor of the plaintiff, inasmuch as her statement . . . . sets forth no cause of action, but purports to be a breach of duty in failing to keep a part of the highway in repair; whereas there is no duty in law incumbent on defendants or any of them to keep the highway in repair."

If this is intended to apply to the sidewalk on which plaintiff was injured, it is not correct as a legal proposition. It is the primary duty of property owners along a street, to keep in proper repair the sidewalk in front of their respective properties: Lohr v. Phillipsburg, 156 Pa. 249; Duncan v. Philadelphia, 173 Pa. 554; Pittsburg v. Fay, 8 Pa. Superior Ct. 275; Pittsburg v. Daly, 5 Pa. Superior Ct. 532. Hence it is that, owing to this primary liability, many cases exist in this state, in which, after recovery from the municipality, the latter has successfully recovered over from the property owner on account of his breach of his primary duty to keep the sidewalk in a safe condition. Among these are Reading v. Reiner, 167 Pa. 41, Brookville v. Arthurs, 152 Pa. 334, and s. c. 130 Pa. 501. Several statutes in this state also recognize the duty of the property owner to keep his sidewalk in a safe condition. By Act of March 25, 1805, 4 Smith's Laws, 233, sec. 5, councils were authorized by ordinance to compel property owners to pave the footwalk; and by the Act of April 10, 1826, P. L. 326, sec. 2, it was made the duty of property owners to pave the footway in front of their respective properties, and to keep the same in repair.

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[a] *Accord: Manchester* v. *Hartford*, 30 Conn. 118 (1861); *Eustace* v. *Jahns*, 38 Cal. 3 (1869); *Jansen* v. *Atchison*, 16 Kan. 358 (1876); *Flynn* v. *Canton Co.*, 40 Md. 312; *Kirby* v. *Boylston Market*, 14 Gray, 249 (Mass., 1859); *Rochester* v. *Campbell*, 123 N. Y. 405 (1890); *Hill* v. *Fond du Lac*, 56 Wis. 242 (1882). In *Weller* v. *McCormick*, 47 N. J. L. 397 (1885), it was held that the abutting owners were under no duty to trim shade trees planted by the municipality on the sidewalk.

[1] Only so much of the opinion is given as relates to the defendant's duty to repair the sidewalk.

To the same effect are the following acts: April 16, 1838, P. L. 626, sec. 3; April 16, 1840, P. L. 412, sec. 9; March 22, 1865, P. L. 562, sec. 1.

The averments in plaintiff's statement are quite sufficient to entitle her to recover, and the evidence tended to sustain all that were material to her case.

Judgment for plaintiff affirmed.[1]

HARDCASTLE *v.* SOUTH YORKSHIRE RAILWAY AND RIVER DUN COMPANY.

In the Court of Exchequer, 1859. 4 Hurl. & Nor. 67.

Declaration.—That the defendants were possessed of certain land near to and adjoining a certain [common and public footway, and also of a certain large reservoir, hole, or dam, then being in and upon the said land and within a short distance of the said common and public footway and then containing a large quantity of water; and the existence of the said reservoir, hole, or dam, so being in and upon the said land and so adjoining the said] common and public footway was dangerous to any person passing along the footway, either by night or day, even if ordinary caution were employed by such person; and it was the duty of the defendants, before, etc., to have so sufficiently guarded, fenced off, and railed in the said land and the reservoir, etc., as to prevent damage or injury to any person lawfully passing in and along the footway; yet the defendants, while they were so possessed of the said land and also of the reservoir, wrongfully permitted the said land and also the reservoir to be wholly unguarded and not fenced off or railed in; that by means of the premises and for want of proper and sufficient guarding, fencing off, and railing in of the same, the said Thomas Hardcastle, who was lawfully passing in and along the said footway, lost his way and missed his path and fell into the reservoir and was thereby killed, etc.

POLLOCK, C. B.—This action was tried before my brother Martin at the last Yorkshire Assizes. The jury found a verdict for the plaintiff, and the defendants had leave to move to enter a verdict for them, upon a traverse of an averment in the declaration, that the defendants were bound to fence a reservoir mentioned in it. The parties had also leave to amend the pleadings, and the plaintiff, before the argument upon a rule obtained by the defendants to enter the verdict for them upon the leave reserved, made an amendment. It is immaterial to refer to it, because we think that not only upon the traverse but upon the facts of the case, as proved at the trial, the defendants are entitled to our judgment. The plaintiff was the widow and administratrix of Thomas Hardcastle, who was drowned upon the 22d. of May, 1858. The defendants are the proprietors of a navigation called "The Dun Navigation."

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[1] In *Lindstrom* v. *Penna. Co.*, 212 Pa. 391 (1905), it was held that a lessor is not liable unless the sidewalk was defective when transferred to the lessee or he had, after notice of its bad condition, failed to repair it.

Upon the night of the day before mentioned, the intestate left Rotherham to walk to Sheffield, but was drowned in the place hereafter described. The action was brought against the defendants under Lord Campbell's Act. The defendants' predecessors were the proprietors of the navigation, and about twenty-four years ago they made a new cut. The cut consisted of a large reservoir out of which there were two branches, one a canal for the boats to navigate in, the other a by-wash for the surplus water to flow away. The division between these two branches was a buttress or projecting wall; the water for the canal passing on one side, the water going through the by-wash passing on the other. There was an ancient footpath from Rotherham to Sheffield, which passed along the by-wash, was continued over it by a bridge and then proceeded to Sheffield. The bridge was from seven to ten yards from the end of the buttress or projecting wall, and a person who continued to walk straight up the pathway along the by-wash, and who did not turn a little to the right in order to go over the bridge would, unless prevented by the arm of a gate to lock upon the canal, get upon a grassy spot, and if he continued walking on would go over the buttress or projecting wall into the reservoir. It was assumed upon both sides that the intestate had walked up the footway along the by-wash, and then instead of turning to the right and going over the bridge, continued to walk straight on and went into the reservoir at the end of the buttress and was drowned. At the trial a statement was made that the course of the way was altered when the new cut was made, but no evidence was given of this, nor indeed is the 'cause of action alleged in the declaration founded upon it; and after such a lapse of time we think it must be taken that the present way is the lawful one.

The authority relied upon by the plaintiff was *Barnes* v. *Ward*, 9 C. B. 392 (E. C. L. R. vol. 67), and with the judgment in that case we entirely concur. The facts there were, that the defendant being possessed of land abutting on a public footway excavated an area in the course of building a house immediately adjoining the footway and left it unprotected, and a person walking in the night time fell in and was killed. The Court held that the defendant was liable. The principle of the decision was that such an excavation was a public nuisance, and that an individual injury arising from such a nuisance was the subject-matter of an action to the party aggrieved.

That a private injury arising from a public nuisance is the subject-matter of an action for damages is a doctrine as old as any in the common law; and if we were of opinion that the state of the reservoir in the present case was a nuisance to the footpath, and that the plaintiff was substantially in the right, notwithstanding that we thought the form of the declaration was defective, and that there was no such obligation to fence as therein alleged, we should be desirous to aid the plaintiff; but we are of opinion that she has no right of action against the defendants.

When an excavation is made adjoining a public way, so that a person walking upon it might, by making a false step, or being affected with sudden giddiness, or, in the case of a horse or carriage-

way, might, by the sudden starting of a horse, be thrown into the excavation, it is reasonable that the person making such excavation should be liable for the consequences; but when the excavation is made at some distance from the way, and the person falling into would be a trespasser upon the defendant's land before he reached it, the case seems to us to be different. We do not see where the liability is to stop. A man getting off a road on a dark night and losing his way may wander to any extent, and if the question be for the jury no one could tell whether he was liable for the consequences of his act upon his own land or not. We think that the proper and true test of legal liability is, whether the excavation be substantially adjoining the way, and it would be very dangerous if it were otherwise,—if in every case it was to be left as a fact to the jury, whether the excavation were sufficiently near to the highway to be dangerous.

When a man dedicates a way to the public, there does not seem any just ground, in reason or good sense, that he should restrict himself in the use of his land adjoining, to any extent, further than that he should not make the use of the way dangerous to the persons who are upon it and using it; to do so would be derogating from his grant; but he gives no liberty or license to the persons using the way to trespass upon his adjoining land, and if they in so doing come to misfortune, we think they must bear it, and the owner of the land is not responsible. If fences are to be put up, it would seem more reasonable that they should be put up by those who use the way, or those who are under the obligation to repair it, than by the person who dedicated it to the public, or his successors; and as we are clearly of opinion that there is no such obligation to fence, as alleged in the declaration, and also that, upon the above state of facts, there is no liability, our judgment is in accordance with the principle of the case of *Blyth* v. *Topham*, Cro. Jac. 158, which we think is the true one. The rule to enter a verdict for the defendant must therefore be made absolute.

Rule absolute.[1]

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[1] *Accord: Collins* v. *Decker*, 120 N. Y. App. Div. 645 (1907), "the test of liability is whether the excavation adjoins the highway or is in such close proximity thereto that a person *while on the highway* slipping or stumbling or making a misstep falls into the excavation, but that such liability does not exist where the traveller deviates from the highway for ever so short a distance and becomes a trespasser before he falls." Cochrane, J., p. 649; *Hadley* v. *Taylor*, L. R. 1 C. P. 53 (1865), hoist hole fourteen inches from sidewalk; *Barnes* v. *Ward*, 9 C. B. 392 (1850); *Hutson* v. *King*, 95 Ga. 271 (1894), traveller falling from sidewalk "casually", *Strange* v. *Bodcaw Co.*, 79 Ark. 490 (1906), frightened horse backing down embankment; *aliter*, where a frightened horse runs into a pond fifteen feet from highway, *Horstick* v. *Dunkle*, 145 Pa. 220 (1891); *Myers* v. *Snyder*, 1 Brightly, N. P. 489 (Pa. 1848), unfenced cellar of building under construction.

If, however, an occupier obstruct the sidewalk he must expect and prepare for deviation onto his land, *Vale* v. *Bliss*, 50 Barb. 358 (N. Y., 1868); but not if the sidewalk is obstructed by a stranger, *Clapp* v. *La Grill*, 103 Tenn. 164 (1899).

In some few cases it is held that distance of excavation from highway is only one consideration, the question being whether the excavation is dangerous to travel; *Norwich* v. *Breed*, 30 Conn. 535 (1862), a case turning largely on

SECTION 2.

Toward Those Coming Voluntarily Upon the Premises. (a). Trespassers.

UNION STOCK YARDS AND TRANSIT COMPANY *v.* ROURKE.

Appellate Court of Illinois, 1st. District, 1881. 10 *Ill. App.* 474.

The defendant owned a plot of ground bounded on the north by a fork of the Chicago river, which had been dredged out so that the bank was well within the defendant's original property line. This tract was enclosed by fences, but there was evidence to show that they were badly broken down, leaving gaps through which persons could pass without obstruction.

It appears, however, that in point of fact, great numbers of persons, consisting of those employed about the Stock Yards and packing houses and others, were daily in the habit of going across said land to the bridge over the river on Laurel street, and other points, that route being shorter and more direct than by way of Transit avenue, and that paths were worn in various directions

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the construction of a statute making it the city's duty to fence a street if raised so as to endanger traffic; *Young* v. *Harvey,* 16 Ind. 314 (1861); *Sanders* v. *Reister,* 1 Dak. 151 (1875), one deviating, if not negligent or an intentional trespasser, may recover if the jury find that the excavation is so near the highway as to be dangerous to those using it with care; *Lowe* v. *Salt Lake City,* 13 Utah, 91 (1896), a trespasser may recover for falling into an excavation if his trespass is unintentional and technical, being only such as he might reasonably suppose the owner would permit without objection and not causing any annoyance or injury to the owner.

In Massachusetts, it is held that since the town invites the public to use the highways, it is its duty to fence the highway when an adjacent excavation renders travel thereon dangerous and the abutting owner is not liable for unguarded excavations on his land though directly adjacent to the highway, *Howland* v. *Vincent,* 10 Met. 371 (Mass. 1845); *McIntire* v. *Roberts,* 149 Mass. 450 (1889); but generally it is no defense that one other than the defendant is bound to fence an excavation he creates, *Wettor* v. *Dunk,* 4 F. & F. 298 (1864).

That plaintiff was sitting on defendant's step, when struck by a stone falling from the house, did not make him a trespasser, since he was using the step reasonably as an incident of his right to travel on the street, *Murray* v. *McShane,* 52 Md. 217 (1879); so in *Whaley* v. *Bank,* 28 Pa. S. C. 531 (1905), a rod charged with electricity placed in front of window to prevent annoyance from crowd was held a danger to traffic, and plaintiff was allowed to recover though he put his hands on it intentionally.

An owner is not liable to one approaching the excavation from any direction other than the highway though in fact the excavation substantially adjoins it, *Dobbins* v. *R. R.,* 91 Tex. 60 (1897), p. 65, *semble.*

An occupier is not bound to guard natural depressions nor artificial excavations existing before the highway is dedicated, the public takes the road with all the dangers incident to adjacent conditions then existing, *Cooper* v *Walker,* 2 B. & S. 770 (1862); though mere long continuance of an excavation is no defence, *Coupland* v. *Hardingham,* 3 Camp. 398 (1813).

One diverting an ancient public path by statutory authority is bound to fence off the old path, if it diverges at a point where the public might otherwise go astray and get into danger, *Hurst* v. *Taylor,* L. R. 14 Q. B. D. 918 (1885).

across said land by persons passing over it; but there is no evidence tending to show that it was used in this manner by the invitation, permission or consent of the defendant; though it can scarcely be doubted that the officers of the defendant were aware of the fact that it was being so used.

The evidence shows that, notwithstanding the construction of the catch-basins, a large amount of animal and other matter was discharged into the river, and that said matter formed a scum or crust on the water at times several inches in depth, the surface of which became dry, cracked and covered with dust, so as to present the appearance of solid earth, though entirely incapable of supporting the weight of a person stepping onto it. The witnesses describe it as resembling the bottom of a pond from which the water had dried up, showing that it was of such a character as to be likely to induce one not acquainted with it to suppose it to be dry land; and the evidence tends to show that the condition of the premises in this respect was known at the time to the officers of the defendant.

On a certain day in April, 1878, the plaintiff's intestate, who, so far as appears, had no acquainance with the premises in question, went to a place a considerable distance southeast of said premises, for the purpose of obtaining employment, and was directed by the person to whom he made application to go to work at another place situated a mile or two northwest of said premises. He started for the place to which he was directed, and, so far as the evidence shows, nothing more was seen of him. As he failed to return to his home, search was made for him, and after several days his body was found in the river, on the defendant's land, a few feet from the bank, at a point where the surface of the water was covered over with a scum or crust such as it above described.[1]

BAILEY, J. The deceased, at the time of his death, was upon the defendant's land without any invitation from the defendant, either express or implied, and without legal right. Many other persons, it is true, were in the habit of passing over said land of their own motion and for their own convenience, and it does not appear that any objection to their so doing was ever raised by the defendant, but these facts, at the utmost, only raise an implication of a license to the deceased, to do the same thing, but gave him no right beyond that of a mere licensee.

The hole, chasm or trap, if it may be so called, into which he fell, was not constructed by the defendant, nor was it the result of any affirmative act on its part. The excavation was made by other parties without its procurement or consent. The refuse matter which formed the scum or crust on the surface of the water came from the packing houses of other parties, in which the defendant had no interest, and over which it had no control. If the defendant was chargeable with negligence at all, it was in failing to abate the nuisance, after it had been created by others, or to surround it with such protections or warnings as would have been sufficient to ward off such persons as might see fit to traverse that portion of

[1] The facts are restated.

its grounds. In other words, its negligence, if any, was mere passive negligence.

It is a general rule of law, that the owner of private grounds is under no obligation to keep them in a safe condition for the benefit of trespassers, idlers, bare licensees, or others who come upon them, not by any invitation, either express or implied, but for their own convenience or pleasure, or to gratify their curiosity, however innocent or laudable their purpose may be. * * *

This rule is doubtless subject to some qualifications. Thus various cases are found where it is held that the owner who has set spring-guns or other instruments of destruction upon his own grounds for the defence of his property, is liable to trespassers who, without notice of such contrivances, have entered upon such grounds and received injury. Ilott v. Wilkins, 3 Barn. & Ald. 304; Bird v. Holbrook, 4 Bing. 628; Hooker v. Miller, 37 Iowa, 613.

Another exception is where the owner permits dangerous pitfalls or obstructions to remain on his land, so near a *highway*, that, combined with the ordinary incidents of travel, they result in injury to persons or animals passing along the highway. * * *

There is also a class of cases constituting a further exception to the rule above stated, where the owners of grounds are held liable for injuries resulting to *children*, although trespassing at the time, where, from the peculiar nature and exposed position of the dangerous defect or agent, the owner should reasonably anticipate such injury to flow therefrom as actually happened. * * *

The distinguishing principle upon which all these cases rest is that the persons injured were mere children, without judgment or discretion, and likely to be drawn by childish curiosity, or by the instincts and impulses of childhood, into places of danger. It is therefore held to be negligence to leave traps or pitfalls exposed on private grounds in the vicinity of public highways or other places where children are likely to be found. * * *

It is apparent from what we have said that the present case falls within neither of the exceptions above mentioned. The deceased was a man of mature years; the chasm into which he fell was neither adjoining nor in the vicinity of a public highway, and the defendant was in no way responsible for its original existence, but merely for passively allowing it to remain without protection or warning. Such being the facts, we know of no authority or principle upon which the defendant can be held liable. The Supreme Court of Michigan, in the very well considered case of Hargreaves v. Deacon, *supra*, in discussing the right of protection against pitfalls in both highways and upon private grounds, says: "If in a highway or sidewalk, the duty of protection extends to all persons who have a legal right to go there, or, in other words, to the whole public, and it depends upon that right; if on private property, not open to the public, it applies less generally, and only to those who have a legal right to be there, and to claim the care of the occupant for their security while on the premises against negligence, or to those who are directly injured by some positive act *involving more than passive negligence.*" * * *

Exception is taken to a number of the instructions given to

the jury at the instance of the plaintiff, but as we are of the opinion that the verdict is not supported by the evidence, we need not take time to consider them, but for the reason stated, the judgment will be reversed and the cause remanded.

Judgment reversed.[2]

DEANE *v.* CLAYTON.

7 Taunton, 489 (1817) p. 522.

DALLAS, J. The difference is, between absolute and relative rights, between that which is mine, exclusive of any right in others, present or future, and that which is of a spreading, shifting possession, as air, water, etc., in which I have but a qualified possession, a possession subservient to the future use by others. If I place a log across a public path, and injury be thereby sustained, the soil being my own, but the public, or individuals having a right of way over it, and action will lie, because there is a right in others to pass along without interruption; but if there be no right of way, I may with any view, and for any purpose, place logs on my own land, and a party having no right to be there, and sustaining damage by his own trespass, cannot bring an action for the damage so sustained. So, in the case put of a ditch, I may not dig it, so as to interfere with any public or private right, but within the limit of my own property adjoining a common, and not separated from it by any actual fence, I may dig a ditch, however wide; and man or beast sustaining harm, having no right to be there, no action will lie. Such was the case cited of the horse straying from the common, and falling into the pit, and in which it was determined that no action would lie, first, because the owner had a right to do what he pleased with his own land, and next, that the plaintiff could shew no right for the horse to be there; and yet, that a horse might, in the night or

[2] *Accord: Blythe* v. *Topham,* Cro. Jac. 158 (1607); *Gramlich* v. *Wurst,* 86 Pa. 74 (1878), excavation dug at such a distance from highway that a person to reach it must become a trespasser; *Chattanooga etc. R. R.* v. *Wheeler,* 123 Ga. 41 (1905), plaintiff using disused freight house without permission for storing his goods; *Lary* v. *R. R.,* 78 Ind. 323 (1881), plaintiff using similar building as refuge from storm; *R. R.* v. *Bingham,* 29 Oh. St., 364 (1876); *Buts* v. *Cavanaugh,* 137 Mo. 503 (1897), a boy, who without permission went into an excavation on defendant's private property to get a piece of wire, and was burned by fire smouldering therein, could not recover, though an ordinance required all dangerous excavations to be fenced; *McNeven* v. *Arnott,* 4 N. Y. App. Div. 133 (1896), a trespasser to gratify his curiosity went into a runway leading to a cellar under construction, designed for use of defendant's employes only; *Anderson* v. *N. Pac. R. R.,* 19 Wash. 340 (1898), plaintiff losing his way on dark stormy night fell into ditch fifty feet from permissive path; *Reeves* v. *French,* 20 Ky. Law Rep. 220 (1898).

Nor can a trespasser complain that an owner of land does not so conduct his business as to make it safe for him to trespass on his premises,—*Mergenthaler* v. *Kirby,* 79 Md. 182 (1894), a boy entering defendant's premises to steal lead scalded by steam and hot water when the engineer, ignorant of his presence, blew off from the boiler through a discharge pipe; but see *Marble* v. *Ross,* 124 Mass. 44 (1878), one keeping a vicious stag in his field liable to persons injured while trespassing with notice of its presence; *Loomis* v. *Terry,* 17 Wend. 496 (N. Y. 1837), vicious dog kept, for no useful purpose, in field where boys come without leave to shoot.

day, stray from an open common into adjoining land, not separated by any fence, was, as a probable consequence, as much to be foreseen, as that a hare might spring up, and a dog chase; or, if the horse had escaped from the owner, and he had sustained damage in the pursuit, would that have given him a right to damages for the consequence of an escape, which he ought, in strictness, to have prevented? I may not keep a mischievous bull in a field through which there is a right of way; but when there is no right of way, I am entitled so to do, as was stated by Lord *Kenyon* in one of the cases cited at the bar, and this, by way of illustration, for the very purpose of shewing the distinction in question. The only case cited on this part of the subject, as bearing the other way, is that of Townsend against Wathen; but in facts and circumstances it has no resemblance to the present. The object in the former was to attract, in order to destroy the dog; and in this, the immediate purpose was to keep the dog from a situation, in which he might incur destruction. In Townsend against Wathen, 9 East, 277 (1808), the enticement was made to operate beyond the line of the defendant's property, and to the destruction of the dog, where the dog had a right to be; and this enticement constituted the foundation of the action. It is, in effect, but the common case of nuisance.

BIRD *v.* HOLBROOK.

Court of Common Pleas, 1828. 4 Bingham, 628.

The cause was tried at the *Bristol* assizes, 1825, when a verdict was taken for the Plaintiff, by consent, damages 50*l.*, subject to a case reserved, with liberty to either party to turn it into a special verdict. The following were the facts of the case:—

Before, and at the time of the Plaintiff's sustaining the injury complained of, the Defendant rented and occupied a walled garden in the parish of *St. Phillip and Jacob,* in the county of *Gloucester,* in which the Defendant grew valuable flower-roots, and particularly tulips, of the choicest and most expensive description. The garden was at the distance of near a mile from the Defendant's dwelling-house, and above one hundred yards from the road. In it there was a summer-house, consisting of a single room, in which the Defendant and his wife had some considerable time before slept, and intended in a few days after the accident again to have slept, for the greater protection of their property. The garden was surrounded by a wall, by which it was separated on the south from a footway up to some houses, on the east and west from other gardens, and on the north from a field which had no path through it, and was itself fenced against the highway, at a considerable distance from the garden, by a wall. On the north side of the garden the wall adjoining the field was seven or eight feet high. The other walls were somewhat lower. The garden was entered by a door in the wall. The Defendant had been, shortly before the accident, robbed of flowers and roots from his garden to the value of 20*l.* and upwards; in consequence of which, for the protection of his property, with the assistance of another man, he placed in the garden a

spring gun, the wires connected with which were made to pass from the door-way of the summer-house to some tulip beds, at the height of about fifteen inches from the ground, and across three or four of the garden paths, which wires were visible from all parts of the garden or the garden wall; but it was admitted by the Defendant, that the Plaintiff had not seen them, and that he had no notice of the spring gun and the wires being there; and that the Plaintiff had gone into the garden for an innocent purpose, to get back a pea-fowl that had strayed.

A witness to whom the Defendant mentioned the fact of his having been robbed, and of having set a spring gun, proved that he had asked the Defendant if he had put up a notice of such gun being set, to which the Defendant answered, that "he did not conceive that there was any law to oblige him to do so," and the Defendant desired such person not to mention to any one that the gun was set, "lest the villain should not be detected." The Defendant stated to the same person that the garden was very secure, and that he and his wife were going to sleep in the summer-house in a few days.

No notice was given of the spring gun being placed in the garden, and before the accident in question occurred, another person to whom the Defendant mentioned the fact of his garden having been robbed of roots to the value of 20*l.*, and to whom he stated his intention of setting a spring gun, proved that he had told the Defendant that he considered it proper that a board should be put up.

On the 21st *March* 1825, between the hours of six and seven in the afternoon, it being then light, a pea-hen belonging to the occupier of a house in the neighbourhood had escaped, and after flying across the field above mentioned, alighted in the Defendant's garden. A female servant of the owner of the bird was in pursuit of it, and the Plaintiff (a youth of the age of nineteen years), seeing her in distress from the fear of losing the bird, said he would go after it for her: he accordingly got upon the wall at the back of the garden, next to the field, and having called out two or three times to ascertain whether any person was in the garden, and waiting a short space of time without receiving any answer, jumped down into the garden.

The bird took shelter near the summer-houses, and the boy's foot coming in contact with one of the wires, close to the spot where the gun was set, it was thereby discharged, and a great part of its contents, consisting of large swan shot, were lodged in and about his kneejoint, and caused a severe wound.

The question for the opinion of the Court was, Whether Plaintiff was entitled to recover; if so, the verdict was to stand; otherwise a nonsuit was to be entered.

Wilde Serjt. for the Plaintiff.

The Defendant is liable in damages for the injury the Plaintiff has sustained.

For the protection of property, no man has a right to resort to violence greater than the occasion requires. The law does not allow the apprehension of a mere trespasser, much less the infliction of wounds or death. * * *

But it being clear from the foregoing authorities, that such conduct would have been illegal, if the defendant had been present, and had seen the plaintiff enter his garden, the absence of the defendant at the time of the injury makes no difference in the case; more especially where his own declarations have shewn so unequivocally what were his intentions in case he had been present. No man is permitted to do indirectly that which it is unlawful for him to do directly. * * *

Merewether Serjt. for the defendant. It is admitted that a trespasser may be repelled by force, if no more force be employed that is necessary; but, during absence, a man can employ, for the protection of his property, no less and no other force than that of machines, which may repress offenders by the fear of pain or detection; and if they are so employed as not to molest another in the exercise of his rights, there is no violation of the maxim, "*Sic utere tuo ut alienum non laedas*", which applies to the active invasion of another's rights, and not to the quiet protection of our own. Besides which, in placing the gun he is making a lawful use of his own property; a use in no degree affecting the rights of others. * * *

In Blithe *v.* Topham (1 Rol. Abr. 88. Cro. Jac. 158), the proprietor of a waste had dug a pit, a few yards only from a highway; a horse having fallen into it, it was holden the owner could not recover damages.

The pit having been as fatal to the horse as a spring gun would have been, the case is in point, and much stronger than the present, there having been no notice at all, and no wall round the pit, as there was round the garden of the present defendant, which in itself operated as notice.

The main ground of the defence, however, is, that the Plaintiff cannot recover for an injury occasioned to him by his own wrongful act. *Commodum ex injuriâ non oritur*; and it is equally the principle of our law, that *jus ex injuriâ non oritur*. If a man place broken glass on a wall, or spikes behind a carriage, one who wilfully encounters them, and is wounded, even though it were by night, when he could have no notice, has no claim for compensation. *Volenti non fit injuria*. The Defendant lawfully places a gun on his own property; he leaves the wires visible; he builds a high wall, expressly to keep off intruders; and if, under those circumstances, they are permitted to recover for an injury resulting from their scaling the wall, no man can protect his property at a distance.

Wilde in reply.

No illustration can be drawn from the use of spikes and broken glass on walls, &c. These are mere preventives, obvious to the sight,—unless the trespasser *chooses* a time of darkness, when no notice could be available,—mere preventives, injurious only to the persevering and determined trespasser, who can calculate at the moment of incurring the danger the amount of suffering he is about to endure, and who will, consequently, desist from his enterprise whenever the anticipated advantage is outweighed by the pain which he must endure to obtain it.

BEST C. J. I am of opinion that this action is maintainable. If

any thing which fell from me in *Ilott* v. *Wilks*[1] were at variance with the opinion I now express, I should not hesitate to retract it; but the ground on which the judgment of the Court turned in that case, is decisive of the present; and I should not have laboured the point that the action was not maintainable in that case on the ground that the plaintiff had received notice, unless I had deemed it maintainable if no notice had been given. *Abbott* C. J. says: "Considering the present action merely on the ground of notice, and leaving untouched the general question as to the liability incurred by placing such engines as these, where no notice is brought home to the party injured, I am of opinion that this action cannot be maintained." *Bayley* J. says: "This is a case in which the plaintiff had notice that there were spring guns in the wood." "The declaration assumes the law to be, not that the mere act of placing these guns in a man's own ground is illegal, and punishable by indictment, but that a party doing that act may be liable to an action, provided he does not take due and proper means, by giving notice, to prevent the injury which those engines are calculated to produce." *Holroyd* J. says: "I am of opinion that this action is not maintainable, on the ground that the plaintiff had notice that the spring guns were placed in the wood in question." "So far as he was concerned, the cause of the mischief could not be considered as latent, and the act of letting off the gun, which was the consequence of his treading on the wire, must be considered wholly as his act, and not the act of the person who placed the gun there." And I am reported to have said, expressly, "Humanity requires that the fullest notice possible should be given, and the law of *England* will not sanction what is inconsistent with humanity."

It has been argued that the law does not compel every line of conduct which humanity or religion may require; but there is no act which Christianity forbids, that the law will not reach: if it were otherwise, Christianity would not be as it has always been held to be, part of the law of *England*. I am, therefore, clearly of opinion that he who sets spring guns, without giving notice, is guilty

[1] 3 Barn. & Ald. 304 (1820), one setting spring guns on his premises is not liable to a trespasser who with knowledge thereof none the less persists in trespassing thereon and is injured. Bayley, J., p. 311. "The maxim of law, volenti non fit injuria, applies; for he voluntarily exposes himself to the mischief which has happened. * * * He had no right to enter the wood." Holroyd, J., held that since the plaintiff knowing the peril went to meet it, the injury was due to his own act, *aliter*, if the danger was latent, then "he would be the mere instrument of producing that which resulted from a prior act done by another," *i. e.*, the setting of concealed spring guns. *Deane* v. *Clayton*, 7 Taunt 489 (1817), a dog chasing hares in defendant's wood ran upon snares set to protect the game; it was held by a divided court that no action lay—though in *Townsend* v. *Wathen*, 9 East 277 (1808), it was held that when an occupier of land by a trap baited with strong smelling meat tempted dogs into reach of the trap he was liable. But see *Johnson* v. *Patterson*, 14 Conn. 1 (1840), farmer placing meal mixed with arsenic liable to owner of chickens which come on his land and are poisoned, the poison being placed there because of the frequency of their trespasses; here the defendant gave notice to the owner of the chickens of his intention to do as he did.

In *Loomis* v. *Terry*, 17 Wend. 496 (N. Y. 1837) an owner who allows a ferocious dog to run at large upon his premises held liable even to a trespasser; *accord: Wolf* v. *Chalker*, 31 Conn. 121 (1862); *contra: Lowery* v. *Walker*, L. R. 2 K. B. 433 (1909), reversed on appeal because the plaintiff was held to be a licensee; see *Marble* v. *Ross*, 124 Mass. 44 (1878), where, however, the trespassing plaintiff knew that the defendant kept the vicious stag in his field.

of an inhuman act, and that, if injurious consequences ensue, he is liable to yield redress to the sufferer. But this case stands on grounds distinct from any that have preceded it. In general, spring guns have been set for the purpose of deterring; the Defendant placed his for the express purpose of doing injury; for, when called on to give notice, he said, "If I give notice, I shall not catch him." He intended, therefore, that the gun should be discharged, and that the contents should be lodged in the body of his victim, for he could not be caught in any other way. On these principles the action is clearly maintainable, and particularly on the latter ground. The only thing which raised any doubt in my mind was the recent act of parliament; and if that had been purely prohibitory, there would be great weight in the argument which has been raised on it; because in a new prohibitory law we have the testimony of the legislature that there was no previous law against the thing prohibited. But the act is declaratory as to part, and prohibitory as to part; declaratory as to the setting of spring guns without notice, and the word "declared" is expressly introduced; prohibitory as to setting spring guns, even with notice, except in dwelling-houses by night. As to the case of *Brock* v. *Copeland,* Lord *Kenyon* proceeded on the ground that the defendant had a right to keep a dog for the preservation of his house, and the plaintiff, who was his foreman, knew where the dog was stationed. The case of the furious bull is altogether different; for if a man places such an animal where there is a public footpath, he interferes with the rights of the public. What would be the determination of the Court if the bull were placed in a field where there is no footpath, we need not now decide; but it may be observed, that he must be placed somewhere, and if kept, not for mischief, but to renew his species; while the gun in the present case was placed purely for mischief. The case of the pit dug on a common has been distinguished, on the ground that the owner had a right to do what he pleased with his own land, and the plaintiff could shew no right for the horse to be there.

Those cases, therefore, do not apply to one, where an instrument is placed solely for a bad purpose. In *Deane* v. *Clayton,* I incline to the opinion expressed by my brothers *Park* and *Burrough.* But in *Deane* v. *Clayton,* the plaintiff, the master of the dog, had a right to hunt in the wood adjoining that in which the dog was spiked; there was no visible boundary between the two woods; the manner in which the plaintiff and defendant occupied their respective properties was evidence of an understanding between them that the enjoyment should be mutual; and the dog was impelled onwards by his natural instinct in pursuit of the game. Looking at the authorities, therefore, *Deane* v. *Clayton* is out of the question; and *Ilott* v. *Wilks* is an authority in point. But we want no authority in a case like the present; we put it on the principle that it is inhuman to catch a man by means which may maim him or endanger his life, and, as far as human means can go, it is the object of *English* law to uphold humanity, and the sanctions of religion. It would be, indeed, a subject of regret, if a party were not liable in

damages, who, instead of giving notice of the employment of a destructive engine, or removing it, at least, during the day, expressed a resolution to withhold notice, lest, by affording it, he should fail to entrap his victim.[2]

BURROUGH J. The common understanding of mankind shews, that notice ought to be given when these means of protection are resorted to; and it was formerly the practice upon such occasions to give public notice in market towns. But the present case is of a worse complexion than those which have preceded it; for if the Defendant had proposed merely to protect his property from thieves, he would have set the spring guns only by night. The Plaintiff was only a trespasser: if the Defendant had been present, he would not have been authorised even in taking him into custody, and no man can do indirectly that which he is forbidden to do directly.

Judgment for the Plaintiff.[3]

PALMER *v.* GORDON.

Supreme Judicial Court of Massachusetts, 1899. 173 *Mass.* 410.

TORT, for personal injuries occasioned by spilling scalding water on the plaintiff.

At the trial in the Superior Court, before *Bishop,* J., the evidence tended to show that the plaintiff, a boy fifteen years old, entered the restaurant of the defendant, not for the purpose of purchasing anything himself, but on the invitation of one of two other boys who accompanied him, and who proposed to stand treat; that, finding the defendant engaged with customers, the boys passed into the kitchen attached to the restaurant, and seated themselves in front of the stove with their feet in or on the edge of the oven; that having twice been ordered by the defendant to leave the kitchen,

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[2] The pleadings, the greater part of the arguments, the whole of the concurring opinion of Park, J., and part of the concurring opinion of Burrough, J., are omitted.

[3] *Accord: Hooker* v. *Miller,* 37 Iowa 613 (1873), spring gun set, without notice, to prevent trespassers stealing owner's grapes; the plaintiff was a person entering to steal the grapes; *Grant* v. *Hass,* 31 Tex. Cir. App. 688 (1903), the Texas Code allowing the taking of life to prevent, *inter alia,* theft at night, an occupant of land setting spring gun to protect his melon patch takes the risk that the person coming in contact therewith intends theft and is liable to a trespasser innocent of criminal intent; see also *State* v. *Barr,* 11 Wash. 481 (1895) where one setting a spring gun to protect his empty cabin, by which an innocent trespasser was killed, was held guilty of murder in the second degree. *Cf., Quigley* v. *Clough,* 173 Mass. 429 (1899), a landowner held not liable for injuries received through contact with a barbed wire fence erected to prevent trespassers making a short cut over his lot. "Here there was nothing but an inert object intended to prevent trespassing, which could do no harm unless the trespass itself brought the trespasser in contact with it", Holmes, J., p. 430; *Worthington* v. *Wade,* 82 Tex. 26 (1891), landowner held not liable for death of a trespasser whose horse being frightened had run against a barbed wire fence put up to shut off a path which the public used without owner's consent. See also *Kelly* v. *Bennett,* 132 Pa. 218 (1890), plaintiff travelling on highway slipped and putting out his hand to save himself from falling it was impaled on the sharp points of an iron railing around defendant's area. It was held he could not recover, the defendant having "the right to protect his area in that manner." So it was held in *Scheuermann* v. *Scharfenberg,* 163 Ala. 337 (1909), that one who placed a spring gun in his shop was not liable to a burglar injured thereby.

and, having disregarded the orders, the defendant went into the kitchen, and, saying, "I will show you how I get my dog out," drew a pan of scalding water to and fro across the top of the stove with a scraping noise, for the purpose of spilling the water on the stove and of frightening the boys away, and in so doing spilled water on the stove and thence on the legs of the boys, scalding them, but, as was admitted by the plaintiff, without intending to scald him.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

H. H. Newton, for the defendant.

G. A. Brown, for the plaintiff.

HOLMES, J. This is an action of tort for personal injuries. We are to take it that the plaintiff, a boy, was a trespasser with some other boys in the kitchen attached to the defendant's restaurant, and that the defendant spilled water upon the stove for the purpose of frightening the boys away. He did not intend to scald them, but the water flew from the stove upon the legs of the boys. The question raised by the exceptions is whether the jury were warranted in finding the defendant liable.

It will be seen that this case falls between the cases of spring guns and the like, where the defendant is or may be in the same position as if he had been personally present and had shot the plaintiff, and the cases where, as against trespassers or licensees, railroads are held entitled to run trains in their usual way without special precautions. *Chenery* v. *Fitchburg Railroad,* 160 Mass. 211, 213. In the case at bar the defendant, although not contemplating or intending actual damage, did an act specifically contemplating the plaintiff's presence and directed against him. He left the safe position of a landowner simply pursuing his own convenience and assuming that no one would break the law and thereby bring himself into danger.

Just as a man may make himself liable to a negligent plaintiff by a later negligence, (*Pierce* v. *Cunard Steamship Co.* 153 Mass. 87, 89,) he may make himself liable to a trespasser by an act that is done with reference to the trespasser's presence, and that sufficiently clearly threatens the danger which it brings to pass. A trespasser is not *caput lupinum.* In the present case the only element of doubt was whether the danger to the plaintiff was sufficiently obvious under the circumstances. That question properly was left to the jury.

Exceptions overruled.[1]

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[1] *Accord: Magar* v. *Hammond,* 183 N. Y. 387 (1906), game keeper liable if he fires a gun toward a point where he knows or has reason to believe a trespasser is, but (*semble*) not if he is negligent merely (*i. e.* in not discovering trespasser); *Walsh* v. *Pittsburg Ry. Co.,* 221 Pa. 463 (1908), trespassing child injured by frayed cable which the engineer set in motion while the child was present—whether the engineer actually saw her and was conscious that his act exposed her to danger, were questions for the jury, Fell, J., p. 465. *Cf. Buch* v. *Amory Co.,* 69 N. H. 257 (1897).

So it is often said that a trespasser can only recover for injury caused by "positive wrongful act," *R. R.* v. *Ballantine,* 84 Fed. 935 (C. C. A. 7th Circ. 1898), boy assisting in putting out fire at freight yard injured by explosion of oil car; "wilful or affirmative acts", *Gibson* v. *Leonard,* 143 Ill. 182

HERRICK *v.* WIXOM.

Supreme Court of Michigan, 1899. 121 Michigan, 384.

MONTGOMERY, J.

This is an action of trespass on the case, brought in the circuit court for the county of Shiawassee. Defendant was possessed of and managed a tent show or circus, September 18, 1897, which he exhibited from place to place, and on the afternoon of this day at Bancroft. Plaintiff went to the circus grounds on the afternoon of this day, in company with his cousin. There is testimony to show that while there he and his cousin were invited by a son of the defendant, who had been selling tickets in the ticket wagon, to enter the tent with him, the entertainment being in progress. This plaintiff did, taking a seat on the lower tier of seats. The testimony on the part of the defense tended to show that plaintiff was not invited into the show, and that the son of defendant had no authority to invite him in. There was also evidence that plaintiff had attended a similar exhibition given by defendant the spring before. A part or feature of the entertainment consisted in the ignition and explosion of a giant firecracker attached to a pipe set in an upright position in one of the show rings. This was done by one of the clowns. There is testimony to show that plaintiff sat 30 or 40 feet from the place where the cracker was exploded, but, when the same was exploded, a part of the firecracker flew and struck plaintiff in the eye, putting it out, whereby he lost the sight and use of the eye. For this injury action was brought against defendant for damages as a result of defendant's negligence in permitting a dangerous explosive to be used in a dangerous manner, which subjected those present to hazard and risk of injury. Upon the trial of the cause a verdict of no cause of action was rendered, and judgment for the defendant entered accordingly. Plaintiff brings error. * * *

The circuit judge charged the jury as follows:

"The negligence charged in this case, gentlemen, is that Mr. Wixom exploded a firecracker, of the dimensions that the plaintiff claims this firecracker was, in the inside of this tent, and in the presence of his audience. They claim that was negligence. And that is the question for you to determine, under the evidence, and under the rules of law that I have given you and that I shall give you hereafter. Now, you must further find, in order that the plaintiff recover, that the plaintiff was in the tent, where he was injured, by the invitation of some person having authority to allow him to go in there. If he was a mere trespasser, who forced his way in, then

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(1892) p. 189; or conduct amounting to a "reckless, wilful or wanton disregard of the trespasser's safety," *Nashville Ry. Co.* v. *Priest*, 117 Ga. 767 (1903) p. 771, railroad employe shouted to a child on top of a freight car, which an engine was approaching, "get off or you will be killed"—she jumped and was injured, it was held this was at most lack of ordinary care and did not make the company liable. A railway company, steam or street, is however liable to child trespasser ejected from a moving train or car, *Enright* v. *Railroad*, 198 Pa. 166 (1901); *Biddle* v. *R. R.*, 112 Pa. 551 (1886); *Aiken* v. *R. R.*, 180 Mass. 8 (1901), 184 Mass. 269 (1903); *cf. Bjornquist* v. *R. R.*, 185 Mass. 130 (1904).

the defendant owed him no duty that would enable him to recover under the declaration and proofs in this case. * * *

We think this instruction faulty, in so far as it was intended to preclude recovery in any event if the plaintiff was found to be a trespasser. It is true that a trespasser who suffers an injury because of a dangerous condition of premises is without remedy. But, where a trespasser is discovered upon the premises by the owner or occupant, he is not beyond the pale of the law, and any negligence resulting in injury will render the person guilty of negligence liable to respond in damages. Beach, Contrib. Neg. § 50; Whart. Neg. § 346; *Marble* v. *Ross,* 124 Mass. 44; *Houston, etc., R. Co.* v. *Sympkins,* 54 Tex. 615 (38 Am. Rep. 632); *Brown* v. *Lynn,* 31 Pa. St. 510 (72 Am. Dec. 768); *Needham* v. *Railroad Co.,* 37 Cal. 409; *Davies* v. *Mann,* 10 Mees. & W. 546; 1 Shear. & R. Neg. § 99. In this case the negligent act of the defendant's servant was committed after the audience was made up. The presence of plaintiff was known, and the danger to him from a negligent act was also known. The question of whether a dangerous experiment should be attempted in his presence, or whether an experiment should be conducted with due care and regard to his safety, cannot be made to depend upon whether he had forced himself into the tent. Every instinct of humanity revolts at such a suggestion.

For this error the judgment will be reversed, and a new trial ordered.

GRANT, C. J., MOORE and LONG, JJ., concurred. HOOKER, J., did not sit.[1]

CAMPBELL *v.* KANSAS CITY, FORT SCOTT & MEMPHIS RAILROAD CO.

Supreme Court of Kansas, 1895. 55 *Kan.* 536.

JOHNSTON, J.:[1] It is contended that Campbell was seen 500 feet ahead of the engine, and therefore the engineer should have stopped the train before reaching him. The engineer, however, is not bound to stop a train whenever he sees a person ahead upon the

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[1] *Accord: Hobb's Adm.* v. *Blanchard Co.,* 74 N. H. 116 (1906), the defendants, a lumber company, left sticks of dynamite lying about near their camp, which the plaintiff, a boy, coming to the camp out of mere curiosity, not knowing its nature, exploded. It was held that on these facts it was error to nonsuit the plaintiff. "It was immaterial whether the deceased was technically a trespasser or a bare licensee," the jury might find "that the defendant knew of his presence in the vicinity of the camp; knowing his presence, as well as that strangers frequented the camp with the tacit acquiescence of the defendant, it was bound not to actively render his liberation unreasonably dangerous". Leaving dynamite lying about was "not only a careless act indicating a disregard of human life, but an unnecessary and unusual act in the reasonable prosecution of lumbering operations." "In this case the defendant's negligence or breach of duty to the deceased consisted in creating upon the land a concealed danger, not justified or required by the business it was ostensibly carrying on, when it knew of the boy's presence and of his probable ignorance that the danger existed" Walker, J., pp. 120, 121. The case having come again before the court, *Hobbs* v. *Hobbs,* 75 N. H. 73 (1908), it was held that the plaintiff, having failed to show that the defendant knew of his presence on the premises when the dynamite was left exposed, could not recover.

[1] Only a portion of the opinion is printed.

railroad, but has a right to assume that an adult person apparently in the possession of his faculties will exercise his senses and step out of the way of danger before the engine reaches him. The engineer is required to keep a reasonable lookout for trespassers upon the track, and to exercise such care as the circumstances require to prevent injury to them. Campbell was undoubtedly seen by the engineer several hundred feet away; but he was awake and moving, and appeared to be in the full possession of all his senses and faculties. Although there were some piles of ballast along the track, he could have stepped aside without difficulty; and, as there was no apparent disablity, the engineer had a right to presume until the last moment that he would heed the warning which had been given, and leave the track in time to avoid injury. The engineer gave the usual signals for the crossing; and we have seen that as the engine approached Campbell danger signals, or what one witness called "screeching whistles," were repeatedly given.[2] * * * Where the appearances indicate that a person upon the track is in such a condition as to be either insensible of his danger or unable to avoid it, those in charge of the train must use all available means consistent with the safety of those on the train to stop. The same rule is applied with reference to a young child, who is unable to understand the peril of being upon a railroad track.[3] * * * Campbell was a man of mature years, who had the use of his faculties; and, as he was moving and apparently capable of taking care of himself, the engineer had a right to presume until the last moment that he would leave the track and not be run over.

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[2] *Accord: Phila. & Reading R. R.* v. *Spearen*, 47 Pa. 300 (1864), *semble; P. R. R.* v. *Morgan*, 82 Pa. 134 (1876); *R. R.* v. *Blakely*, 59 Ala. 471 (1877); *R. R.* v. *McClaren*, 62 Ind. 566 (1878); *High* v. *R. R.*, 112 N. C. 385 (1893); *R. R.* v. *Herrin*, 6 Tex. Civ. App. 718 (1894); see, however, *aliter*, when the train is going at a prohibited speed, *R. R.* v. *O'Conner*, 115 Ill. 254 (1885); *R. R.* v. *Daniel*, 89 Ga. 463 (1892). Even at a public crossing a traveller is ordinarily only entitled to timely warning of the approach of the train, *Telfer* v. *R. R.*, 30 N. J. L. 188 (1862).

[3] The youth of trespassers does not cast on a railroad any duty to keep on the watch for their possible presence on its tracks, *Phila. & Reading R. R.* v. *Spearen*, 47 Pa. 300 (1864); *Nolan* v. *R. R.*, 53 Conn. 461 (1885); but where a trespasser is seen, obviously too young to care for itself, the railroad is bound to take steps to stop the train or bring it within control so that it may be quickly stopped, *Galveston R. R.* v. *Olds*, 112 S. W. 787 (Tex. Cir. App. 1908); *R. R.* v. *Spearen, supra; R. R.* v. *Lohges*, 6 Ind. App. 288 (1892). So if a child be seen near the track, the engineer should immediately slacken speed and bring the train under control, *R. R.* v. *Barker*, 39 Ark. 491 (1882); *Kelly* v. *P. & R. R. R.*, 30 L. I. 140 (Phila. Dist. Ct. 1873), *aliter* when the child is in custody of an adult, *Benson* v. *R. R.*, 98 Cal. 45 (1893). See as to railroad's liability, where the engineer sees an obstruction on the track but does not realize its nature, mistaking the helpless trespasser for an inanimate object, *R. R.* v. *Dunnaway*. 93 Va. 29 (1896); *Murch* v. *R. R.*, 78 Hun 601 (N. Y. 1894), company not liable:—*contra Keyser* v. *R. R.*, 66 Mich. 390 (1887); *R. R.* v. *St. John*, 5 Sneed 524 (Tenn. 1858). So if the trespasser, though an adult, is obviously as helpless from some other cause as an infant he is entitled to the same care, *Tanner* v. *R. R.*, 60 Ala. 621 (1877), plaintiff thrown from horse in deep cut; *R. R.* v. *Kotoski*, 109 Ill. 383 (1902), trespasser on high trestle, attacked by vertigo; *R. R.* v. *Hankerson*, 72 Ga. 182 (1883); there is of course no duty other than of giving warning owed to trespasser till not only his presence but his helplessness is known, *Fraser*

EASTERN KENTUCKY RAILWAY CO. *v.* POWELL.

Court of Appeals of Kentucky, 1895. 17 Ky. Law Rep. 1051.

PAYNTER, J. The only duty which a railroad company owes a trespasser is to use care to save him after he is discovered in his perilous position. It is not required to use care to anticipate and discover the peril of such person. As this court has so often stated the duty of railroad companies with reference to trespassers on their tracks, it seems to us the best way to restate it by quoting from former opinions of this court.

It was said in *Kentucky Central R. R. Co.* v. *Gastineau's Adm'r*, 83 Ky. 122: "A railroad company has the right to the exclusive use and occupation of its yard and track, except at crossings or such places as the public are by law authorized to use; otherwise it could not properly perform its duties to the public. It is not required to anticipate the intrusion of others; and one who enters upon them without right does so at his peril, and in case of injury cannot recover unless it was wantonly inflicted after the danger was discovered. Its duty to such a person or trespasser is merely negative; it must not, when it knows of the peril, act maliciously or with a disregard of obvious consequences. It is not required to use care to *anticipate* and discover the peril to such a person, but only to do so *after* the *discovery* of the danger. Until then no legal duty is imposed upon it, because no one by a wrongful act can impose a duty upon another."

In *L. & N. R. R. Co.* v. *Howard's Adm'r*, 82 Ky. 217, the deceased lost his life at night on the track, away from any town or road crossing, and the court said: "In the case before us the company had the exclusive right to the use of the road at the place where the appellee's intestate lost his life, and we see no reason for making the company responsible unless it should appear that those in charge of the train, after discovering the condition and danger of the party exposed, could, by the exercise of proper care, have avoided the injury."

In *Conley's Adm'r* v. *C., N. O. & T. P. Ry. Co.*, 89 Ky. 406, the court, recognizing the rule as stated, said: "We recognize and repeat the rule, that the operators of a train are ordinarily under no obligations to look out for trespassers; that as a rule they have the exclusive right to their track and have the right to presume that no person will trespass upon it, are, therefore, under no obligations to look out for them." The court in this as in other cases stated the exception to the rule as to public crossings, cities, etc.

In *Brown's Adm'r* v. *L. & N. R. R. Co.*, 17 Ky. Law Rep. 145, the court said: "So that a trespasser and wrongdoer cannot be heard to argue and say that the train was too heavy or machinery insufficient, or that the train was improperly manned. There is this right, however, that belonged to the decedent as one of humanity, and that

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v. *R. R.*, 81 Ala. 185 (1886); *Poole* v. *N. C. R. R.*, 8 Jones 340 (N. C., 1861). See extreme case, *R. R.* v. *Boswell*, 82 Va. 932 (1887), and *cf. Baicker* v. *People's Ry. Co.*, 215 Pa. 478 (1906).

is, that it was the duty of the railroad company, after becoming aware of his danger, to use all reasonable care to avoid his injury."[1]

Many cases of this court could be cited which enunciate the principle found in the cases cited, and from which the foregoing quotations are made.

In *Shackelford* v. *L. & N. R. R. Co.*, 84 Ky. 43, it was said: "Railroad trains must give the customary signals at public places and public crossings; the failure to do so is negligence. But this is required for the safety of passengers, trainmen and the public using, and who have the right to use, the track at such public ways, and not for the purpose of protecting those who, as trespassers, may be crossing or using the track elsewhere."

From the doctrine stated, in the cases cited, the plaintiff, being a trespasser, could not complain that there was no headlight on the engine. If those in charge of the train were not required to anticipate his presence where the accident occurred, it follows that the defendant was not required to do anything to facilitate the discovery of his danger. There is no question that the train did not have a whistle and bell, with which to give proper warning of the train's approach at public crossings, etc.

The only question in this case was as to whether those in charge of the train could have, with reasonable care, after they discovered plaintiff's danger, prevented the injury.

The whole of the plaintiff's testimony was directed to the issue as to whether Irwin had the authority, express or implied, to operate the hand car on the occasion of the accident, as to his care for the protection of plaintiff, and as to whether there was a headlight on the engine.

There was not a scintilla of evidence in the record even tend-

[1] While it is often said that a trespasser can only recover if injured by wanton or wilful misconduct, *Tanner* v. *Louisville & N. R. Co.*, 60 Ala. 621 (1877); *Haley* v. *Kansas City M. & B. R. Co.*, 113 Ala. 640 (1896), or when reckless disregard for his safety is shown equivalent to an intent to injure him, *Chicago & Eastern Illinois R. Co.* v. *Hedges*, 105 Ind. 398 (1886), any lack of care to avoid causing injury to a trespasser after knowledge of his helpless peril is usually regarded as wanton, wilful or reckless misconduct toward him, *Haley* v. *Kansas City M. & B. R. Co.*, 113 Ala. 640 (1896); *Martin* v. *Chicago & N. W. R. Co.*, 194 Ill. 138 (1902); *Krenzer* v. *Pittsburgh, C., C. & St. L. R. Co.*, 151 Ind. 587 (1898); *Rosenthal* v. *N. Y. etc. R. R.*, 112 App. Div. (N. Y.) 431 (1906), per McLaughlin, J., p. 435; *Tanner* v. *Louisville & N. R. Co.*, 60 Ala. 621, trespasser thrown from his horse upon track; *Pannell* v. *Nashville, F. & S. R. Co.*, 97 Ala. 298 (1893), yardmaster, seeing a trespasser caught between two cars, gave no warning, but allowed the train to be operated as though no one was in peril; but see *Hoberg* v. *Collins, Lavery & Co.*, 80 N. J. L. 425 (1911), where the driver of the defendant's wagon struck with his whip at a boy stealing a ride, the boy fell off and was run over by a trolley car, held that the defendant was not liable—as to distinction between mere negligence and intentional injury or wanton and wilful misconduct see *Bolin* v. *Chicago, etc., R. Co.*, 108 Wis. 333 (1900). It is often said to be the railroad's duty to use every practicable means to prevent injury to a trespasser discovered in a place of danger, *St. Louis &c. R. Co.* v. *Townsend*, 69 Ark. 380 (1901); *Garza* v. *Texas Mexican R. Co.*, 41 S. W. 172 (Tex. Civ. App. 1897), boy asleep under car; *Mathews* v. *Chicago R. I. & P. R. Co.*, 63 Mo. App. 569 (1895); *Baltimore & Ohio R. Co.* v. *Welch*, 114 Md. 536 (1911); *Omaha R. Co.* v. *Cook*, 42 Nebr. 577 (1894), but see *Griswold* v. *Boston & M. R. Co.*, 183 Mass. 434 (1903), p. 435; *Aiken* v. *Holyoke St. R. Co.*, 184 Mass. 269 (1903); *Raden* v. *Georgia Railroad*, 78 Ga. 47 (1886). In some jurisdictions a trespasser helpless through some fault, as wilfully going to sleep on the track, *Raden* v. *Georgia Railroad Co.*, 78 Ga. 47 (1886), or drunkenness, is regarded as guilty

ing to show that the injury could have been prevented after plaintiff's danger was discovered, nor was there any testimony offered for the purpose of showing that it could have been so prevented.

As appears from the record, the injury to plaintiff resulted from his own wrong and negligence, and except for which it would not have occurred.[2]

GUINN, ADMINISTRATOR, *v.* DELAWARE AND ATLANTIC TELEPHONE CO.

Court of Errors and Appeals, New Jersey, 1905. *72 N. J. L., 276.*

SWAYZE, J. William C. Guinn, a lad thirteen years of age, was killed by contact with a guy wire charged with electricity. The wire was of a character used for telephone construction—copper wire of a tensile strength of two hundred and fifty pounds. It was attached to a pole on which were strung wires of the defendant alone. There was no proof except by inference that the defendant erected or owned the pole, or had attached the wire. In answer to an interrogatory, the defendant stated that the wire had been inspected May 27th or 28th, 1904, about three weeks before the injury. No testimony was offered by the defendant. The trial judge left it to the jury to say whether the wire was put there by the servants of

of continuing contributory negligence, and so barred when an innocent trespasser might recover; *R. R.* v. *Hankerson,* 61 Ga. 114 (1878); *Smith* v. *Norfolk & S. R. Co.,* 114 N. Car. 728 (1894); *R. R.* v. *Cragin,* 71 Ill. 177-181 (1873); see also, *Woods* v. *Tipton,* 128 Ind. 289 (1890), and *Bageard* v. *Consolidated Traction Co.,* 64 N. J. L. 316 (1899); *contra, Williams* v. *Southern Pac. R. Co.,* 72 Cal. 120 (1887); *St. Louis &c. R. Co.* v. *Townsend,* 69 Ark. 380 (1901); and *cf., Wheeler* v. *Grand Trunk R. Co.,* 70 N. H. 607 (1900); and *Black* v. *New York, N. H. & H. R. Co.,* 193 Mass. 448 (1907).

[2] *Accord*: *Fraser* v. *R. R.,* 81 Ala. 185 (1886), failure to keep a lookout; *Ward* v. *R. R.,* 25 Ore. 433 (1894); *Williams* v. *R. R.,* 72 Cal. 120 (1887); *Terra Haute & I. R. R.* v. *Graham,* 95 Ind. 286 (1883), similar facts; *Phila. & R. R. R.* v. *Hummell,* 44 Pa. 375 (1863); *Phila. & Reading R. R.* v. *Spearen,* 47 Pa. 300 (1864), no warning of train's approach; *Tennenbrock* v. *R. R.,* 59 Cal. 269 (1881); *Campbell* v. *R. R.,* 55 Kans. 536 (1895); *Yarnall* v. *R. R.,* 75 Mo. 575 (1882); *Ling* v. *R. R.,* 165 Fed. 813 (1908); *contra,* North Carolina and Texas; *Bogan* v. *R. R.,* 129 N. C. 154 (1901); *Pickett* v. *R. R.,* 117 N. C. 616 (1895), held that trespasser may recover when injured by breach of the duty, admittedly owed to passengers, to keep a lookout; *Galveston, etc., R. R.* v. *Olds,* 112 S. W. 787 (Tex. Civ. App., 1908), railways owe to trespassers duty to look out for them; *Houston R. R.* v. *Adams,* 44 Tex. Civ. App. 288 (1906), this however only enures to the benefit of infants and others without fault on the track, adult wilful trespassers are barred by their continuing contributory fault. Since a street railway has merely a right to use the highway in common with the public, travellers upon their tracks are not trespassers and the railway is bound to keep a lookout at all points and not merely at street crossings; *Ind. Trac. Co.* v. *Kidd,* 167 Ind. 402 (1906); *R. R.* v. *O'Donnell,* 207 Ill. 478 (1904). See as to the differing rights and duties of travellers on highway crossing steam railroads and street railway tracks; *steam railroads, Runyon* v. *R. R.,* 1 Dutcher, 556 (N. J., 1856); *Telfer* v. *R. R.,* 30 N. J. L., 188 (1862); *street railways, Conrad* v. *R. R.,* 70 N. J. L., 676 (1904); *Vrooman* v. *R. R.,* 70 N. J. L., 818 (1904). A railroad engineer is bound to keep a lookout for trespassers when approaching places where the presence of the public, though unauthorized, is to be expected, *Pa. R. R.* v. *Lewis,* 79 Pa. 33 (1875), but *cf. Hummell* v. *R. R., supra; Ga. Pac. R. R.* v. *Lee,* 92 Ala. 262 (1890), persons crossing unfenced tracks in or on outskirts of towns and cities; see *Balt. & Pot. R. R.* v. *Cumberland,* 176 U. S. 232 (1899), persons so crossing though in no defined path said not to be trespassers; *Chicago, B. & Q. R. R.* v. *Wymore,* 40 Neb. 645 (1894), plaintiff crossing track to get to station while technically a trespasser is one whose presence is to be expected and her safety provided for, such trespassers being habitual; *Haley* v *R. R.,*

the defendant. We think there was sufficient evidence to warrant the inference that such was the fact.

The injury was caused by the guy wire breaking and falling on an electric light wire belonging to another company. The broken end fell in the grass in a field belonging to Gulick. Across this field people were accustomed to travel without objection, but as far as appears without other right. The boy's body was found still in contact with the guy wire shortly after the shock. It does not appear that he had any right to be on Gulick's property except such as may be inferred from the facts stated. The contention of the defendant is that it was under no duty to the decedent for the reason that he was a trespasser on Gulick's property, or at best a mere licensee.

The liability of the defendant rests upon the fact that it was maintaining wires which might become charged with a deadly current of electricity. *New York and New Jersey Telephone Co.* v. *Bennett*, 33 *Vroom* 742; *Brooks* v. *Consolidated Gas Co.*, 41 *Id.* 211.

The duty to exercise care is established as to travelers upon the highway and employes of the defendant or of another company who in the exercise of their rights are likely to come in contact with the wires, and of persons who are lawfully in a place of proximity to the wires. The question presented in this case is whether the duty exists also as to third persons who are not at the time in the exercise of any legal right. The principle underlying the case is stated by Chief Justice Beasley, in *Van Winkle* v. *American Steam Boiler Co.*, 23 *Vroom* 240 (at *p.* 247), to be that in all cases in which any person undertakes the performance of an act which, if not done with care and skill, will be highly dangerous to the persons or lives of one or more persons, known or unknown, the law, *ipso facto*, imposes as a public duty the obligation to exercise such care and skill.

The test of the defendant's liability to a particular person is whether injury to him ought reasonably to have been anticipated. In the present case the guy wire was stretched over an open field, across which people were accustomed to travel without objection by the landowner. The adjoining field was used as a ball ground. It was probable that if the guy wire broke some one crossing the field would come in contact with it. That whoever did so was a trespasser or a bare licensee, as against the landowner cannot avail the defendant. If a bare licensee, he would still be there lawfully. If a trespasser, his wrong would be to the landowner alone, not a public wrong nor a wrong to the defendant.

The case differs from one where a trespasser or licensee seeks to recover of the landowner. A landowner may in fact reasonably anticipate an invasion of his property, but in law he is entitled to assume that he will not be interfered with. His right to protect his possession and to use his property is paramount. It is these considerations which led this court to deny the liability of the defendant in the turn-table cases. *Turess* v. *New York, Susquehanna and Western Railroad Co.*, 32 *Vroom* 314; *Delaware, Lackawanna and Western Railroad Co.* v. *Reich*, *Id.* 635, and in *Friedman* v. *Snare & Triest Co.*, 42 *Id.* 605.

The general rule is that a person is liable for those results of his negligence which are reasonably to be anticipated; the exemption

113 Ala. 640 (1896), plaintiff walking on path on right of way near track, such trespassers are to be expected in populous rural districts as well as in towns and cities; *Brown* v. *R. R.*, 73 N. H. 568 (1906), *semble.*

of the landowner from liability as to trespassers and licensees is necessary to secure him the beneficial use of his land, but no reason exists for extending this exemption to the case where the rights of the defendant have not been interfered with.

There is no proof that the defendant had any right to maintain the pole and wire, but even if it had the deceased is not shown to have interfered with the defendant's rights. The right to maintain the pole and wire did not involve the right to have the wire swing loose or occupy another portion of the field. Whoever interfered with the pole and wire in place might be a trespasser, but he would not be a trespasser upon the defendant's rights if he came in contact with the wire elsewhere.

The trial judge, in his charge, rested his refusal to nonsuit upon the theory that the defendant had no right to stretch the guy wire, and he therefore refused to charge that the mere fact that the boy was there as a licensee defeated the plaintiff's right to recover. We think that even if the defendant had a right to stretch the guy wire, the plaintiff might still be entitled to recover. There was no error in the refusal to charge.[1]

(b) Infant Trespassers.

LYNCH v. NURDIN.

In the Queen's Bench, 1841. 1 *Q. B.* 29.

LORD DENMAN, C. J.

It was an action of tort for negligence by the defendant's ser-

[1] *Accord*: *Daltry* v. *Media Electric, etc., Co.*, 208 Pa. 403 (1904), p. 412, boy playing inside of gate of vacant suburban premises shocked by live wire left hanging near driveway after electric lights had been removed from the residence, and see also *Mullen* v. *Wilkes-Barre, etc., Co.*, 38 Pa. S. C. 3, (1909); *Davoust* v. *Alameda*, 149 Cal. 69 (1906), city, supplying electric light for profit, held liable to plaintiff injured by live wire lying across path in vacant lot which the public were accustomed to use. "She had a right to be where she was, at least against every one except the owner of the lot; and the city, itself a mere trespasser, is in no position to raise the question as to what duty the owner of the land owes to a trespasser," McFarland, J., p. 74; *Wilson* v. *Am. Bridge Co.*, 74 N. Y. App. Div. 596 (1902), defendant discharged a large stream of boiling water over the land of an adjacent owner, which as was well known people were in the habit of using as a path; held, that it was immaterial whether plaintiff, scalded thereby, was a trespasser on the adjacent land or a licensee.

Where the place is one not likely to be used by the public, even a trespasser owes a duty only to those coming thereto under authority of the owner, since there is no reason to anticipate the presence of any others. *Hector* v. *Electric Co.*, 161 Mass. 558 (1894); *Illingsworth* v. *Boston El. Co.*, 161 Mass. 583 (1894), plaintiff licensee and so duty owed; *Greenville* v. *Pitts*, 107 S. W. 50, Tex. (1908), no reason to anticipate presence of policeman on roof though lawfully there to detect crime; all cases of uninsulated wires strung over roofs; *Gross* v. *So. Chic. Ry.*, 73 Ill. App. 217 (1897), plaintiff riding on top of high barrel car struck by defendant's trolley wire strung across street. See *St. Joseph Ice Co.* v. *Bertch*, 33 Ind. App. 491 (1904), a land owner held not liable to one, occupying adjacent land without authority of owner thereof, for fall of building, ruinously out of repair thereon; *aliter* to one occupying adjacent property by permission or invitation of owner; *Lynds* v. *Clark*, 14 Mo. App. 74 (1883).

vant, in leaving his cart and horse half an hour in the open street at the door of a house in which the servant remained during that period. * * *

Witness for the defense proved that, after the servant had been about a quarter of an hour in the house, the plaintiff and several other children came up, and began to play with the horse, and climb into the cart and out of it. While the plaintiff was getting down from it, another boy made the horse move, in consequence of which the plaintiff fell, and his leg was broken as before mentioned. On this undisputed evidence (for there was no cross examination of the witnesses), the defendant's counsel claimed the Judge's direction in his favour. * * * My learned brother, however, thought himself bound to lay all the facts before the jury, and take their opinion on that general point. They found a verdict for the plaintiff. It is now complained that such direction was not given. * * *

It is urged that the mischief was not produced by the mere negligence of the servant as asserted in the declaration, but at most by that negligence in combination with two other active causes, the advance of the horse in consequence of his being excited by the other boy, and the plaintiff's improper conduct in mounting the cart and so committing a trespass on the defendant's chattel. On the former of these two causes no great stress was laid, and I do not apprehend that it can be necessary to dwell at any length. For if I am guilty of negligence in leaving any thing dangerous in a place where I know it to be extremely probable that some other person will unjustifiably set it in motion to the injury of a third, and if that injury should be so brought about, I presume that the sufferer might have redress by action against both or either of the two, but unquestionably against the first. * * * But in the present case an additional fact appears. The plaintiff himself has done wrong: he had no right to enter the cart, and, abstaining from doing so, would have escaped the mischief. Certainly he was a cooperating cause of his own misfortune by doing an unlawful act: and the question arises, whether that fact alone must deprive the child of his remedy. The legal proposition, that one who has by his own negligence contributed to the injury of which he complains cannot maintain his action against another in respect of it, has received some qualifications. * * * Ordinary care must mean that degree of care which may reasonably be expected from a person in the plaintiff's situation: and this would evidently be very small indeed in so young a child. But this case presents more than the want of care: we find in it the positive misconduct of the plaintiff an active instrument towards the effect. * * * *Bird* v. *Holbrook*, 4 Bing. 628, is a decisive authority against the general proposition that misconduct, even wilful and culpable misconduct, must necessarily exclude the plaintiff who is guilty of it from the right to sue. I remember being present at a trial at Warwick before Lord Chief Baron Richards, where the same law prevailed.

But the question remains, can the plaintiff then, consistently with the authorities, maintain his action, having been at least equally in fault. The answer is that, supposing that fact ascertained by the jury, but to this extent, that he merely indulged the natural instinct

of a child in amusing himself with the empty cart and deserted horse, then we think that the defendant cannot be permitted to avail himself of that fact. The most blameable carelessness of his servant having tempted the child, he ought not to reproach the child with yielding to that temptation. He has been the real and only cause of the mischief. He has been deficient in ordinary care: the child, acting without prudence or thought, has, however, shown these qualities in as great a degree as he could be expected to possess them. His misconduct bears no proportion to that of the defendant which produced it.

For these reasons, we think that nothing appears in the case which can prevent the action from being maintained. It was properly left to the jury, with whose opinion we fully concur.

Rule discharged.[1]

KREINER *v.* STRAUBMÜLLER.

Superior Court of Pennsylvania, 1906. 30 *Pa. Super Ct.* 609.

OPINION BY HENDERSON, J.:

It is a well established rule that those controlling property on, or immediately adjacent to, a public highway must have regard to the reckless and thoughtless tastes and traits of childhood. The owners of the premises are required in such cases to anticipate that children may use the highway, and in so doing be exposed to any unsafe object placed thereon. They are bound to know that young children are likely to be at play on the streets, and to make use of objects attractive for their exploits and games, and this responsibility has been held to attach in some cases where the offensive object was wholly upon the property of the defendant, and where the children injured were trespassers, as in Hydraulic Works Company v. Orr, 83 Pa. 332, and Duffy v. Sable Iron Works, 210 Pa. 326. "Children, wherever they go, must be expected to act upon childish instincts and impulses; others, who are chargeable with a duty of care and caution toward them, must calculate upon this and take precautions accordingly. If they leave exposed to the observation of children

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[1] This case, though doubted in *Hughes* v. *Macfie,* 2 H. & C. 744 (1863), and *Mangan* v. *Atterton,* L. R. 1 Ex. 239 (1866)—but see Cockburn, C. J., *Clark* v. *Chambers,* L. R. 3, Q. B. D. 327 (1878), p. 339—is followed in *Jewson* v. *Gatti,* 2 Times L. R. 381, 441 (1886), a bar was put up to protect an open cellar abutting on the highway on which work was going on; the plaintiff leaned on it to watch the work, it gave way, injuring him, and is expressly approved in *Harrold* v. *Watney,* L. R. (1898), 2 Q. B. 320, fence fell when boy tried to climb it to join friends at play within.

Accord: *Westerfield* v. *Levis,* 43 La. Ann. 63 (1891), boy injured in trying to drive horse roller left unguarded in street in front of his house; *Kreiner* v. *Straubmüller,* 30 Pa. S. C. 609 (1906); *Cahill* v. *Stone & Co.,* 96 Pac. 84, Cal., 1908.

Contra: *McGuiness* v. *Butler,* 159 Mass. 233 (1893), slab of marble proped almost upright on a sidewalk; *Gay* v. *El. Ry. Co.,* 159 Mass. 238 (1893), car with defective brake left unguarded in public street; *Holbrook* v. *Aldrich,* 168 Mass. 15 (1897), infant customer in a grocer's shop injured by coffee grinder; *Kaumeier* v. *City Ry. Co.,* 116 Mich. 306 (1898), hand car left, unbraked and unguarded, on street. And see *Rodgers* v. *Lees,* 140 Pa. 475, (1891) but *cf. Kreiner* v. *Strabmüller, post.* p. 222.

anything which would be tempting to them, and which they in their immature judgment might naturally suppose they were at liberty to handle or play with, they should expect that liberty to be taken:" Chief Justice COOLEY, in Power v. Harlow, 57 Mich. 107. * * *

All of the cases agree that where the object is upon the highway and is of such a character that it should have been reasonably anticipated that it would be used by children in the course of their play, and that owing to its position, form or condition it would be dangerous to them when so engaged, the owner would be guilty of negligence if he failed to guard against the contingency of accident. This principle is recognized in Rodgers v. Lees, 140 Pa. 475, and Guilmartin v. Philadelphia, 201 Pa. 518, upon which the appellant relies. In the former case the child who was killed was a trespasser, and engaged in an act which was obviously dangerous. The object to which he clung was moving at the time, and his act was one which ordinary prudence might not have foreseen.[1] In the latter case the child was injured by a falling gate on which he had climbed. The city was not required to anticipate dangers resulting from the improper use of objects safe in themselves, and for the use for which they are designed.[2] In the same case, however, it was said: "If an object was in itself dangerous or might become dangerous if a child chanced to set it in motion while playing with it, or by running against it, there was a duty on the city to take such precaution as was reasonable, under the circumstances, to prevent injury by it." Marsh v. Giles, 211 Pa. 17, turned upon the point that the act of the defendant in placing the stone against the pole was not the proximate cause of the injury; that that was the immediate consequence of the intervening act of the plaintiff's companion in making a use of the stone not likely to have been anticipated. The injury could as well have occurred if the plaintiff's companion had used a billet of wood or a stone picked up from the ground. The question presented to the referee at the trial below was whether the action of the children in playing upon the pile of barrels was one of the things which might have been expected to occur, and against the disastrous result of which the defendant was bound to guard. This question was one of fact. The defendant was not authorized to use the side-

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[1] In *Rodgers* v. *Lees* (1891), a cable with a ball and hook attached, used by the defendants to hoist material into their mill, hung over a public but little used street. Through some oversight of defendant's employes the machinery was not stopped while they were away at dinner and in consequence the ball continued to go up and down. The infant plaintiff being lawfully on the street and seeing the ball, said to a companion, "I bet I can go up higher on the ball than you" and against his comrade's warning got upon the ball, but losing courage, as it went up, let go and fell. It was held that the defendant owes "no duty of protection to passing children against the consequences of their reckless acts in rushing into so manifest a danger;" there being no room for the argument "that the boy was ignorant of the effect of his act" since "he got upon the ball for the express purpose of riding upon it" and in order to impress upon his comrade his contempt of danger.

[2] But see, *Birge* v. *Gardiner*, 19 Conn. 507, 1849, and *Harold* v. *Watney*, L. R. 1898, 2 Q. B. 320, *contra*.

The Court evidently is speaking of *Rodgers* v. *Lees*, *supra*.

walk as a place for the storage of barrels. They were not there temporarily in the course of transfer from the street to the brewery, or from the brewery to the street. The same barrels did not remain all the time, but the evidence tends to show that barrels of the same character were kept there much of the time in the prosecution of the defendant's business. This use of the street being unlawful, he has not the excuse that he was in the exercise of his own right in so obstructing the highway. The plaintiff was scarcely more than five years of age. He had slipped away from the home of his aunt, who had temporary care of him, while she was engaged in the house and was injured within a very short time thereafter. The playful instincts of himself and his companions took them to the place, and it does not seem improbable that they should have done just what was done. The barrels were empty, were not in any way secured, and were so arranged in tiers as to invite the children to the enterprise in which they engaged. The referee found that the pile of barrels was of such a character that the defendant should have anticipated that children would climb upon them in their play, and that the manner of piling was such as to render it dangerous to children who would be tempted to play thereon. This finding is warranted by the evidence and is conclusive against the defendant. It cannot be declared as a matter of law that children of such tender age would not be tempted in their plays to climb to the top of the pile, nor is there anything in the facts to indicate that they must have seen that such action was manifestly dangerous. Some situations might be obviously dangerous to persons of their years, as the track of a railroad when a train is at hand, or the middle of a highway when a rapidly moving team is closely approaching, or the ascending ball in Marsh v. Giles,[3] but we have nothing of that kind here. It

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[3] *Accord: Brinkley Car Co.* v. *Cooper,* 70 Ark. 331 (1901), "If the pool of water was open, and not concealed, and the boy had notice it was hot, the company could reasonably suppose that a boy six years of age would not intentionally or carelessly put his foot into water known by him to be hot," p. 336; *Stiefsohn* v. *Brooke & Co.,* 5 T. L. R. 684, Eng. (1889), and *cf. Jewson* v. *Gatti,* 2 T. L. R. 441, Eng. (1886), Esher, M. R.; *George* v. *Los Angeles Ry. Co.,* 126 Cal. 357 (1899), "if the element of danger connected with these trailers (cars left in street) was not hidden or concealed but was open to the observation and could have been comprehended by a boy of the plaintiff's age with average intelligence, * * * the plaintiff cannot recover," p. 365. Compare, *Barthold* v. *Phila.,* 154 Pa. 109 (1893), infant falling into open well in a city park, and *Le Grand* v. *Wilkesbarre Traction Co.,* 10 Pa. S. C. 12 (1899), boy on picnic drowned while swimming in open pond in trolley park. In *Edgington* v. *R. R.,* 116 Iowa, 410 (1902), Weaver, J., says, p. 436, "Hoodlums find no immunity or protection in the law as we interpret it. * * * They know the difference between right and wrong, and understand the meaning of trespass as well as the property owner. Ordinarily, they are at no loss to care for themselves. They disregard property right from mere love of mischief, and take risks out of mere bravado, or in conscious defiance of moral and legal restraint. When a boy is thus injured, we may pity his folly, but justly say, as the law says, that, having intelligently assumed the risk, he ought not to recover damages. This has no application whatever to infants who are yet without judgment or discretion;" *Rodgers* v. *Lees,* cited in principal case, *accord:* but see, *contra, Price* v. *Atchison Water Co.,* 58 Kan. 551 (1897), where though the boy was a trespasser, the condition one necessary to the owner's use of its land, the danger

was not unlawful for the children to play upon the street, and it cannot be said that they had no business there. The owner of the premises owed them the duty to provide against the consequences of their inexperience and youthful inclination to play upon his property placed on the sidewalk in a position which might attract them. The referee arrived at a satisfactory conclusion on the evidence presented, and the facts being established the law declares the liability.

The judgment is affirmed.[4]

DUFFY *v.* SABLE IRON WORKS.

Supreme Court of Pennsylvania, 1904. 210 *Pa.* 326.

OPINION BY MR. JUSTICE THOMPSON:

The accident which occasioned the present action for damages for the death of appellees' son, some five or six years of age, was caused by the child falling into a vat constructed by the appellant in proximity to Thirteenth street in the city of Pittsburg and used by it in connection with its iron mill. It was located about eleven feet distant from the line of the street in question and was eleven feet in length and nearly eight feet in width and was sunk into the ground about twelve inches. The kettle annexed to it was used to melt tar and grease which ran into it and when cold this material was cut into pieces and used in the mill of appellant. Its top was a few inches above the surface of the ground surrounding it and was not protected. The kettle was near the line of the street and the vat beyond it making its distance from the street as above stated.

Appellant's negligence it was contended by appellees arose from placing a dangerous and unprotected vat in such close proximity to the street, that their son fell into it and met with the accident which resulted in his death. The determination of such negligence depends upon the resolution of the questions whether the vat as constructed, filled with boiling materials and unprotected, with but three or four inches above the level of the surface of the ground surrounding it and located in close proximity to the street made it dangerous, and whether the space between it and the street was such that a child would be likely to stroll there and become exposed to peril. These questions were for the jury and were properly left to it by the learned trial judge, and the jury by its verdict resolved them against the appellant.

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open, the boy warned by his friends and taking a known risk merely out of bravado, he was allowed to recover.

So while mere lack of care will not bar recovery by one, adult or infant, injured by a wild beast kept by defendant, even an infant cannot recover if with full knowledge of the facts he deliberately puts himself within reach of such animal, *Molloy* v. *Starin*, 113 N. Y. App. Div. 852 (1906).

[4] *Accord*: *Mullen* v. *Wilkesbarre G. & E. Co.*, 38 Pa. S. C. 3 (1909), boy in climbing a tree in highway came in contact with uninsulated electric light wire.

The measure of duty under such circumstances is clearly defined in Rachmel v. Clark, 205 Pa. 314, by Mr. Justice MESTREZAT:

"If it be conceded, however, that the ground between the factory and the building line was not paved yet it was open and practically a part of the foot walk of the street. The defendants, therefore, having regard to these circumstances, owed a duty to the public to exercise reasonable care to keep it safe so that those using the adjacent highway would not be exposed to danger. As said by Chief Justice AGNEW in Hydraulic Works Company v. Orr, 83 Pa. 332: 'Duties arise out of circumstances. Hence, where the owner has reason to apprehend danger, owing to the peculiar situation of his property and its openness to accident, the rule will vary. The question then becomes one for a jury, to be determined upon all its facts of the probability of danger and the grossness of the act of imputed negligence.' The owners of the premises are required in such cases to anticipate that children as well as adults may use the highway and thereby be exposed to any unsafe objects placed upon the premises."

The appellant's principal contention was that the child was a trespasser and that appellees therefore were not entitled to recover. A similar question was involved in Hydraulic Works Company v. Orr, 83 Pa. 332, and in the opinion there, Mr. Chief Justice AGNEW, said: "The gate and passage way opened out upon a public and much frequented street, where persons were passing and children playing. Unlike an ordinary private alley, this passage was often open, and therefore liable to the incursions of children and even grown persons, from thoughtlessness, accident or curiosity. Now the inclined way which did the injury was a dangerous trap. It was a heavy platform weighing 800 or 900 pounds, attached by hinges within eighteen or twenty inches of the wall, and when lowered it fell across the cartway. When not lowered it stood upright against the wall, leaning so little beyond the center of gravity that a jar or a slight pull would cause it to fall forward. It fell in this instance, caught four children beneath it, one had his neck broken, another his hands mashed and two escaped under the cavity. It was held up by no hook or other fastening, but merely rested by its own slight weight beyond the equipoise, ready therefore to catch children, like mice, beneath a dead fall. When wagons passed it was often held up by hand, and a witness saw it fall against the wheels. Now can it be righteously said that the owner of such a dangerous trap, held by no fastening, so liable to drop, so near a public thoroughfare, so often open and exposed to the entries of persons on business, by accident or from curiosity,[1] owes no duty to those who will be probably there?" * * *

The learned trial judge in his instructions submitted the question of appellees' negligence to the jury for its determination, and there was no error in his instructions in this regard.

The judgment is affirmed.

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[1] "The open gate, sign or no sign, was an implied invitation to children to enter into an open alley," Orlady, J., *Feehan* v. *Dobson*, 10 Pa. S. C. 6 (1899), p. 11. See *R. R.* v. *Bockoven*, 53 Kan. 279 (1894), p. 289.

MR. CHIEF JUSTICE MITCHELL, dissenting.

On the facts of this case I would reach a different conclusion from that of the court below and the majority here. But the dangerous construction here was not far from the public street and appears to have been easily accessible from it. The case is therefore a close one and the submission of it to the jury might be sustained on its facts without great stretch of principle. But I most earnestly dissent from the effort to recognize the case of Hydraulic Works Co. v. Orr, 83 Pa. 332. The opinion of the majority refers to it as having "become like a shuttlecock in battledore to be pitched up and down." The reason is not far to seek. The case was a departure from settled principles, was wrongly decided, and has never commanded the general approval of professional opinion either at the bar or on the bench. In the very next subsequent case that arose in this court, Gramlich v. Wurst, 86 Pa. 74, it was practically overruled, for though Justice WOODWARD makes an effort to distinguish the cases, yet the distinction is merely in the details of fact and not in principle, and when he says that "no cause was ever more justly decided" he does not say more correctly or more legally decided, and his dictum is manifestly based on humane sentiment rather than on settled law. The two cases are absolutely irreconcilable in principle, and Gramlich v. Wurst, restored the ancient and established law. What little was left of authority in Hydraulic Works Co. v. Orr, was practically ended by Gillespie v. McGowan, 100 Pa. 144, though there again the mistake was made of setting up an unsubstantial distinction, instead of overruling the case absolutely. * * *

The settled common-law rule, followed in Gramlich v. Wurst, that a land-owner is not liable for injury to a trespasser from a ditch or an open quarry or other obstruction on his own land unless it is so near the public highway that a traveler lawfully using the highway may accidentally or without intended trespass fall into it, is the only safe and permanent guide. The fact that the person injured is a child is immaterial because under the circumstances there was no negligence of the defendant.[2]

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[2] *Accord*: *Rachmel* v. *Clark*, 205 Pa. 314 (1903), defendant left slabs of slate standing almost upright against the walls of its building a few feet from the street line, the intervening space being paved and used as part of the sidewalk. The plaintiff, a boy, in writing upon one of the slabs, knocked it over upon himself; *Birge* v. *Gardiner*, 19 Conn. 507 (1849), boys injured while meddling with ruinous gate maintained on or near the line of a public highway, see *Fitsmaurice* v. *Conn. Ry., etc., Co.*, 78 Conn. 406 (1905), p. 409; *Whirley* v. *Whiteman*, 1 Head. 610 (Tenn., 1858), dangerous machine exposed substantially as in *Rachmel* v. *Clark, supra; Mullaney* v. *Spence*, 15 Abb. Pr. R. N. S. 319 (N. Y., 1874), elevator operated in shaft open to street and within a foot of it, but see *Stiefsohn* v. *Brooke & Co.*, 5 T. L. R. 684 (Eng., 1889), where it was held that, under somewhat similar facts, the danger was obvious even to the injured child who it was also said was a conscious deliberate trespasser. The English cases appear to hold that if an owner maintain a structure adjacent to the highway in such condition as to be a danger to travel lawfully carried on, he is liable to an infant who meddles with it for some purpose of his own not incidental to the proper use of the highway as such—if the risk of so doing is not obvious to one of his tender years, *Jewson* v. *Gatti* and *Harrold* v. *Watney*, note to *Lynch* v. *Nurdin*, *ante*, p. 222.

A land owner is equally liable if he creates or maintains a dangerous

RYAN *v.* TOWAR.

Supreme Court of Michigan, 1901. 128 *Mich.* 463.

HOOKER, J. The Bice Manufacturing Company is an existing corporation, which formerly carried on a manufacturing business at Marquette. Its plant has been shut down for some years. Among other structures, it owned a small pump-house, located upon ground owned by a railroad company, under an arrangement between them. In the house was a small overshot water-wheel. The plaintiff, a girl between 12 and 13 years of age, was in the habit of passing this pump-house on the way to school, with her brothers and sisters; going across lots through the field, because it was nearer. For some time previous to the time of the accident through which plaintiff received her injury, a hole existed in the stone wall of the house inclosing the wheel, through which children went to play on the wheel. What evidence there is on the subject justifies the inference that it was made by children, and from time to time enlarged, by tearing out the stone of which the wall was built, for the purpose of entry to the wheel. On the day in question, the brothers of plaintiff, on their way from school, crawled through this hole, and, mounting the wheel, were able by their weight to turn the wheel part way round and back. A younger sister, aged 8 years, got caught between the wheel and the wheel-pit. The plaintiff heard her screams, and went through the hole to her succor, and aided in rescuing her, and was herself injured. Suit was brought against the corporation and two of its directors, and the negligence alleged was in permitting the wheel to remain there, accessible to children. The court directed a verdict in favor of the directors, and allowed the jury to determine the liability of the corporation, against which they rendered a verdict for $5,000. From a judgment in favor of the directors, the plaintiff has appealed. The only error assigned is the direction to return a verdict in favor of the directors.

The testimony shows that the buildings of the Bice Manufacturing Company were upon land owned by the railroad company, and that such land, together with the railroad, consisting of several tracks, was fenced. The plaintiff was not shown to have been invited upon the premises, but there is testimony from which the jury might reasonably conclude that children were in the habit of crossing the land of the defendant company and the railroad, and that neither company took steps to prevent it, further than to keep up the fences. It is contended that this amounted to an invitation or

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condition close to a path or near to a place which the plaintiff has the right to use as a business guest or a permissive licensee, *Henderson* v. *Cont. Ref. Co.,* 219 Pa. 384 (1908).

See also *Powers* v. *Harlow; McDonald* v. *R. R.,* and Cobb, J., in *Etheredge* v. *R. R.,* note 8 to *Ryan* v. *Towar, post.* p. 238.

In *Gramlich* v. *Wurst,* 86 Pa. 74 (1878), the much contraverted case of *Hydraulic Co.* v. *Orr,* 83 Pa. 332 (1877), is said, p. 80, to be "the case suggested by Baron Martin, in *Hardcastle* v. *The South Yorkshire Railway Company,* of a dangerous appliance adjoining a public way."

license, but we think not. Mere toleration of a trespass does not alone constitute a license even, certainly not an invitation. 1 Thomp. Neg. (2d. Ed.) § 1050, and note. The pedestrians who insist upon risking their lives by making a footpath of a railroad track, and others who habitually shorten distances by making footpaths across the corners of village lots, are none the less trespassers because the owners do not choose to resent such intrusion, and be to the expense and trouble of taking effective measures to prevent it. There is no more lawless class than children, and none more annoyingly resent an attempt to prevent their trespasses. The average citizen has learned that the surest way to be overrun by children is to give them to understand that their presence is distasteful. The consequence is that they roam at will over private premises, and, as a rule, this is tolerated so long as no damage is done. The remedy which the law affords for the trifling trespasses of children is inadequate. No one ever thinks of suing them, and to attempt to remove a crowd of boys from private premises by gently laying on of hands, and using no more force than necessary to put them off, would be a roaring farce, with all honors to the juveniles. For a corporation with an empty treasury, and overwhelmed with debt, to be required to be to the expense of preventing children from going across its lots to school, lest it be said that it invited and licensed them to do so, is to our minds an unreasonable proposition. As to this question of license or invitation, there is no difference between children and adults. * * *

It is a general and nearly uniform rule that there is no duty imposed upon the owner of premises to keep them in a suitable condition for those who come there for their own convenience merely, without the invitation of the owner. The origin of the alleged modern doctrine may be said to practically rest upon what are called the *"Turntable Cases,"* the first of which was the case of *Railroad Co.* v. *Stout,* 17 Wall. 657. The opinion was written by Mr. Justice Hunt in the year 1873. A child of 6 years of age was hurt while playing with others upon a turntable, by getting its foot caught between the ends of the rails. The turntable was in a remote place, not far from a public highway, on ground belonging to the company. The trial court charged the jury—

"That, to maintain the action, it must appear * * * that it was a dangerous machine,—one which, if unguarded or unlocked, would be likely to cause injury to children; * * * that the jury were to consider whether, situated as it was, as the defendant's property, in a small town, somewhat remote from habitations, there was negligence in not anticipating that injury might occur if it was left unlocked or unguarded; that if they did not have reason to anticipate that children would be likely to resort to it, or that they would be likely to be injured if they did resort to it, then there was no negligence."

The only question in the case was whether the child was a trespasser, and for that reason could not recover. This case practically laid down the rule "that a railroad company might be liable to trespassers for injuries resulting from its failure to construct, locate, manage, and maintain its turntable with that care and atten-

tion to prevent accidents which prudent and careful men ordinarily bestow;" and it held that while "the evidence was not strong, and the negligence was slight," the court was "not able to say that there was not evidence sufficient to justify the verdict," and that the charge was sound.

Four cases are cited as precedents for the proposition that a trespasser is entitled to demand from a landowner ordinary care in the use, condition, and maintenance of structures upon his premises. The first was *Lynch* v. *Nurdin,* 1 Adol. & E. (N. S.) 29.[1] * * *

It is noticeable that even the *Lynch Case* did not involve a trespass upon defendant's close, though it did perhaps involve a trespass to personal property.

The next case cited as authority in *Railroad Co.* v. *Stout* is *Birge* v. *Gardiner,* 19 Conn. 507. There a child was injured by the fall of a gate on the land of the defendant on or near the line of a private alley leading from a public highway back to several dwellings, in one of which the plaintiff lived, and *in which alley it had a right to be.* The court refused to consider the question, and intimated that it made no difference because the plaintiff was not faultless; citing *Lynch* v. *Nurdin.* In *Daley* v. *Railroad Co.,* 26 Conn. 591, a heavy train of cars coming around a curve killed a child less than 3 years old, playing on the track. The court followed the case of *Birge* v. *Gardiner.* The last case cited was *Bird* v. *Holbrook,* 4 Bing. 628. This was an action brought by a trespasser who was shot by a spring gun set for the purpose, and is clearly not in point. There was a wanton, intentional act, intended to punish trespassing with death, meriting punishment as an attempt at homicide. It is chiefly valuable in this connection as showing the difficulty found in the attempt to support *Railroad Co.* v. *Stout* by precedents.

The enunciation by the highest tribunal in the country of the rule that a landowner owes a duty of care towards a trespasser was sure to be followed by other courts. Among the earliest of these is *Keffe* v. *Railway Co.,* 21 Minn. 207. This was a turntable case, and the trespassing child 7 years of age. The court there discovers a distinction between a voluntary trespass and one by a person without judgment, who is allured upon premises by his natural inclination, and meddles with things whose uses and dangers he is unable to comprehend. It says, "What an express invitation would be to an adult, the temptation of an attractive plaything is to a child of tender years." Therefore this was an invitation, and the child licensed. Having by this reasoning found the child lawfully on the premises, it proceeds to treat the turntable as a trap, and compares it with a case when one sets traps baited with tainted meat, to allure his neighbors' dogs, which he intends to catch, or sets a spring gun, with the formed design of taking a trespasser's life. This case was followed by another case in the same court. *O'Malley* v. *Railway Co.,* 43 Minn. 289 (45 N. W. 440). This was also a turntable case, and the child 6 years of age.

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[1] The Court's discussion of *Lynch* v. *Nurdin* and the later conflicting cases of *Mangan* v. *Atterton,* L. R. 1 Ex. 239, and *Hughes* v. *Macfie,* 2 H. & C. 744 (see Cockburn, C. J., L. R. 3, Q. B. D. 339), is omitted.

In 1881 the supreme court of Nebraska approved the case of *Railroad Co.* v. *Stout*, although it reversed the case before it, and, as was done in the *Stout Case*, recognized the fact that the cases were not harmonious. *Atchison, etc., R. Co.* v. *Bailey*, 11 Neb. 332 (9 N. W. 50).

In Kansas the doctrine was applied in a case of a turntable located in the midst of *an open prairie*, and *a boy 12 years of age*. In discussing the tendencies of boys, the court said:

"Everybody knows that, by nature and by instinct, boys love to ride, and love to move by other means than their own locomotion.[2] They will cling to the hind ends of moving wagons, ride upon swings and swinging gates, slide upon cellar doors and the rails of staircases, pull sleds up hill in order to ride down, etc. * * * Now, everybody, knowing the nature and the instincts common to all boys, must act accordingly. No person has a right to leave, even on his own land, dangerous machinery, calculated to attract and entice boys to it, there to be injured, unless he first take proper steps to guard against *all danger*,[3] and any person who thus does leave dangerous machinery exposed, without first providing against all danger, is guilty of negligence. * * * It is true that the boys in such cases are technically trespassers. But even trespassers have rights which cannot be ignored, as numerous cases which we might cite would show." * * *

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[2] See *Pekin* v. *McMahon*, 154 Ill. 141 (1895), pp. 150, 151, a turn-table, when in motion, is "attractive to children by reason of their love of motion 'by other means than their own locomotion.' * * * The love of motion, which attracts a child to play upon a revolving turn-table, will also attract him to experiment with a floating plank or log which he finds in a pond within his easy reach." And see *Cent. Branch Union Pac. R. R.* v. *Henigh*, 23 Kan. 347 (1880), the cars were not of "that alluring character to entice boys to play upon them; for when unfastened they would move only a few feet and then stop," pp. 358-359.

No liability exists where there is nothing in the lot attractive to children beyond its mere availability, as an open lot, for use as a playground. *Am. Adv. Co.* v. *Flannigan*, 100 Ill. App. 452 (1902).

[3] Two Kansas cases carry liability to infant trespassers to its extreme limit. *Price* v. *Atchison Water Co.*, 58 Kan. 551 (1897), and *Cons. Elec. Co.* v. *Healy*, 65 Kan. 798 (1902).

In Price's case the Water Co. had erected a barbed wire fence around their reservoir but the watchman permitted boys to climb it, the plaintiff's decedent, aged eleven, going thereto with some friends to play and fish attempted, against the warnings of his comrades, to cross the reservoir upon an "apron" or platform of lumber, a necessary part of the reservoir, fell in and was drowned; it was held that "knowing the fence to be ineffective either as a barrier or warning, it was the duty of the Company to expel the intruders or adopt other measures to avoid accident," p. 557; but see *Buch* v. *Amory Co.*, 69 N. H. 257 (1897), *ante*, p. , *contra*. In Healey's case an electric light Company was held liable to a boy injured while walking on the ledge outside of the balustrade of a city bridge, as boys often did, by contact with an uninsulated wire laid there by the Company. See also *Peirce* v. *Lyden*, 157 Fed. 552 (C. C. A., 2nd Circ. 1907), children were, to the knowledge of defendant's watchman, in the habit of stealing oil from an unlocked shed occupied by the defendant and situate in an open railway yard near a public school, and with it making bonfires. The plaintiff, an infant, was burned either by the explosion of a can of oil thrown on the fire or while himself running and jumping through it—it was held that he might recover from the defendants.

Here we have the doctrine of the *Turntable Cases* carried to its natural and logical result. We have only to add that every man who leaves a wheelbarrow, or a lawnmower, or a spade upon his lawn; a rake, with its sharp teeth pointing upward, upon the ground or leaning against a fence; a bed of mortar prepared for use in his new house; a wagon in his barn-yard, upon which children may climb, and from which they may fall; or who turns in his lot a kicking horse or a cow with a calf,—does so at the risk of having the question of his negligence left to a sympathetic jury. How far does the rule go? Must his barn door, and the usual apertures through which the accumulations of the stable are thrown, be kept locked and fastened, lest 12-year-old boys get in and be hurt by the animals, or by climbing into the haymow and falling from beams? May a man keep a ladder, or a grindstone, or a scythe, or a plow, or a reaper, without danger of being called upon to reward trespassing children, whose parents owe and may be presumed to perform the duty of restraint? Does the new rule go still further, and make it necessary for a man to fence his gravel-pit or quarry? And, if so, will an ordinary fence do, in view of the known propensity and ability of boys to climb fences? Can a man nowadays safely own a small lake or fish-pond? and must he guard ravines and precipices upon his land? Such is the evolution of the law, less than 30 years after the decision of *Railroad Co.* v. *Stout,* when, with due deference, we think some of the courts left the solid ground of the rule that trespassers cannot recover for injuries received, and due merely to negligence of the persons trespassed upon. * * *

The case of *Frost* v. *Eastern Railroad,* 64 N. H. 220 (9 Atl. 790, 10 Am. St. Rep. 396), lays down the general rule thus:

"At the time of his injury, the plaintiff was using the defendant's premises as a play-ground, without right. The turntable was required in operating the defendant's railroad. It was located on its own land, so far removed from the highway as not to interfere with the convenience and safety of the public travel, and it was not a trap set for the purpose of injuring trespassers. *Aldrich* v. *Wright,* 53 N. H. 404 (16 Am. Rep. 339). Under these circumstances, the defendant owed no duty to the plaintiff, and there can be no negligence or breach of duty where there is no act or service which the party is bound to perform or fulfill. A landowner is not required to take active measures to insure the safety of intruders, nor is he liable for an injury resulting from the lawful use of his premises to one entering upon them without right. A trespasser ordinarily assumes all risk of danger from the condition of the premises, and, to recover for an injury happening to him, he must show that it was wantonly inflicted, or that the owner or occupant, being present and acting, might have prevented the injury by the exercise of reasonable care after discovering the danger." * * *

To hold the owner liable for consequential damages happening to trespassers from the lawful and beneficial use of his own land would be an unreasonable restriction of his enjoyment of it."

The following is the criticism indulged in of the case of *Railroad Co.* v. *Stout:*

"We are not prepared to adopt the doctrine of *Railroad Co.* v.

Stout, 17 Wall. 657, and cases following it,—that the owner of machinery or other property attractive to children is liable for injuries happening to children wrongfully interfering with it on his own premises. The owner is not an insurer of the safety of infant trespassers. One having in his possession agricultural or mechanical tools is not responsible for injuries caused to trespassers by careless handling; nor is the owner of a fruit tree bound to cut it down or inclose it, or to exercise care in securing the staple and lock with which his ladder is fastened, for the protection of trespassing boys who may be attracted by the fruit. Neither is the owner or occupant of premises upon which there is a natural or artificial pond, or a blueberry pasture, legally required to exercise care in securing his gates and bars to guard against accidents to straying and trespassing children. The owner is under no duty to a mere trespasser to keep his premises safe; and the fact that the trespasser is an infant cannot have the effect to raise a duty where none otherwise exists. 'The supposed duty has regard to the public at large, and cannot well exist as to one portion of the public, and not to another, under the same circumstances. In this respect children, women, and men are upon the same footing. In cases where certain duties exist, infants may require greater care than adults, or a different kind of care; but precautionary measures having for their object the protection of the public must, as a rule, have reference to all classes alike.' *Nolan* v. *Railroad Co.*, 53 Conn. 461."

The Massachusetts court has been no less emphatic in its condemnation of the case of *Railroad Co.* v. *Stout*; *Daniels* v. *Railroad Co.*, 154 Mass. 349.

The case of *Walsh* v. *Railroad Co.*, 145 N. Y. 301, unqualifiedly condemns the rule of *Railroad Co.* v. *Stout*.

In addition, there are many cases that disregard the rule.[4]

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[4] Even in those jurisdictions which follow, *R. R.* v. *Stout*, there is a distinct tendency to limit its application to railroads maintaining turn-tables on their premises or at the broadest to land owners maintaining on their land attractive and dangerous machinery, *Stendal* v. *Boyd*, 73 Minn. 53 (1898); *Savannah, etc., Ry. Co.* v. *Beavers*, 113 Ga. 398 (1901), p. 411; *Mo., Kan. & Tex. R. R.* v. *Edwards*, 90 Tex. 65 (1896), per Gaines, C. J.; *Dobbins* v. *R. R.*, 91 Tex. 60 (1897); *Barney* v. *R. R.*, 126 Mo. 372 (1894); *Peters* v. *Bowman*, 115 Cal. 345 (1896).

So in the majority of such jurisdictions it is held that there is no duty to guard a pond or excavation not adjacent to a highway nor to fence the lot in which it is situated. *Schauf's Adm.* v. *Paducah*, 106 Ky. 228 (1899); *Overholt* v. *Vieths*, 93 Mo. 422 (1887); *Richards* v. *Connell*, 45 Neb. 467 (1895); *Savannah Ry.* v. *Beavers, supra; Dobbins* v. *R. R., supra; Peters* v. *Bowman, supra; Klix* v. *Nieman*, 68 Wis. 271 (1887); [this is, of course, so where *R. R.* v. *Stout* is not followed; *Gillespie* v. *McGowan*, 100 Pa. 144 (1882); *Hargreaves* v. *Deacon*, 25 Mich. 1 (1872)]. *Contra*: *Pekin* v. *McMahon*, 154 Ill. 141 (1895); *Franks* v. *Southern Cotton Oil Co.*, 78 S. C. 10 (1907); *Brinkley Car Co.* v. *Cooper*, 60 Ark. 545 (1895); *Price* v. *Atchison Water Co.*, 58 Kan. 551 (1897); *Mackey* v. *Vicksburg*, 64 Miss. 777 (1887).

So it has been held there is no liability for the fall of ties negligently stacked in railroad yard, *R. R.* v. *Edwards, supra*, see *acc. Kelly* v. *Benas*, 116 S. W. 557 (Mo., 1909), and *Vanderbeck* v. *Hendry*, 34 N. J. L. 467 (1871); *contra, Bransom's Adm.* v. *Labrot*, 81 Ky. 638 (1884); nor for a failure to fence a freight yard, *Barney* v. *R. R., supra;* nor for failure to prevent children from getting upon moving trains, *ibid*, also *Catlett* v. *R. R.*,

It remains to discuss our own cases cited in support of plaintiff's contention. The case of *Powers* v. *Harlow,* 53 Mich. 507, was a case where a young person exploded a dynamite cap which he found on defendant's premises, under a shed. In discussing the case the court alluded to *Hargreaves* v. *Deacon,* 25 Mich. 1, where it was unqualifiedly held that "owners of private property are not responsible for injuries caused by leaving a dangerous place thereon, but not immediately adjoining the highway, unguarded, where the person injured was not on the premises by permission, or on business or other lawful occasion, and had no right to be there," and said: "The children, it is said, were trespassers; and, even if it can be said that they were licensed to go where they did, the result must be the same," etc. "This is the point on which the case must turn." The court then proceeded to show that the children were rightfully there by invitation, and that some caution was required in such a case. Clearly, this does not adopt the rule of *Railroad Co.* v. *Stout.* * * *

That a landowner is under no obligation to use care to protect a trespasser is a broad, and, until recently, undisputed, rule, without exception; liability for injuries sustained by such being limited to cases of intentional or wanton injuries. The rule, with this limitation, is sustained today by the great weight of authority. It is contended by some law writers, and has been held in some cases, that an exception exists in favor of children of tender years. The varying reasons given should lead us to doubt the solidity of the foundations upon which these cases rest, especially when none of the reasons are of recognized authority. The law has never before denied the liability of children for trespass because of tender years. On the contrary, it was intimated in *Mangan* v. *Atterton,* L. R. 1 Exch. 239, that a 4-year-old boy was a trespasser, under the circumstances of that case; and there are numerous cases cited in this opinion where liability is denied upon that, and no other, ground. The assertion that the weight of authority supports the plaintiff's contention in this case seems to us incorrect. It may be true that, in cases involving turntables, a majority of the cases, which are necessarily few, have followed the case of *Railroad Co.* v. *Stout, supra;* but there should be a legal principle underlying the rule laid down in that case, and that principle has been assiduously sought for by some of the courts, without success, as we have seen. Others have asserted different reasons for following it. One gives us to understand that

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57 Ark. 461 (1893); *L. & N. R. R.* v. *Hunt,* 11 Ky., L. R. 825, 13 S. W. 275 (1890); *Bishop* v. *Ry. Co.,* 14 R. I. 314 (1884), boy getting on rear platform of street car having no conductor but only a driver; *Moran* v. *Pullman Co.,* 134 Mo. 641 (1896), boy drowning while swimming in a pond in unfenced lot; *Arnold* v. *St. Louis,* 152 Mo. 173 (1899), boy falling through ice while skating, but see *Osborn* v. *A. T. & S. F. R. Co.,* 86 Kans. 440 (1912), where an abandoned roundhouse was held to be an "attractive danger."

There is no duty on the part of the land owner to make it impossible for a child to injure himself, only reasonable care need be taken. *Haesley* v. *R. R.,* 46 Minn. 233 (1891), cars left on side track on heavy grade but firmly braked; *Cent. Branch Union Pac. R. R.* v. *Henigh,* 23 Kan. 347 (1880); *George* v. *Los Angeles Ry. Co.,* 126 Cal. 357 (1899), cars so heavy that great force was necessary to set them in motion, *aliter,* if easily moved by children; *Cahill* v. *Stone & Co.,* 96 Pac. 84 (Cal., 1908).

a child is licensed to go wherever he can find that which attracts him; a Texas court has held that children of tender years cannot be trespassers; while other authorities are content to rest their approbation of and adherence to the alleged rule upon the inhumanity of the doctrine that a landowner must not be held responsible for injuries suffered by trespassing children, when by ordinary thoughtfulness and care he could have anticipated and prevented it, and the generic term "attractive nuisances" is applied to the great variety of things which may naturally be expected to allure young children upon private premises. The term "attractive nuisance," as applied, is a new one in the books, and the plausible application of the well-known principle that one must so occupy his own as not to do harm to the rights of others should not be construed to so restrict the use of private lands as to make it necessary to guard and protect trespassers. A man's home has always been considered his castle,—a domain where, secure from intrusion, he might lawfully do as he would, so long as he did not interfere with the *legal rights* of others. It has been his duty to guard those licensed to enter, but beyond that he has not been required to go. In our anxiety to prevent personal injuries, we should not go so far as to overturn private rights.

Admittedly, the duty of incessant watchfulness and care of one's own premises is limited to young children. It does not extend to an adult. Why should it extend to children, upon whose parents both nature and the law impose the duty of care and watchfulness? [5]

When, by reason of a parental neglect of duty, a trespassing child is injured, it might be treated as a casualty, or the neglectful guardian might be liable; but there is much reason, if not wisdom, in the common-law rule that the person trespassed upon should not be liable to respond in damages, instead of, as in other cases, having a right of action against the trespasser. But, however Draconic the common-law rule may be considered, it is the province of the courts to enforce it until changed by the legislature. No one questions the power or the propriety of the regulation of the use of railway turn-

[5] See Prof. Jeremiah Smith, 11 Harv. L. R. 349, 435, p. 372: "If those who brought the child into the world are unable, by reason of poverty, to provide him a playground, this may afford an argument for the passage of a statute imposing that duty upon the municipality, in which case each land owner would have to contribute his proportion of the expense. But this is quite another thing from assessing upon a single unfortunate land owner the entire damage arising from the want of such a playground."

On the contrary, *Edgington* v. *R. R.*, 116 Iowa, 410 (1902), bases the owner's liability on the extreme inhumanity of the contrary view and, in *Chic., B. & Q. R. R.* v. *Krayenbuhl*, 65 Neb. 889 (1902), it was held that to require a railroad to fasten its turn-table is not an unreasonable restriction upon its right as land owner to do as it pleased thereon, since the attendant interference with its enjoyment of its land, and the conduct of its business thereon, was, out of all proportion, slight as compared with the magnitude of the risk of serious injury to children thereby averted (see per Hunt, J., *R. R.* v. *Stout*, 17 Wallace, p. 662, "It was not shown that this 'locking the turn-table' would cause any particular expense or inconvenience to the defendant.") So, in *Schultz* v. *Byers*, 53 N. J. L. 442 (1891), p. 446-7, the slightness of the trouble required to prevent great harm is given as a reason for requiring an owner to give notice to his neighbor before excavating upon his own land so that the latter may shore up his buildings and so prevent their fall.

tables and other appliances of a dangerous nature. The legislature can do this, and leave untouched the common rights of the ordinary landed proprietor. The courts cannot. The rule laid down in *Railroad Co.* v. *Stout* must be a general one, applicable to every one; and, aside from the impropriety of judicial legislation, a wise public policy should forbid such a sweeping innovation by judicial main strength.

In innumerable cases the courts have applied and continue to apply the general rule that a landowner need not protect a trespasser, every case being an assertion of the principle which is disregarded in the cases relied upon by the plaintiff. We have cited a few of them,—enough, we think, to show that the great weight of authority does not sustain the principle of the *Turntable Cases*. While some of the courts have followed the rule of *Railroad Co.* v. *Stout*, both the courts and profession have evinced a tendency to allow this innovation to go no further, and refuse to consider it applicable to other cases every way analogous. They speak of the cases generically, as the "*Turntable Cases*," and treat such cases as exceptional. We are of the opinion that they are exceptional, and that they are not based upon principle, but contravene one of the old and well-established rules of the law; and we therefore decline to recognize them as authority, preferring to adhere to the better doctrine of the other cases cited. The defendant owed no duty to these children, who were trespassers.

Counsel invoke a further rule, or alleged rule, viz., that the plaintiff went into a place of danger lawfully to rescue her sister, and therefore was rightfully there and entitled to protection. The defendant had a right to rely upon his right to privacy, and to believe that his premises would only be invaded by those whom he should choose to invite and warn against the dangers of the place. Was he, then, bound to suppose that somebody might trespass, and to have some one on hand to warn and protect some possible rescuer of an imaginary trespasser? We think not.

The question discussed disposes of the case, and other points need not be alluded to.

The judgment is affirmed.[6]

LONG and GRANT, JJ., concurred with HOOKER, J.

MONTGOMERY, C. J. (*dissenting*). There is a limitation upon the right which a man has to do what he will with his own. I think a very proper statement of that limitation is that he shall not so use his own property as to be likely to work injury to another. My Brother HOOKER seems to be of the opinion that, even though the

[6] The authority of *R. R.* v. *Stout* has been repudiated in the following "turn-table" cases in addition to those cited in the principal case: *Thompson* v. *R. R.*, 218 Pa. 444 (1907); *Turess* v. *R. R.*, 61 N. J. L. 314 (1898); *Paolino* v. *McKendall*, 24 R. I. 432 (1902), *semble; Railroad Co.* v. *Harvey*, 77 Oh. S. 235 (1907); *Bottum's Admr.* v. *Hawks*, 84 Vt. 370 (1911), *semble; Walker's Adm.* v. *R. R.*, 105 Va. 226 (1906); *Uthermohlen* v. *Bogg's Run Co.*, 50 W. Va. 457 (1901), *semble; Conrad* v. *B. & O. R. R.*, 61 S. E. 44 (W. Va., 1908). See also *Bates* v. *R. R.*, 90 Tenn. 36 (1890), no duty to so fasten a turn-table that boys cannot unfasten and put it in motion. The duty was only "to have a fastening adapted to hold the turn-table in place."

In *Wilmot* v. *McPadden*, 79 Conn. 367 (1909), it was held that an owner of a building in the course of demolition, is not liable to a child who uses the premises as a playground.

use made of property by its owner is likely to result in injury to young children, by attracting them to a dangerous use of the property, yet, if the property be located wholly upon one's own land, so that the child must become a trespasser, in the technical sense, before he can receive injury from the property, the owner may leave it exposed, and will not be liable.

In *Powers* v. *Harlow,* 53 Mich. 507 (19 N. W. 257, 51 Am. Rep. 154), it was said by Mr. Justice COOLEY that:

"Children, wherever they go, must be expected to act upon childish instincts and impulses; and others who are chargeable with a duty of care and caution towards them must calculate upon this, and take precautions accordingly. If they leave exposed to the observation of children anything which would be tempting to them, and which they, in their immature judgment, might naturally suppose they were at liberty to handle or play with, they should expect that liberty to be taken;" citing *Railroad Co.* v. *Stout,* 17 Wall. 657, and other cases.

This case has been since cited by this court as an authority that where injury results from leaving a dangerous substance exposed, or leaving a pitfall for others, or leaving dangerous machinery in a position where children, acting upon childish instincts, have attempted its use to their injury, the owner is liable. See *Keating* v. *Railroad Co.,* 97 Mich. 154 (56 N. W. 346, 37 Am. St. Rep. 328).

It is true that neither in *Powers* v. *Harlow* nor *Keating* v. *Railroad Co.* were the facts analogous to those in the present case, and for this reason the cases may be distinguished. I refer to them as showing the expressions of the court upon this subject. Indeed, we are not left in doubt as to what was intended by the opinion in *Powers* v. *Harlow.* Judge COOLEY, in his work on Torts (2d Ed., p. 356, *303), under the head of "Implied Licenses," says:

"In the case of young children and other persons not fully *sui juris,* an implied license might sometimes arise when it would not in behalf of others. Thus, leaving a tempting thing for children to play with exposed, where they would be likely to gather for that purpose, may be equivalent to an invitation to them to make use of it; and perhaps if one were to throw away upon his premises, near the common way, things tempting to children, the same implication should arise."

Similar expressions have been indulged in by other eminent writers. In Bish. Noncont. Law, § 854, it is stated:

"A child too young to be controlled by reason, therefore not improperly led by its instincts, receives from the law the protection which its special nature requires. For example, a man who leaves on his own ground, open to the highway, or upon or beside any public place, a dangerous machine, likely to attract children, will be liable to one injured by playing with it, if he neglected precautions against such an accident. On this principle, railroads are held responsible, under proper circumstances, for injuries to young children playing with their turntables."

In 1 Thomp. Neg. (1st Ed.) p. 305, it is said:

"It would be a barbarous rule of law that would make the owner of land liable for setting a trap thereon, baited with stinking

meat, so that his neighbor's dog, attracted by his natural instincts, might run into it and be killed, and which would exempt him from liability for the consequences of leaving exposed and unguarded on his land a dangerous machine, so that his neighbor's child, attracted to it and tempted to intermeddle with it by instincts equally strong, might thereby be killed or maimed for life.[7] Such is not the law."

See, also, Whart. Neg. § 860.

It becomes of some interest to inquire to what extent this doctrine has been adopted by the courts.[8] * * *

It is said that *Lynch* v. *Nurdin*, 1 Adol. & E. (N. S.) 29, has been disapproved by later English cases, and the case of *Mangan* v. *Atterton*, L. R. 1 Exch. 239, is cited. But the latter case has itself been disapproved by Chief Justice Cockburn in *Clark* v. *Chambers*, 3 Q. B. Div. 327, in which case it was said:

"It appears to us that a man who leaves in a public place, along which persons, and, amongst them, children, have to pass, a dan-

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[7] See this argument elaborated in *Edgington* v. *R. R.*, *supra*, note 5.

[8] He then cites the following cases applying *R. R.* v. *Stout*, where an infant is injured while playing with an insufficiently secured turn-table, *Keffe* v. *R. R.*, 21 Minn. 207 (1875); *A. & N. R. R.* v. *Bailey*, 11 Neb. 332 (1881); *Barrett* v. *R. R.*, 91 Cal. 296 (1891); *Kan. Cent. R. R.* v. *Fitzsimmons*, 22 Kan. 686 (1879); *Nagel* v. *R. R.*, 75 Mo. 653 (1882); *Bridger* v. *R. R.*, 25 S. C. 24 (1885); *Ferguson* v. *R. R.*, 77 Ga. 102 (1886); *Ilwaco Co.* v. *Hedrick*, 1 Wash. 446 (1890): *accord*, also, *Ala. Gt. So. R. R.* v. *Crocker*, 131 Ala. 584 (1901), *Lewis* v. *R. R.*, 84 N. E. 23 (1908, Ind. App.); *Edgington* v. *R. R.*, 116 Iowa, 410 (1902), and *Brown* v. *Salt Lake City*, 33 Utah 222 (1907), not cited.

He also cites the following cases of attractive dangers other than turntables, *Pekin* v. *McMahon*, *supra*, note 2; *Schmidt* v. *Distilling Co.*, 90 Mo. 284 (1866)—but see *Overholt* v. *Vieth*, *supra*, note 4—unguarded ponds, *acc. Brinkley Co.* v. *Cooper*, *supra*, note 4; *Harriman* v. *R. R.*, 45 Ohio St. 11 (1887), torpedo left on track, explained and approved, however, in *R. R.* v. *Harvey*, *supra*, note 5, because the plaintiff was, at least, a permissive licensee; and *Whirley* v. *Whiteman*, 1 Head. 610 (Tenn., 1858), and *Union Pac. Ry. Co.* v. *McDonald*, 152 U. S. 262 (1893), where, in the first case, a dangerous machine and, in the second, a concealed pit of burning coal was maintained close to a highway or permissive path, see *Powers* v. *Harlow*, 53 Mich. 507 (1884), not cited, and Cobb, J., in *Etheredge* v. *R. R.*, 122 Ga. 853 (1905), p. 855, "It may be that an owner may be bound to anticipate that a young child will stray a few feet from the path."

In *Cooke* v. *Midland Gt. Western Ry. of Ireland*, L. R. (1909) A. C. 229, the House of Lords, reversing the Irish Court of Appeals, 2 I. R. (1908), 242, held in accordance with the doctrine of *Stout* v. *R. R.*, that a railway was liable to a little boy of four who, having with some older boys entered their premises through a gap in the hedge, was injured while being given a ride by his companions on the Company's unfastened turn-table. Notwithstanding a notice forbidding anyone to trespass children had, to the defendant's knowledge, been in the habit of entering the premises and playing with the turn-table; in fact there was a clearly defined path leading from the gap to it. Lord MacNaghten saying that "it could not make very much difference whether the place was dedicated to the use of the public, or left open by a careless owner to the invasion of children who made it their playground. * * * It did not seem unreasonable to hold that if persons allowed their property to be open to all comers—infants as well as children of maturer age—and placed upon it a machine attractive to children, and dangerous as a plaything, they might be responsible in damages to those who resorted to it with their tacit permission, and who were unable in consequence of their tender age to take care of themselves."

gerous machine, which may be fatal to any one who touches it, without any precaution against mischief, is not only guilty of negligence, but of negligence of a very reprehensible character; and not the less so because the imprudent and unauthorized act of another may be necessary to realize the mischief to which the unlawful act or negligence of the defendant has given occasion." * * *

It will be seen that the great weight of authority in this country sustains the rule laid down in *Railroad Co.* v. *Stout.* Its authority has been recognized by our own decisions, although in cases where a ruling upon the precise point was not called for. I do not share the apprehension of my Brother HOOKER that a man would not be safe to leave agricultural implements on his farm if this rule should obtain. Undoubtedly there must be something about the premises to entice a child, and, unless there is something calculated to allure a child of tender years, and to appeal to his childish instincts, no duty of the owner is violated. Nor do I understand that the question of negligence or of no negligence is to be decided by ascertaining whether a farmer may or may not be guilty of the act. You may call the doctrine of these cases the result of evolution of the law, or what you please. It is a humane doctrine, and the principle cannot be better stated than in the extract from Thompson on Negligence above quoted. I do not feel justified in ignoring the overwhelming weight of authority which makes for this rule, as well as the expressions of our own court. I dissent from the views expressed by Mr. Justice HOOKER.

(c) Licensees—Persons Coming Upon the Premises for their Own Purposes and Benefit.

1. By the Occupier's Express or Tacit Permission.

FITZPATRICK *v.* CUMBERLAND GLASS MANUFACTURING CO.

Supreme Court of New Jersey, 1898. 61 *N. J. L.* 378.

GUMMERE, J. This is an action brought to recover damages for personal injuries, received by the plaintiff at the defendant company's glass works under the following circumstances: The plaintiff's father was an employe of the defendant company, and plaintiff (who was a boy twelve years of age) was accustomed to carry his father's dinner to him at the company's works. The evidence justfies the conclusion that this was done not only with the knowledge of, but by the permission of the company.

On the day upon which the plaintiff received his injuries, he carried his father's dinner to the works, as usual, and, as he passed through the main gateway, one of the gates, which had been allowed by the company to get out of repair, fell upon him, crushing his leg.

These facts having been proved by the plaintiff and not having been controverted by the defendant company, a verdict in his favor was rendered by the jury.

The chief question presented by this rule is whether the defend-

ant, at the time of the injury, owed the plaintiff any duty with regard to keeping the entrance to its works safe for his ingress and egress. If it did, the jury properly found in favor of the plaintiff, but if it did not the verdict must be set aside, for, unless the plaintiff's injuries were the result of the neglect of duty on the part of the defendant, which it owed to him, no legal responsibility rests upon the defendant to compensate him for those injuries.

The question of the liability of the owner of land for injuries received by a person entering thereon, by reason of the unsafe condition of the premises, came before the Court of Errors and Appeals for determination in the late case of *Phillips* v. *Library Company*, *26 Vroom* 307. Mr. Justice Depue, who delivered the opinion of the court, after considering and discussing the cases on the subject, declares the rule to be this: "That the owner or occupier of lands who, *by invitation*, express or implied, induces persons to come upon the premises for any purpose, is under a duty to exercise ordinary care to render the premises reasonably safe for such purpose, or at least to abstain from any act that will make the entry upon or use of the premises dangerous," but that "*mere permission* to pass over dangerous lands, or acquiescence in such passage for the benefit or convenience of the licensee, creates no duty on the part of the owner except to refrain from acts wilfully injurious."

The same rule had previously been enunciated by this court in the case of *Vanderbeck* v. *Hendry*, 5 *Vroom* 467; and Chief Justice Beasley, in the case of *Matthews* v. *Bensel*, *22 Vroom* 30, declares that there is no legal principle that imposes upon the owner of property, with respect to a mere licensee, the duty of keeping it in a safe condition.

Applying the rule established by these cases to the case in hand, it will at once be perceived that the defendant company was under no obligation to keep its premises safe for the use of the plaintiff. He was not there *by the invitation* of the company, express or implied. He was there about a matter in which the company had no concern, *i. e.*, the bringing of his father's dinner, and was saved from being a mere trespasser only by the fact that the company *permitted* him to come upon its premises for that purpose. He was a mere licensee.

His presence on the company's land being merely permissive, and not by invitation, the only duty which the company owed him was to abstain from acts wilfully injurious. That they failed in the performance of any such duty is not pretended in this case.

The rule to show cause should be made absolute, and a new trial directed.[1]

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[1] *Accord*: *Batchelor* v. *Fortescue*, L. R. 11, Q. B. D. 474 (1883), one visiting factory out of curiosity injured by defect in machine which he was watching at work; *Sullivan* v. *Waters*, 14 Ir. C. L. 460 (1864), hole in floor of loft in which laborer was allowed to sleep; *Knight* v. *Abert*, 6 Pa. 472 (1847), cattle having right to run at large fell into unguarded pit on unfenced land; *Blackmore* v. *Toronto Ry. Co.*, 38 U. C. Q. B. 172 (1876), p. 217, newsboy injured by reason of defective platform of car which he entered in order to sell papers; *Vanderbeck* v. *Hendry*, 34 N. J. L. 467 (1871),

GALLAGHER *v.* HUMPHREY.

Court of Queen's Bench, 1862. 6 Law Times, N. S. 684.

Declaration.—That the deft. was possessed of a crane fixed upon the New Hibernia-wharf, in a certain passage called Montague-close, Southwark, along which passage the plt. and others were permitted to pass, repass and use the same as a way to certain wharves; that the crane was used by the deft. and his servants to raise and lower goods over the passage; that the plt. was, with the permission of the proprietors of the passage, lawfully passing along the said passage to the said wharves, yet the deft., by himself and his servants, so negligently, &c. managed, directed and conducted themselves, that by and through such neglect, &c., a part of the said crane broke whilst the deft., by his servants, was using the same, and certain goods fell upon the plt. whilst he was passing along, &c. and broke both his legs, &c.

Pleas:—1. Not guilty. 2. That the plt. and others were not permitted by the proprietors of the said passage to pass, repass and use the said passage as a way from a highway to certain wharves as in the declaration charged. 3. That the plt. was not, with the permission of the proprietors of the said passage, lawfully passing along the said passage from the said highway to the said wharves, as in the declaration alleged.

Issue on the said pleas.

At the trial before Blackburn, J., at the Croydon summer assizes 1861, it was proved that plt., the son of a labourer employed in the erection of West Kent-wharf, under a contractor for the deft.'s father, had on the day when the accident happened taken his father's dinner, according to his usual custom, to West Kent-wharf, and on his return was obliged to pass under a crane erected on the deft.'s (Hibernia) wharf, and there employed in lowering barrels of sugar. As he was passing the chain broke, and 12cwt. of sugar fell upon him, inflicting the injuries complained of. The breakage of the chain was caused by negligence in the mode of applying the breaks, for, after the sugar had been attached, the chain of the crane was allowed to run, and then the man suddenly put on the break and the jerk caused the weight to rise and fall, and the chain to break. Montague-close is approached by steps from London-bridge, the gate to which was usually opened very early in the morning, and numbers of persons, to the knowledge of the deft., used to pass along the passage, and no objection was made to persons using the way if on legitimate business. The judge left the following

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lumber carelessly piled near path through lumber yard used by plaintiff as "short cut." *Mathews* v. *Bensel,* 51 N. J. L. 30 (1888), unfenced machinery; *Larmore* v. *Crown Point Iron Co.,* 101 N. Y. 391 (1886), plaintiff seeking work injured by machine which an inspection would have shown to be defective; *Schiffer* v. *Sauer Co.,* 238 Pa. 550 (1913), similar facts; *Reardon* v. *Thompson,* 149 Mass. 267 (1889), hole on premises customarily used by neighbors as a "short cut," concealed only by darkness of night; *Gibson & Co.* v. *Sziepienski,* 37 Ill. App. 601 (1891), facts identical with those of principal case; *South Bend Iron Co.* v. *Larger,* 11 Ind. App. 367 (1894); *Monroe* v. *Atlantic Coast Line,* 151 N. Car. 374 (1909), unguarded pit near path which plaintiff was permitted to use solely for his own purposes.

questions to the jury:—1st. Was the accident caused by the negligence of the deft., or was it a pure accident, over which no one could have any control? 2nd. Could the boy by reasonable care have avoided the accident? 3rd. Were the plt. and others permitted to go up Montague-close by the owners? 4th. Did the deft. on the evidence as disclosed tacitly give permission to the plt. to pass that way? 5th. Was the boy going to the wharf for a legitimate purpose? The jury having answered all the questions in favour of the plt. a verdict was entered for him, with leave for the deft. to move to set it aside and enter a verdict on the second and third issues. The damages were assessed at 100*l.*

A rule *nisi* having been obtained calling on the plt. to show cause why the verdict should not be entered for the deft. on the second and third issues.

Shee, Serjt. (*Grady* with him) showed cause.—On the form of the rule as obtained, the plt. is clearly entitled to succeed, as there was evidence that the deft. did by his acts tacitly give permission to the boy to pass along the close for a lawful purpose, and the jury have so found. But the plt. is also entitled to succeed on the broader ground. In *Corby* v. *Hill,* 4 C. B. N. S. 556, it was held that the deft. was liable for the negligence of his servant in placing materials in a dangerous position, and without notice, on a private road along which persons were accustomed to pass by leave of the owners; and in *Southcott* v. *Stanley,* 25 L. J. 339, Ex., a visitor to a person's house was held entitled to recover for injuries caused by opening a glass door which was insecure, and which it was necessary for him to open. (He was then stopped by the Court.)

Petersdorff, Serjt. (*Bridge* with him) in support of the rule.—Montague-close was the deft.'s private property, and no one had any right to be there without his express or implied permission. The lowering heavy goods from the warehouses by cranes is a manifestly dangerous busness, and persons using the way took upon themselves whatever risks might be incidental to that business. In *Hounsel* v. *Smyth,* 7 C. B., N. S., 743, where the deft. was held not to be liable for leaving a quarry unfenced on waste land, across which the public were allowed to pass, Williams, J. said: "No right is averred, but merely that the owners allowed persons, for diversion or business, to go across the waste without complaint; that is, that they were not so churlish as to interfere with any one who went across. But a person so using the waste has no right to complain of any excavation he may find there; he must accept the permission with its concomitant conditions, and it may be its perils." [BLACKBURN, J.—Have you any authority that persons so using the way take upon themselves the negligence of the servants about the place?] In *Bolch* v. *Smith,* 31 L. J. 201, Ex., where workmen employed in a dockyard were permitted to use a place as a way, on which revolving machinery had been erected, it was held that the right so to use the place was only the right not to be treated as a trespasser, and that there was no obligation to fence the machinery, and no liability for insufficiently fencing it. [COCKBURN, C. J.—There was the ordinary state of things in that case, and no superadded negligence.]

COCKBURN, C. J.—I doubt whether on the pleadings and this rule it is competent to enter into the question of negligence, and whether the whole matter does not turn upon the question whether permission was or was not given to the plt. to pass along the way. But I should be sorry to decide this case upon that narrow ground. I quite agree that a person who merely gives permission to pass and repass along his close is not bound to do more than allow the enjoyment of such permissive right under the circumstances in which the way exists; that he is not bound, for instance, if the way passes along the side of a dangerous ditch or along the edge of a precipice, to fence off the ditch or precipice. The grantee must use the permission as the thing exists. It is a different question, however, where negligence on the part of the person granting the permission is superadded. It cannot be that, having granted permission to use a way subject to existing dangers, he is to be allowed to do any further act to endanger the safety of the person using the way. The plt. took the permission to use the way subject to a certain amount of risk and danger, but the case assumes a different aspect when the negligence of the deft.—for the negligence of his servants is his—is added to that risk and danger. The way in question was a private one leading to different wharves. On part of the way a wharf was being constructed or repaired, and the plt.'s father was employed upon that work. It was the father's habit not to go home to his meals, and the boy used to take them to him at the wharf, and on this occasion was passing along carrying his father's dinner. The plt. was therefore passing along on a perfectly legitimate purpose, and the evidence is that the deft. permitted the way to be used by persons havng legitimate business upon the premises. That being so, the deft. places himself by such permission under the obligation of not doing anything by himself or his servants from which injury may arise, and if by any act of negligence on the part of himself or his servants injury does arise, he is liable to an action. That is the whole question. The plt. is passing along the passage by permission of the deft., and though he could only enjoy that permission under certain contingencies, yet when injury arises not from any of those contingencies, but from the superadded negligence of the deft., the deft. is liable for that negligence as much as if it had been upon a public highway.

WIGHTMAN, J.—The rule in this case was obtained on a very narrow ground. The declaration having alleged that the plt. and others were permitted to pass, repass and use the way in question, and that the plt. was there with the permission of the proprietors of the passage lawfully passing along the passage, the deft. took issue on the fact whether such right to pass along the passage was permitted by the deft. I think that there was evidence to show that the plt. had the permission of the deft. to use the way, and that he was lawfully there at the time of the accident. I entirely agree with my Lord Chief Justice that the plt. is also entitled to succeed on the larger ground. It appears to me that such a permission as is here alleged may be subject to the qualification that the person giving it shall not be liable for injuries to persons using the way arising from

the ordinary state of things, or of the ordinary nature of the business carried on;[1] but that is distinguishable from the case of injuries wholly arising from the negligence of that person's servants.

CROMPTON and BLACKBURN, JJ. delivered similar judgments.

Rule discharged.[2]

BARRY *v.* NEW YORK CENTRAL AND HUDSON RIVER R. R. CO.

Court of Appeals of New York, 1883. 92 New York, 289.

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, entered upon an order made December 16, 1882, which affirmed a judgment in favor of plaintiff, entered upon a verdict.

This action was brought to recover damages for alleged negligence causing the death of John J. Barry, plaintiff's intestate, who was run over and killed in attempting to cross defendant's tracks in the city of Troy.

The material facts are stated in the opinion.

ANDREWS, J. If the absolute legal right of the intestate to be upon the track of the defendant at the place of the injury was a material question in the case, it may have been error in the court to have submitted to the jury to find whether such right existed under the deed from Cushman Norton to Pain and Buell. But we are of opinion that the question was quite immaterial to the determination of the controversy. It is undisputed that the owners of lots abutting on the railroad at this point had a right of way across the defendant's tracks, and that for more than thirty years the public were in the habit of crossing the tracks at this point to reach Madison and other streets lying northerly and easterly of the railroad, the proof being that several hundred people crossed there every day. There can be no doubt that the acquiescence of the defendant for so long a time, in the crossing of the tracks by pedestrians, amounted to a license and permission, by the defendant, to all persons to cross the tracks at this point. These circumstances imposed a duty upon the defendant in respect of persons using the crossing, to exercise reasonable care in the movement of its trains. The company had a lawful right to use the tracks for its business, and could have withdrawn its permission to the public to use its premises as a public way, assuming that no public right therein existed; but so long as

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[1] *Accord*: *Rosenthal* v. *Beef Co.*, 101 N. Y. Supp. 532 (1906), a licensee in passageway, over which sides of beef were, in the course of the owner's business, carried at frequent intervals by a trolley, struck by a side of beef.

[2] *Accord*: *De Haven* v. *Hennessy, etc., Co.*, 137 Fed. 472 (C. C. A., 6th Circ., 1905), visitor going by invitation of assistant superintendent of defendant to inspect the tower of a building under construction by the latter injured by the negligence of the elevator operator; *Corrigan* v. *Union Sugar Refinery*, 98 Mass. 577 (1868), one struck by a keg carelessly thrown from a window may recover though on the premises by bare permission, revocable at the owner's pleasure; *De Boer* v. *Brooklyn Wharf Co.*, 51 N. Y. App. Div. 289 (1900), plaintiff crossing defendant's premises by a path, which for years the public had used, run down by an engine on its private railway.

it permitted the public use, it was chargeable with knowledge of the danger to human life from operating its trains at that point, and was bound to such reasonable precaution in their management as ordinary prudence dictated to protect wayfarers from injury. It is doubtless true that the owner of the premises owes no duty to keep them in such condition that an intruder, or a person casually thereon by sufferance, shall not be injured. The quarry case (*Hownsell* v. *Smyth*, 97 Eng. Com. Law, 731) is an apt illustration. There the plaintiff in crossing the defendant's waste land, which the public had been allowed to cross, fell into an unguarded excavation, and the court held that the plaintiff had no cause of action, because the defendant was under no legal duty to fence or otherwise guard the excavation for his protection. The plaintiff there availed himself of the license to use the premises in their existing condition, and accepted it with its attendant perils. The defendant did no affirmative act at the time by which existing conditions were changed and new perils created.

In the case of the movement of a train of cars over a track at a place which the public are permitted to use as a crossing the company are necessarily apprised that it is attended with danger to life. The company is an actor at the time in creating the circumstances which imperil human life, and it would be alarming doctrine that it was under no duty to exercise any care in the movement of its trains. The cases of *Nicholson* v. *Erie Ry. Co.* (41 N. Y. 525), and of *Sutton* v. *N. Y. C. & H. R. R. R. Co.* (66 id. 243), do not sustain the defendant's contention. In neither of these cases was the movement of the cars the direct act of the party sought to be charged, but resulted from causes which could not reasonably or naturally have been anticipated. There was in fact no negligence shown on the part of the defendants. The court in these cases properly held that the circumstances did not create any duty toward the party injured, or tend to establish any culpable negligence.

The ground of liability in this case is negligence and the duty of the defendant to exercise reasonable care, existed irrespective of the fact whether the plaintiff's intestate had a fixed legal right to cross the tracks, or was there simply by the defendant's implied permission. The construction of the deed was not material in determining the question of reasonable care. The circumstances known to the defendant required this, whether the plaintiff's intestate was there by right or by a mere license. The judge, upon the defendant's request, charged that if the intestate was on the track by mere license of the defendant, and having no other right, the plaintiff could not recover. The learned judge in making this charge followed what he understood to be the ruling of the General Term on the first appeal, and the charge was, we think, for the reasons stated erroneous. But the error was in favor of the defendant, and the jury having found that the defendant was guilty of negligence in the management of the train which caused the intestate's death, this finding, if justified (in the absence of contributory negligence), sustains the action.

It is claimed that there was no evidence to justify the submission to the jury of the question of the defendant's negligence. The court

could not, we think, have properly taken this question from the jury. The train consisted of an engine and two passenger cars. It was, as the evidence on the part of the plantiff tends to show, backing up without a bell being rung, or other signal being given, in charge of a brakeman who was at the time on the platform between the two cars, and where he could not see persons on the track, or have notice so as to apply the brake in case of danger. Moving a train in this way in a populous locality where persons were at all times crossing the track, might very well be found by a jury to be culpable negligence.

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We find no error of law in the record and the judgment should therefore be affirmed.

All concur, except Ruger, Ch. J., dissenting.

Judgment affirmed.[1]

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[1] *Accord*: *Phila. & Reading R. R.* v. *Troutman*, 11 W. N. C. 453 (Pa., 1882); *Taylor* v. *R. R.*, 113 Pa. 162 (1886); *Pomponio* v. *R. R.*, 66 Conn. 528 (1895); *West. & Atl. R. R.* v. *Meigs*, 74 Ga. 857 (1885); *Mitchell* v. *R. R.*, 68 N. H. 96 (1894); *Green* v. *R. R.*, 110 Mich. 648 (1896); *Delaney* v. *R. R.*, 33 Wisc. 67 (1873); *Smalley* v. *R. R.*, 98 Pac. 311 (Utah, 1908); *Felton* v. *Aubrey*, 74 Fed. 350 (1896). This applies only where the public or adjacent owners are accustomed without dissent to cross at some definite point not where the intrusion is of "that general kind that may occur (anywhere) on the tracks of a railroad located in a city or town," *Shea* v. *R. R.*, 69 N. H. 361 (1898), p. 363; while the language of Agnew, C. J., in *Pa. R. R.* v. *Lewis*, 79 Pa. 33 (1875), may appear to sanction a wider liability, the plaintiff was in fact crossing on a well defined customary passageway; see as to duty of a railroad running upon an unfenced right of way upon a public street, *Balt. & Pot. R. R.* v. *Cumberland*, 176 U. S. 232 (1900), and see *Smedis* v. *R. R.*, 88 N. Y.. 13 (1882). In *Lake Shore & So. R. R.* v. *Bodemer*, 139 Ill. 596 (1892) and *Lafayette, etc., R. R.* v. *Adams*, 26 Ind. 76 (1866) it is held that to run trains at a high speed and without signals through public streets, or what has the appearance thereof, is wilful, wanton misconduct for which even a trespasser if injured may recover.

So where the public are in the habit of using a path on the railroad's right of way by the side of or between the tracks, the railroad is bound to anticipate their probable presence and so operate its trains as not to injure them, *Brown* v. *R. R.*, 73 N. H. 568 (1906); *Davis* v. *R. R.*, 58 Wis. 646 (1883); but the fact that the public or adjacent owners are in the habit of walking along the tracks imposes no such duty on the railroad, *Kaseman* v. *Sunbury*, 197 Pa. 162 (1900), p. 168, *semble; Wabash R. R.* v. *Jones*, 163 Ill. 167 (1896); save where the tracks run unfenced through a public street, *R. R.* v. *Bodemer*, and *R. R.* v. *Adams, supra*. It is not necessary that the crossing be one habitually used by the public, it is enough if the defendant has reason to expect the plaintiff's presence at some definite point on its track, *Felch* v. *R. R.*, 66 N. H. 318 (1890), plaintiff using track in hauling and loading wood under contract with defendants, but see *contra., Railroad* v. *Norton*, 24 Pa. 465 (1855).

A railroad is liable to a licensee by mere tacit acquiescence only for misfeasance, not for nonfeasance. *Nicholson* v. *R. R.*, 41 N. Y. 525 (1870), cars improperly braked, started by high wind, ran down plaintiff at a permissive crossing; *Sutton* v. *R. R.*, 66 N. Y. 243 (1876), somewhat similar facts, *cf. Vanderbeck* v. *Hendry*, 34 N. J. L. 467 (1871), lumber carelessly piled near path through yard. As to what is misfeasance, see *Davis* v. *R. R.*, 58 Wis. 646 (1883), leaving a boiler unattended, so that it exploded, held to be active misconduct of the business, the risk of which the licensee does not assume, *aliter*, if the explosion had been due to a defect in the boiler discoverable by inspection, (*semble*). See also, *Lowery* v. *Walker*, L. R. 1911 A. C. 10, where an owner, who had permitted (or rather tolerated rather than go to the trouble of preventing) the public to cross his field, was held liable to a person so crossing it who was injured by a savage stallion which he had placed therein without giving notice of its presence and character.

2. At the Occupier's Invitation—Express or Implied.

SWEENY *v.* OLD COLONY AND NEWPORT RAILROAD COMPANY.

Supreme Judicial Court of Massachusetts, 1865. *92 Mass.* 368.

Tort to recover damages for a personal injury sustained by being run over by the defendants' cars, while the plaintiff was crossing their railroad by license, on a private way leading from South Street to Federal Street, in Boston.[1]

BIGELOW, C. J. This case has been presented with great care on the part of the learned counsel for the defendants, who have produced before us all the leading authorities bearing on the question of law which was reserved at the trial. We have not found it easy to decide on which side of the line, which marks the limit of the defendants' liability for damages caused by the acts of their agents, the case at bar falls. But on careful consderation we have been brought to the conclusion that the rulings at the trial were right, and that we cannot set aside the verdict for the plaintiff on the ground that it was based on erroneous instructions in matter of law.

In order to maintain an action for an injury to person or property by reason of negligence or want of due care, there must be shown to exist some obligation or duty towards the plaintiff, which the defendant has left undischarged or unfulfilled. This is the basis on which the cause of action rests. There can be no fault, or negligence, or breach of duty, where there is no act, or service, or contract, which a party is bound to perform or fulfil. All the cases in the books, in which a party is sought to be charged on the ground that he has caused a way or other place to be incumbered or suffered it to be in a dangerous condition, whereby accident and injury have been occasioned to another, turn on the principle that negligence consists in doing or omitting to do an act by which a legal duty or obligation has been violated. Thus a trespasser who comes on the land of another without right cannot maintain an action, if he runs against a barrier or falls into an excavation there situated. The owner of the land is not bound to protect or provide safeguards for wrongdoers. So a licensee, who enters on premises by permission only, without any enticement, allurement or inducement being held out to him by the owner or occupant, cannot recover damages for injuries caused by obstructions or pitfalls. He goes there at his own risk, and enjoys the license subject to its concomitant perils. No duty is imposed by law on the owner or occupant to keep his premises in a suitable condition for those who come there solely for their own convenience or pleasure, and who are not either expressly invited to enter or induced to come upon them by the purpose for which the premises are appropriated and occupied, or by some preparation or adaptation of the place for use by customers or passengers, which might naturally and reasonably lead them to suppose that they might properly and safely enter thereon.

[1] The reporter's statement of the facts is omitted.

On the other hand, there are cases where houses or land are so situated, or their mode of occupation and use is such, that the owner or occupant is not absolved from all care for the safety of those who come on the premises, but where the law imposes on him an obligation or duty to provide for their security against accident and injury. Thus the keeper of a shop or store is bound to provide means of safe ingress and egress to and from his premises for those having occasion to enter thereon, and is liable in damages for any injury which may happen by reason of any negligence in the mode of constructing or managing the place of entrance and exit. So the keeper of an inn or other place of public resort would be liable to an action in favor of a person who suffered an injury in consequence of an obstruction or defect in the way or passage which was held out and used as the common and proper place of access to the premises. The general rule or principle applicable to this class of cases is, that an owner or occupant is bound to keep his premises in a safe and suitable condition for those who come upon and pass over them, using due care, if he has held out any invitation, allurement or inducement, either express or implied, by which they have been led to enter thereon. A mere naked license or permission to enter or pass over an estate will not create a duty or impose an obligation on the part of the owner or person in possession to provide against the danger of accident. The gist of the liability consists in the fact that the person injured did not act merely for his own convenience and pleasure, and from motives to which no act or sign of the owner or occupant contributed, but that he entered the premises because he was led to believe that they were intended to be used by visitors or passengers, and that such use was not only acquiesced in by the owner or person in possession and control of the premises, but that it was in accordance with the intention and design with which the way or place was adapted and prepared or allowed to be so used. The true distinction is this: A mere passive acquiescence by an owner or occupier in a certain use of his land by others involves no liability; but if he directly or by implication induces persons to enter on and pass over his premises, he thereby assumes an obligation that they are in a safe condition, suitable for such use, and for a breach of this obligation he is liable in damages to a person injured thereby.[2]

[2] *Accord: Atlanta Mills* v. *Coffey*, 80 Ga. 145 (1887), plaintiff invited into defendant's mill to haul away seed given to him; *Central R. R.* v. *Robertson*, 95 Ga. 430 (1894), railroad building bridge, not part of highway, over its line for convenience of adjacent "settlement" liable for injuries due to its defective condition; *Manderville Mills* v. *Dale*, 2 Ga. App. 607 (1907), plaintiff coming into mill on express invitation of owner's agent to do private business with an employé. *Howe* v. *Ohmart*, 7 Ind. App. 32 (1893), visitor invited to attend lectures at a college; *Gorr* v. *Mittlestaedt*, 96 Wis. 296 (1897), guest at funeral, defect near private driveway, *semble; Richmond, etc., R. R.* v. *Moore*, 94 Va. 493 (1897), visitor at free trolley park, immaterial whether he came as passenger on defendant's line or not. See also *Vanderbeck* v. *Hendry*, 34 N. J. L. 467 (1871); *Phillips* v. *Library Co.*, 55 N. J. L. 307 (1893); *Furey* v. *R. R.*, 67 N. J. L. 270 (1901), and *Beehler* v. Daniels & Co., 18 R. I. 563 (1894), *accord.* (*semble*). So, while it was held in *Cahnon* v. *R. R.*, 157 Ind. 682 (1902), that a railroad company owed no duty to persons merely permitted to cross their

This distinction is fully recognized in the most recent and best considered cases in the English courts, and may be deemed to be the pivot on which all cases like the one at bar are made to turn. In *Corby* v. *Hill*, 4 C. B. (N. S.) 556, the owner of land, having a private road for the use of persons coming to his house, gave permission to a builder engaged in erecting a house on the land to place materials on the road; the plaintiff, having occasion to use the road for the purpose of going to the owner's residence, ran against the materials and sustained damage, for which the owner was held liable. Cockburn, C. J. says: "The proprietors of the soil held out an allurement whereby the plaintiff was induced to come on the place in question; they held this road out to all persons having occa-

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tracks at some particular point save not to wilfully or wantonly injure them, if the crossing is planked (*Slaughter* v. *R. R.*, 167 Ind. 330, 1906), or if a gateway be made in a fence enclosing the tracks (*Pittsburgh, etc., R. R.* v. *Simons*, 168 Ind. 333, 1906), this is held to be tantamount to an invitation to cross and the company is liable even for a failure to keep the crossing in good and safe condition and repair.

In Massachusetts it is the fact of an active invitation, and not the object of the business, whether for some business purpose of the owner or purely for the convenience of the guest, that creates the duty to take care to prepare a safe place for the latter's reception, but see Knowlton, J., in *Plummer* v. *Dill*, 156 Mass. 426 (1892). So where the plaintiff comes on to the premises for a purpose for which the owner has manifestly prepared them he is bound to see that they are reasonably safe, *Davis* v. *Congregation*, 129 Mass. 367 (1880), plaintiff going to religious meeting in church loaned by defendant for the purpose; *Learoyd* v. *Godfrey*, 138 Mass. 315 (1885), policeman coming upon premises to effect arrest at request of tenant; *Gordon* v. *Cummings*, 152 Mass. 513 (1890), postman collecting letters from box in hall. The liability of an occupier to a purely social guest, though mooted in *Plummer* v. *Dill*, *supra*, and *Hart* v. *Cole*, 156 Mass. 475 (1892), is left undecided.

Where as is usually the case no express invitation is given, an invitation will be implied where the conditions are such that a reasonable man would suppose that the place had been prepared for his use, *Chenery* v. *Railroad*, 160 Mass. 211 (1893). It is necessary that the conditions show that the place is prepared for *the plaintiff's* use. So if the condition be one appropriate and necessary for the operation of the business carried on by the owner there will be no implication of an invitation to others to utilize it, *Furey* v. *R. R.*, 67 N. J. L. 270 (1901), spaces left between cars on a pier to facilitate unloading of freight constitute no invitation to pass through. So the preparing and throwing open a premises to the public as a place of business implies an invitation to those only who desire to come thereon for the purposes of the business there carried on; no duty is thereby assumed toward one coming on the premises for a purpose purely his own, *Gillis* v. *R. R.*, 59 Pa. 129 (1868), boy coming to station platform to see the President pass by; *Thiele* v. *McManus*, 3 Ind. App. 132 (1891), plaintiff injured by bad condition of a part of a store customarily used by customers, held not entitled to recover unless herself a customer or at least "a shopper," *i. e.*, one who goes to a shop to inspect its contents with a view to possible purchase; *Faris* v. *Hoberg*, 134 Ind. 269 (1892), p. 279; *Johnson* v. *R. R.*, 125 Mass. 75 (1878), planking put across the tracks at railroad station is an invitation to passengers only to cross; *Vanderbeck* v. *Hendry*, 34 N. J. L. 467 (1871), plaintiff using passageway in lumber yard not on business with owner but as a short cut between streets; *Sterger* v. *Van Sicklen*, 132 N. Y. 499 (1892), woman seeking her children in a house next her own injured by fall of steps. And this is the more so where the plaintiff for his own purposes goes into a part of the premises not usually frequented by customers but reserved for the owner's private use, *Faris* v. *Hoberg*, *supra*; *Gibson, etc.*, v. *Sziepienski*, 37 Ill. App. 601 (1891). As to effect of express consent to

sion to proceed to the house as the means of access thereto." In *Chapman* v. *Rothwell,* El. Bl. & El. 168, the proprietor of a brewery was held liable in damages for injury and loss of life caused by permitting a trap-door to be open without sufficient light or proper safeguards, in a passage way through which access was had from the street to his office. This decision was put on the ground that the defendant, by holding out the passage way as the proper mode of approach to his office and brewery, invited the party injured to go there, and was bound to use due care in providing for his safety. This is the point on which the decision turned, as stated by Keating, J., in *Hounsell* v. *Smyth,* 7 C. B. (N. S.) 738. In the last named case the distinction is clearly drawn between the liability of a person who holds out an inducement or invitation to others to enter on his premises by preparing a way or path by means of which they can gain access to his house or store, or pass into or over the land, and in a case where nothing is shown but a bare license or permission tacitly given to go upon or through an estate, and the responsibility of finding a safe and secure passage is thrown on the passenger and not on the owner. The same distinction is stated in *Barnes* v. *Ward,* 9 C. B. 392; *Hardcastle* v. *South Yorkshire Railway, &c.* 4 Hurlst. & Norm. 67; and *Binks* v. *South Yorkshire Railway, &c.* 32 Law Journ. (N. S.) Q. B. 26. In the last cited case the language of Blackburn, J. is peculiarly applicable to the case at bar. He says, "There might be a case where permission to use land as a path may amount to such an inducement as to lead the persons using it to suppose it a highway, and thus induce them to use it as such." See also, for a clear statement of the difference between cases where an invitation or allurement is held out by the defendant, and those where nothing appears but a mere license or permission to enter on premises, *Balch* v. *Smith,* 7 Hurlst. & Norm. 741, and *Scott* v. *London Docks Co.* 11 Law Times, (N. S.) 383.

The facts disclosed at the trial of the case now before us, carefully weighed and considered, bring it within that class in which parties have been held liable in damages by reason of having held out an invitation or inducement to persons to enter upon and pass over their premises. It cannot in any just view of the evidence be said that the defendants were passive only, and gave merely a tacit license or assent to the use of the place in question as a public crossing. On the contrary, the place or crossing was situated between two streets of the city, (which are much frequented thoroughfares,) and was used by great numbers of people who had occasion

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enter such part of premises, see *Berlin Mill Co.* v. *Croteau,* 88 Fed. 860 (C. C. A., 1st Circ., 1898), merely license; *contra, Mandeville Mills* v. *Dale, supra.*

In many cases, while it is said that the duty of care arises from the invitation, it is held that such an invitation will be implied "where there is a common interest or mutual advantage, while a license is inferred where the object is the mere pleasure or benefit of the person using it," Campbell, Negligence, § 33; *Simons* v. *R. R., supra.* This would relieve an occupier, of liability towards persons who were not expressly invited unless their visit was directly or indirectly of advantage to him though the premises were manifestly prepared for their reception; but see *Slaughter* v. *R. R., supra; Davis* v. *Congregation, supra;* and *Robertson* v. *R. R., supra.*

to pass from one street to the other, and it was fitted and prepared by the defendants with a convenient plank crossing, such as is usually constructed in highways, where they are crossed by the tracks of a railroad, in order to facilitate the passage of animals and vehicles over the rails. It had been so maintained by the defendants for a number of years. These facts would seem to bring the case within the principle already stated, that the license to use the crossing had been used and enjoyed under such circumstances as to amount to an inducement, held out by the defendants to persons having occasion to pass, to believe that it was a highway, and to use it as such. But the case does not rest on these facts only. The defendants had not only constructed and fitted the crossing in the same manner as if it had been a highway, but they had employed a person to stand there with a flag, and to warn persons who were about to pass over the railroad when it was safe for them to attempt to cross with their vehicles and animals, without interference or collision with the engines and cars of the defendants. And it was also shown that when the plaintiff started to go over the tracks with his wagon, it was in obedience to a signal from this agent of the defendants that there was no obstruction or hindrance to his safe passage over the railroad. These facts well warranted the jury in finding, as they must have done in rendering a verdict for the plaintiff under the instructions of the court, that the defendants induced the plaintiff to cross at the time when he attempted to do so, and met with the injury for which he now seeks compensation.

It was suggested that the person employed by the defendants to stand near the crossing with a flag exceeded his authority in giving a signal to the plaintiff that it was safe for him to pass over the crossing just previously to the accident, and that no such act was within the scope of his employment, which was limited to the duty of preventing persons from passing at times when it was dangerous to do so. But it seems to us that this is a refinement and distinction which the facts do not justify. It is stated in the report that the flagman was stationed at the place in question, charged among other things with the duty of protecting the public. This general statement of the object for which the agent was employed, taken in connection with the fact that he was stationed at a place constructed and used as a public way by great numbers of people, clearly included the duty of indicating to persons when it was safe for them to pass, as well as when it was prudent or necessary for them to refrain from passing.

Nor do we think it can be justly said that the flagman in fact held out no inducement to the plantiff to pass. No express invitation need have been shown. It would have been only necessary for the plaintiff to prove that the agent did some act to indicate that there was no risk of accident in attempting to pass over the crossing. The evidence at the trial was clearly sufficient to show that the agent of the defendants induced the plaintiff to pass, and that he acted in so doing within the scope of the authority conferred on him. The question whether the plaintiff was so induced was distinctly submitted to the jury by the court; nor do we see any reason for supposing that the instructions on this point were misunderstood or mis-

applied by the jury. If they lacked fulness, the defendants should have asked for more explicit instructions. Certainly the evidence as reported well warranted the finding of the jury on this point.

It was also urged that, if the defendants were held liable in this action, they would be made to suffer by reason of the fact that they had taken precautions to guard against accident at the place in question, which they were not bound to use, and that the case would present the singular aspect of holding a party liable for neglect in the performance of a duty voluntarily assumed, and which was not imposed by the rules of law. But this is by no means an anomaly. If a person undertakes to do an act or discharge a duty by which the conduct of others may properly be regulated and governed, he is bound to perform it in such manner that those who rightfully are led to a course of conduct or action on the faith that the act or duty will be duly and properly performed shall not suffer loss or injury by reason of his negligence. The liability in such cases does not depend on the motives or considerations which induced a party to take on himself a particular task or duty, but on the question whether the legal rights of others have been violated by the mode in which the charge assumed has been performed.

The court were not requested at the trial to withdraw the case from the jury on the ground that the plaintff had failed to show he was in the exercise of due care at the time the accident happened. Upon the evidence, as stated in the report, we cannot say, as matter of law, that the plaintiff did not establish this part of his case.

Judgment on the verdict.

After the above decision was rendered, the verdict was set aside, by *Chapman,* J., as against the evidence.[8]

LEAROYD, EXECUTOR, *v.* GODFREY.

Supreme Judicial Court of Massachusetts, 1885. 138 *Mass.* 315.

Tort for personal injuries occasioned to one Booth, the plaintiff's intestate. The defendant was the owner of the premises, on which were four tenements, rented to different tenants, the owner retaining control of the common yard and approaches to the rear tenements. The plaintiff's intestate, a police officer, having at ten o'clock at night been called by the occupant of one of the rear tenements to stop a disturbance taking place there, went thereto and having arrested the disturber was leaving the premises with his prisoner

[8] *Accord*: *Johnson* v. *R. R.*, 125 Mass. 75 (1878), railroad owes no duty as to the operation of its trains to one, not a passenger, crossing its tracks at a station, though the public are in the habit of crossing at that point as a short cut to the station of another road; *Chenery* v. *R. R.*, 160 Mass. 211 (1893), *acc.*, but *cf. Corrigan* v. *Union Sugar Refinery*, 98 Mass. 577 (1868); *Ill. Cent. R. R.* v. *Godfrey*, 71 Ill. 500 (1874), no liability to persons using merely permissive crossing, unless wilful or wanton injury is done them or there is lack of ordinary care after discovery of their peril. The weight of authority is *contra*. See *Felton* v. *Aubrey*, 74 Fed. 350 (C. C. A., 6th Circ., 1896), and cases cited therein, p. 357, and *Barry* v. *R. R. ante*, p. 244, and note thereto.

In *Lowery* v. *Walker*, L. R. 1910, 1 K. B. 173, Kennedy, L. J., draws a distinction between persons invited and those whose presence is only tolerated because of the owner's disinclination to go to the trouble of prosecuting trespassers or making his premises trespass proof, but see same case in House of Lords, L. R. 1911, A. C. 10.

when in the dark he fell into an open well situate in the open space between the two tenements situate in the front of the lot, over which was the only apparent approach to the rear tenements.

Verdict for plaintiff.[1]

HOLMES, J. The plaintiff's intestate went to the tenement referred to, to stop a disturbance of the peace which was taking place there, as he had a right to. Gen. Sts. *c.* 23, § 2. Pub. Sts. *c.* 34 § 2. He seems also to have been invited by the occupant, whose son was making the trouble. He arrested the son, but as the arrest does not appear to have affected his course in leaving the place, his right to recover would not be affected if the arrest were unlawful. He came on the premises lawfully, and could lawfully leave them.

Under the instruction of the court, the jury must have found that the intestate was using the passageway by the defendant's invitation. That is to say, that the intestate had a right to understand from the appearance of the premises that the intended mode of approach to the tenement in question was over the open space where the well was; and the evidence warranted the finding to that extent.

Now supposing there had been a wrought avenue, and the accident had happened within it, as the avenue would have held out exactly as great an invitation to the public having lawful occasion to visit the tenement when some one else lived there as if the defendant himself had done so, the defendant would have been liable for any neglect to take proper precautions to make the avenue reasonably safe. *Larue* v. *Farren Hotel Co.* 116 Mass. 67. *Sweeny* v. *Old Colony & Newport Railroad,* 10 Allen, 368.

But the principle of the case last supposed does not depend upon the way being wrought. If the appearance of the premises is such as to point out a certain open space as the mode of approach, while it may not be the defendant's duty to take care of the whole open space as an approach, his duty to keep safe the approach offered, whatever it is, is as great as if it were a wrought avenue. And although the jury should regard less than the whole space as the approach proper, yet they would be at liberty to find, from the absence of any marks defining and separating the approach proper from the rest of the space, that an exceptional danger outside the former and in the latter made the approach itself unreasonably dangerous. See *Barnes* v. *Chicopee, ante,* 67, and cases cited; *White* v. *France,* 2 C. P. D. 308. To put it in another way, the jury had a right to find that the plaintiff was properly where he was. *Gilbert* v. *Nagle,* 118 Mass. 278.

The defendant argues that the plaintiff was not using due care, because, coming to an obstacle fifteen inches high, in the dark, and stepping upon it, he then stepped forward, and so fell into the well. The jury, who regarded the well as making the passage dangerous, may have considered that the plaintiff had a right to assume that no such danger would be allowed to beset the way. We cannot say, as matter of law, that they were wrong. *Severy* v. *Nickerson,* 120

[1] The facts are restated and a portion of the opinion is omitted.

Mass. 306, 307. *Fox* v. *Sackett*, 10 Allen, 535, 536. *Lawless* v. *Connecticut River Railroad*, 136 Mass. 1, 6.

This disposes of all the questions argued before us, and of all the exceptions which were not waived.

Exceptions overruled.[2]

HOLMES *v.* DREW.

Supreme Judicial Court of Massachusetts, 1890. 151 *Mass.* 578.

W. ALLEN, J.[1] The jury might have inferred from the facts stated that the defendant laid out and paved the sidewalk on her own land in order that it should be used by the public as the sidewalk of the street, and allowed it to remain apparently part of the street that was intended to be used by foot passengers. This would amount to an invitation to the public to enter upon and use as a public sidewalk the land so prepared, and the plaintiff so using it would have gone upon the defendant's land by her implied invitation, and she would owe to him the duty not to expose him to a dangerous condition of the walk which reasonable care on her part would have prevented. *Sweeny* v. *Old Colony & Newport Railroad*, 10 Allen, 368. *Carleton* v. *Franconia Iron & Steel Co.*, 99 Mass. 216. *Oliver* v. *Worcester*, 102 Mass. 489. *Davis* v. *Central Congregational Society*, 129 Mass. 367, 371. *Murphy* v. *Boston & Albany Railroad*, 133 Mass. 121.

The place was not a way, and the Pub. Sts. *c.* 52, § 19, do not apply. The ground of the defendant's liability is not her obligation to keep a way in repair; but her obligation to use due care that her land should be reasonably safe for the use which she invited the plaintiff to make of it. Whether she invited the plaintiff to cross her

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[1] A police officer or constable, entering premises in the course of his duty and right as such, is lawfully upon the premises and entitled to the protection of such obligations as the owners owe to such a class. *Parker* v. *Barnard*, 135 Mass. 116 (1883), a policeman entering warehouse in course of duty held within the protection of a statute requiring the fencing, etc., of elevator shafts; *aliter*, where the officer has no authority to enter as such, as where a constable for the purpose of executing civil process enters a house which he mistakenly believes is the residence of the person named in the writ. *Blatt* v. *McBarron*, 161 Mass. 21 (1894).

There is however no duty on a land owner to make his premises safe for the exceptional visits of officers to parts of his premises not normally meant for use by visitors, though their purpose is proper and their intrusion lawful: *Greenville* v. *Pitts*, 107 S. W. 50 (Tex., 1908), policeman going on roof to detect crime in adjoining house; *Woods* v. *Miller*, 30 N. Y. App. Div. 232 (1898), fireman fighting fire falls from unfenced party wall; *Gibson* v. *Leonard*, 143 Ill. 182 (1892), fireman falling into unguarded elevator shaft; *Beehler* v. *Daniels*, 18 R. I., 563 (1894); *Woods* v. *Lloyd*, 16 Atl. 43 (Pa., 1888), policeman in pursuit of prisoner falls from street onto unfenced lot which by change of grade of street has been left thirty feet below the street level; *Casey* v. *Adams*, 234 Ill. 350 (1908); *Kohn* v. *Lovett*, 44 Ga. 251 (1871), private citizen coming on defendant's premises to aid in extinguishing fire thereon.

This applies also to licensees of the owners, who create by their authority dangerous conditions on the premises. *Greenville* v. *Pitts*, *supra*.

[2] The facts are omitted.

land on a paved walk, whether the pavement was in such a condition as to render walking over it dangerous, whether it was in that condition through the negligence of the defendant, and whether the plaintiff was hurt in consequence while in the exercise of due care, were questions proper to be submitted to the jury.

Exceptions sustained.[2]

KNOWLTON, J., in *Plummer* v. *Dill*, 156 Mass. 426 (1892), p. 430: There is a class of cases to which *Sweeny* v. *Old Colony & Newport Railroad*, 10 Allen, 368, and *Holmes* v. *Drew*, 151 Mass. 578, belong, which stand on a ground peculiar to themselves. They are where the defendant by his conduct has induced the public to use a way in the belief that it is a street or public way which all have a right to use, and where they suppose they will be safe. The inducement, or implied invitation, in these cases, is not to come to a place of business fitted up by the defendant for traffic, to which those only are invited who will come to do business with the occupant, nor is it to come by permission, or favor, or license, but it is to come as one of the public and enjoy a public right, in the enjoyment of which one may expect to be protected. The liability in such a case should be co-extensive with the inducement or implied invitation.

CORBY *v.* HILL.

In the Common Pleas, 1858. 4 *Common Bench, N. S.* 556.

This was an action against the defendant for negligently leaving certain slates upon a certain road, whereby the plaintiff's horse was injured.

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[2] *Accord*: *Rachmel* v. *Clark*, 205 Pa. 314 (1903), per Mestrezat, J., p. 317; *Scars* v. *Merrick*, 175 Mass. 25 (1899); *Crogan* v. *Schiele*, 53 Conn. 186 (1885); *Kelly* v. *R. R.*, 28 Minn. 98 (1881); so in *Marsh* v. *Brewing Co.*, 92 Minn. 182 (1904), one owning a building, standing a few feet back from the street, is bound to keep in repair a sidewalk built on his own land connecting it with the street.

As to liability of one making a private road on his own land opening from and paved and curbed like a public highway, see *Stevens* v. *Nichols*, 155 Mass. 472 (1892); *Moffatt* v. *Kenny*, 174 Mass. 311 (1899); and *D'Amico* v. *Boston*, 176 Mass. 599 (1900).

In *Beck* v. *Carter*, 68 N. Y. 283 (1877), *Lepnick* v. *Gaddis*, 72 Miss. 200 (1894) and *Graves* v. *Thomas*, 95 Ind. 361 (1883) it was held that where the public had been permitted to use a part of the defendant's premises as a part of the public highway, he was bound to fence a dangerous excavation therein or adjacent thereto, and this though he had done nothing to give to the path any appearance of being part of the highway, but in each case the excavation was a new and hidden danger, see *Oliver* v. *Worcester*, 102 Mass. 489 (1869) and *Corby* v. *Hill*, 4 C. B. N. S. 556 (1858).

In *Barthold* v. *Phila.*, 154 Pa. 109 (1893), and *Glase* v. *Phila.*, 169 Pa. 488 (1895), it is held that a city laying out land as a park and inviting the public to resort thereto, owes a similar duty to those frequenting it; see also, *Fox* v. *Phila.*, 208 Pa. 127 (1904); but the weight of authority is contra, *Bisbing* v. *Asbury Park*, 80 N. J. L. 416 (1910), for the reason that in maintaining parks the city is acting in its public capacity, *Curran* v. *Boston*, 151 Mass. 505 (1890); *Moffitt* v. *Asheville*, 103 N. Car. 237 (1889), *aliter*, when the city derives a revenue from the building of a park or when a public park is made dangerous by work done on revenue producing buildings, *Oliver* v. *Worcester*, 102 Mass. 489 (1869),

The declaration stated, that, before and at the time when, &c., the plaintiff was lawfully possessed of a certain carriage, and of a certain horse drawing the said carriage, which said horse and carriage were under the government and direction of a servant of the plaintiff, and which said horse and carriage were then, with the consent of the owners and occupiers of the land and road and carriage line thereinafter mentioned, during the night-time, under such care and government as aforesaid, lawfully in and lawfully being driven along certain land and a certain road or carriage line, part of and crossing the said land then belonging to and occupied by certain persons other than the plaintiff and the defendant, and leading to a certain public building known as the Hanwell Lunatic Asylum, for the purpose of proceeding to the said building; that the defendant then negligently, carelessly, and improperly kept and continued upon and across the said road or carriage line, part of the said land, a stack of slates, and divers other things and materials, without placing or keeping any light or signal near them, or adopting any means whatever to show that the said slates and other materials were upon or across the said land, road, or carriage line; by reason whereof it was then impossible for the servant of the plaintiff to see or avoid the said slates, materials, or other things; and that, by reason thereof, the said horse drawing the said carriage, while being driven by the said servant as aforesaid, ran into, upon, and against the said stack of slates or other materials and things, and was greatly bruised, wounded, and injured: special damage.

The fourth plea stated that the defendant had lawfully placed, kept, and continued the said slates and other things and materials across the said land and road or carriage line by the license of the owners and occupiers of the said land, road, or carriage line, before the consent of the owners and occupiers of the said land, road, or carriage line as in the declaration alleged; and that the said consent so given to the defendant was in full force at the time when, &c.; and that the alleged damage was not sustained by any breach of duty of the defendant. Issue thereon.

The cause was tried before Byles, J., at the sittings in London after the last term. The facts which appeared in evidence were as follows:—The carriage-road or way in question was a private road leading from the turnpike-road to the Hanwell Lunatic Asylum and to the residence of the superintendent, Dr. Saunders. The defendant, a builder, was employed to do certain work at the asylum, and, with the consent of the owners of the land, stacked certain slates and other materials upon a portion of the road, without taking the precaution of placing a light near them at night; in consequence of which, the plaintiff's servant, who was driving a horse and carriage along the private road to the residence of Dr. Saunders, not seeing the slates, drove against them, and seriously injured the horse.

In answer to questions put to them by the learned judge, the jury found that the defendant had the consent of the owners of the property for placing the slates and materials where he placed them, but upon the usual terms of properly providing for the safety of the public, or of such of the public as had permission to use the way;

that there was negligence in leaving the stack without a proper light; and that that negligence was chargeable upon the defendant, in conjunction with the owners of the soil.

It was insisted, on the part of the defendant, that the fourth plea was an answer to the action.

The learned judge directed a verdict to be entered for the plaintiff, reserving leave to the defendant to move to enter a verdict for him upon the fourth plea, if the court should be of opinion that the action would not lie under the circumstances.

COCKBURN, C. J. I am of opinion that there should be no rule in this case. This action is brought by the plaintiff on the ground that whereas there was a road leading from the main or turnpike-road to the Hanwell Lunatic Asylum and to the residence of Dr. Saunders adjoining thereto, and the plaintiff, having lawful occasion to be on the land, was on it by the leave and licence of the owners thereof, the defendant negligently obstructed the way by placing thereon certain slates and other materials without giving notice or warning of the obstruction by light or other signal, and that, by reason thereof, the plaintiff's horse was driven against the obstruction, and injured. To this declaration the defendant, by his fourth plea,—not denying the leave and license stated in the declaration,—says that the slates and materials were placed on the road by the licence of the owners and occupiers of the land before the consent given to the plaintiff to use the said road, that the consent so given to the defendant was in full force at the time of the accident, and that the injury complained of was not the result of any breach of duty on his part: and it has been contended by Mr. Huddleston that the owners of the soil, and consequently also any person having leave and licence from them, may, as against any other person using the way by the like leave and licence, erect an obstruction thereon without incurring any responsibility for injury resulting therefrom, unless in the case of a holding out any allurement or inducement to such other person to make use of the way. It seems to me that the very case from which the learned counsel seeks to distinguish this, is the case now before us. The proprietors of the soil held out an allurement whereby the plaintiff was induced to come upon the place in question: they held out this road to all persons having occasion to proceed to the asylum as the means of access thereto. Could *they* have justified the placing an obstruction across the way, whereby an injury was occasioned to one using the way by their invitation? Clearly they could not. Having, so to speak, dedicated the way to such of the general public as might have occasion to use it for that purpose, and having held it out as a safe and convenient mode of access to the establishment, without any reservation, it was not competent to them to place thereon any obstruction calculated to render the road unsafe, and likely to cause injury to those persons to whom they had held it out as a way along which they might safely go. If that be so, a third person could not acquire the right to do so under their licence or permission. The case is entirely distinguishable from those which have been referred to. In those, the plaintiff was in the position of a wrong-doer, a trespasser: whereas, here, the plaintiff was at the

time he sustained the injury complained of in the course of using the way upon the invitation of the owners of the soil. We must take it as the jury have found it, that, though the defendant had the leave and licence of the owners of the soil to place the slates upon the road, such licence was to be exercised with reasonable precautions and a due regard to the safety of all persons using the way. I doubt whether the finding of the jury might not have been objected to. I incline to think, that, where a general leave and licence is given to use a road as a means of access to a certain place, any subsequent leave to place an obstruction there would be inoperative, and therefore I think the evidence does not justify the finding upon the fourth plea. But the jury having coupled it with a finding that the leave granted to the defendant was to be exercised with a due regard to the protection of the public, we must presume it to have been so qualified. I therefore think there is no ground for disturbing the verdict. Then comes the question whether there is anything to entitle the defendant to have the judgment arrested. The ground upon which that is sought, is, that the declaration does not shew that the obstruction complained of was erected without the permission of the owners of the soil. I am of opinion that it was not necessary that the declaration should allege that. It was enough for the plaintiff to aver that there was a road which he was entitled, as of right, or by the owners' permission, to use, and that the defendant negligently and improperly placed an obstruction thereon, whereby the plaintiff sustained an injury. It was altogether unnecessary for the plaintiff to go on and negative the fact of permission having been given to the defendant by the owners of the soil; for, it was not to be presumed that they would have done that which would have been in fraud of the leave and licence granted to the plantiff.

WILLES, J.[1] I am of the same opinion. In substance the case is this:—There was a road leading to a certain building, along which road persons having occasion to go to the building were accustomed to pass by leave of the owners of the soil, and were likely to pass; and the defendant, being engaged in some work upon the adjoining land, obtained leave to place slates and other materials there, either absolutely or modified in the way found by the jury, so as not to endanger persons using the road. Under that leave, the defendant placed certain slates across the road in such a way as to be likely to occasion injury to persons using the road. It is not suggested that the defendant did not know that the road was likely to be used in the way I have mentioned, or that he gave any notice or warning to the persons, including the plaintiff, who were accustomed and likely to use the road. The question is, whether there is any legal remedy for a person lawfully using the road, to whom injury results from the act of a third person in negligently placing an obstruction upon the road. I should have thought that the bare statement of the proposition was enough. The defendant had no right to set a trap for the plaintiff. One who comes upon another's land by the owner's permission or invitation has a right to expect that the

[1] A portion of this opinion and the entire opinions of Williams and Byles, JJ., are omitted.

owner will not dig a pit thereon, or permit another to dig a pit thereon, so that persons lawfully coming there may receive injury. That is so obvious that it is needless to dwell upon it. The form of declaration which I should have drawn upon such a state of facts, would have been something like this,—that there was a certain road over which the plaintiff and others having occasion to go to a certain building by licence of the owners were accustomed and were likely to pass, and that the defendant, knowing that, wrongfully and negligently placed certain slates and materials across the road in such a manner as to be likely to prove dangerous to persons driving along the road, and that the plaintiff, being lawfully on the road on his way to the building, ran against the obstruction and was injured.[2]

(d) Persons Coming upon the Premises for Purposes in which the Occupier has an Interest.

1. Social Guests.

SOUTHCOTE *v.* STANLEY.

In the Court of Exchequer, 1856. 1 *Hurl. & Nor.* 247.

The declaration stated, that at the time of the committing of the grievances, &c., the defendant was possessed of an hotel, into which he had then permitted and invited the plaintiff to come as a visitor of the defendant, and in which the plaintiff as such visitor then lawfully was by the permission and invitation of the defendant, and in which hotel there then was a glass door of the defendant, which it was then necessary for the plaintiff, as such visitor, to open for the purpose of leaving the hotel, and which the plaintiff, as such visitor, then by the permission of the defendant and with

[2] *Accord: Thayer* v. *Jarvis,* 44 Wis. 388 (1878), defendant who had allowed his private alley to be used by adjacent owners placed caustic soda thereon which injured the horses of a teamster hauling material for a neighbor, the driver being ignorant of the presence of the soda in the alley; *Oliver* v. *Worcester,* 102 Mass. 489 (1869), city, in erecting building for rental purposes, made and left unlighted an excavation in a path through the public common over which the public were licensed to pass; *Toomey* v. *Sanborn,* 146 Mass. 28 (1888), city slopman removing garbage injured by latent defect in stairway created by landlord in effort to make repairs; *Ellsworth* v. *Metheney,* 104 Fed. 119 (C. C. A., 6th Circ., 1900), uninsulated wire left exposed where employes were allowed to congregate during lunch hour.

When there is a mere acquiescence in the passing of the public over an open lot in no definite path, the owner is not liable for digging a ditch in the use of his own land or for neglect to guard or light it, *Habina* v. *Electric Co.,* 150 Mich. 41 (1907). An owner or one acting under his authority creating a danger upon a permissive path in the enjoyment of his property, is not liable to a licensee using it at night and injured thereby, where the owner's use is open and notorious and involves the probable creation of dangerous conditions, *McCann* v. *Thilemann,* 72 N. Y. Supp. 1076 (1901); nor is there any duty imposed on an owner to warn a licensee by acquiescence of dangers created on the property by third persons, *Martin* v. *Bridge Co.,* 41 Ind. App. 493 (1908).

his knowledge, and without any warning from him, lawfully opened for the purpose aforesaid, as a door which was in a proper condition to be opened; nevertheless, by the negligence of the defendant the said door was then in a dangerous condition, and by reason thereof, a large piece of glass from the said door fell out of the same, to and upon the plaintiff, and wounded him.[1]

Demurrer and joinder therein.

Raymond, in support of the demurrer.—The declaration discloses no cause of action. It is not stated that the plaintiff was in the hotel as a guest, but merely as a visitor; and there is no allegation that the defendant knew of the dangerous condition of the door. * * * [BRAMWELL, B.—If a person invites another into his house, and the latter can only enter through a particular door, is it not the duty of the former to take care that the door is in a secure condition?] He may not be aware that the door is insecure.

Gray, contra.—The declaration shows a duty on the part of the defendant, and a breach of that duty. It is immaterial whether the injury takes place in a private house, or in a shop, or in a street; the only question is, whether the person who complains was lawfully there? * * * Here it is alleged that the defendant invited the plaintiff to come into the hotel as a visiter; that shows that he was lawfully there. [POLLOCK, C. B.—The position, that an action lies because the plaintiff was lawfully in the house, cannot be supported: a servant is lawfully in his master's house, and yet if the balusters fell, whereby he was injured, he could not maintain an action against the master. If a lady, who is invited to dinner, goes in an expensive dress, and a servant spills something over her dress, which spoils it, the master of the house would not be liable. Where a person enters a house by invitation the same rule prevails as in the case of a servant. A visitor would have no right of action for being put in a damp bed, or near a broken pane of glass, whereby he caught cold. ALDERSON, B.—The case of a shop is different, because a shop is open to the public; and there is a distinction between persons who come on business and those who come by invitation.]

POLLOCK, C. B.—We are all of opinion that the declaration cannot be supported, and that the defendant is entitled to judgment. I do not think it necessary to point out the reasons by which I have come to that conclusion; because it follows from the decision of this Court, that the mere relation of master and servant does not create any implied duty on the part of the master to take more care of the servant than he may reasonably be expected to do of himself. That decision has been followed by several cases, and is now established law, though I believe, the principle was not recognised until recent times. The reason for the rule is, that the servant undertakes to run all the ordinary risk of service, including those arising from the negligence of his fellow servants. The rule applies to all the members of a domestic establishment, so that the master is not in general liable to a servant for injury resulting from the negligence of a fellow servant; neither can one servant maintain an action against another for negligence whilst engaged in their common

[1] The statement of facts is abridged.

employment. The same principle applies to the case of a visitor at a house: whilst he mains there he is in the same position as any other member of the establishment, so far as regards the negligence of the master or his servants, and he must take his chance with the rest.

ALDERSON, B.—I am of the same opinion.

BRAMWELL, B.—I agree with Mr. *Gray* to this extent, that where a person is in the house of another, either on business or for any other purpose, he has a right to expect that the owner of the house will take reasonable care to protect him from injury; for instance, that he will not allow a trap-door to be open, through which the visitor may fall. But in this case my difficulty is to see that the declaration charges any act of commission. If a person asked another to walk in his garden, in which he had placed spring-guns or men-traps, and the latter, not being aware of it, was thereby injured, that would be an act of commission. But if a person asked a visitor to sleep at his house, and the former omitted to see that the sheets were properly aired, whereby the visitor caught cold, he could maintain no action, for there was no act of commission, but simply an act of omission. This declaration merely alleges that "by and through the mere carelessness, negligence, default, and improper conduct of the defendant," the glass fell from the door. That means a want of care—a default in not doing something. The words are all negatives, and under these circumstances the action is not maintainable. I doubted whether the words "carelessness, negligence, and improper conduct," &c., might not mean something equivalent to actual commission, but on the best consideration which I can give the subject, it appears to me that they do not mean that, but merely point to a negative. If I misconstrue the declaration, it is the fault of those who so framed it.

Judgment for the defendant.[2]

[2] See *contra* (*semble*) *Barman* v. *Spencer*, 49 N. E. 9 (Ind., 1898), per McCabe, J., p. 12. The liability toward an invited social guest is discussed but left undecided in *Plummer* v. *Dill*, 156 Mass. 426 (1892), a woman coming to business office to get reference for a servant, and *Hart* v. *Cole*, 156 Mass. 475 (1892), woman going to the wake of a perfect stranger. But a landlord retaining control of the approaches to offices, or apartments, is liable to all guests of his tenants who are expressly or impliedly invited to visit him whether for business or social purposes, *Henkel* v. *Murr*, 31 Hun 28 (N. Y., 1883); *Alperin* v. *Earle*, 55 Hun 211 (N. Y., 1889); *Barman* v. *Spencer*, *supra*; *Phillipps* v. *Library Co.*, 55 N. J. L. 307 (1893), but not to those who come exclusively for their own purposes and without express invitation or any presumption of desire on tenant's part to receive them, *Plummer* v. *Dill*, *supra*; *Hart* v. *Martin*, *supra*; *Ganley* v. *Hall*, 168 Mass. 513 (1897), plaintiff going to brother's rooms to try to borrow money.

Where the plaintiff comes on the premises, not on any business, directly or indirectly, profitable to the occupier but still for the very purpose, other than one merely social, for which the building is prepared and thrown open to the public, the occupier is held liable in *Davis* v. *Society*, 129 Mass. 367 (1880), plaintiff invited to attend a church conference at defendant's church and *Howe* v. *Ohmart*, 7 Ind. App. 32 (1893), a visitor at a college invited to attend a lecture. In *Stanwood* v. *Clancey*, 106 Maine 72 (1909), it is said "when an owner of a building fits it up for business uses, he impliedly invites all persons to come there whose coming is naturally incidental to the business carried on there, and if he leases the building or parts of it to tenants he impliedly invites all persons to come there in connection with the business carried on by the tenants. At the same time, if the building is open and there is nothing to indicate that strangers are not wanted, he impliedly permits and licenses persons to come there for their own conveniences or to gratify their curiosity. To those invited he owes the duty (to manage an

2. Business Guests.

INDERMAUR *v.* DAMES.

Court of Common Pleas, 1866. *L. R.* 1, *C. P.* 274.

WILLES, J.—This was an action to recover damages for hurt sustained by the plaintiff's falling down a shaft at the defendant's place of business, through the actionable negligence, as it was alleged, of the defendant and his servants.

At the trial before the Lord Chief Justice at the sittings here after Michaelmas Term, the plaintiff had a verdict for 400*l*. damages, subject to leave reserved.[1]

A rule was obtained by the defendant in last term to enter a nonsuit, or to arrest the judgment, or for a new trial because of the verdict being against the evidence.

The rule was argued during the last term, before Erle, C. J., Keating and Montague Smith, JJ., and myself, when we took time to consider. We are now of opinion that the rule ought to be discharged.

It appears that the defendant was a sugar-refiner, at whose place of business there was a shaft four feet three inches square, and twenty-nine feet three inches deep, used for moving sugar. The shaft was necessary, usual, and proper in the way of the defendant's business. Whilst it was in use, it was necessary and proper that it should be open and unfenced. When it was not in use, it was sometimes necessary, with reference to ventilation, that it should be open. It was not necessary that it should, when not in use, be unfenced; and it might then without injury to the business have been fenced by a rail. Whether it was usual to fence similar shafts when not in use did not distinctly appear; nor is it very material, because such protection was unquestionably proper, in the sense of reasonable, with reference to the safety of persons having a right

elevator carefully) but not to those merely licensed;" Savage, J. Plaintiff to accommodate a friend went to look for the office of one H. He went into defendant's building to inquire if H. had an office there, (which he had not). Thinking that the open space in the elevator frame was an office door, he walked into it, fell into the well and was hurt.

[1] "In his summing-up, the Lord Chief Justice stated in substance as follows: The plaintiff has to establish that there was negligence on the part of the defendant; that the premises of the defendant, to which he was sent in the course of his business as a gas-fitter, were in a dangerous state; and that, as between himself and the defendant, there was a want of due and proper precaution in respect of the hole in the floor. To my mind, there would not be the least symptom of want of due care as between the defendant and a person [permanently] employed on his premises, because the sugar-baking business requires a lift on the premises, which must be as well known to the persons employed there as the top of a staircase in every dwelling-house. But that which may be no negligence towards men ordinarily employed upon the premises, may be negligence towards strangers lawfully coming upon the premises in the course of their business. And, after observing upon the facts, he told the jury, that, if they found that there was no negligence on the part of the defendant, or that there was want of reasonable care on the part of the defendant, but that there was also want of reasonable care on the part of the plaintiff which materially contributed to the accident, the plaintiff was not entitled to recover; but that, if there was want of reasonable care in the defendant, and no want of reasonable care in the plaintiff, then the plaintiff was entitled to a verdict."

to move about upon the floor where the shaft in fact was, because in its nature it formed a pit-fall there. At the time of the accident it was not in use, and it was open and unfenced.

The plaintiff was a journeyman gas-fitter in the employ of a patentee who had supplied the defendant with his patent gas regulator, to be paid for upon the terms that it effected a certain saving: and, for the purpose of ascertaining whether such a saving had been effected, the plaintiff's employer required to test the action of the regulator. He accordingly sent the plaintiff to the defendant's place of business for that purpose; and, whilst the plaintiff was engaged upon the floor where the shaft was, he (under circumstances as to which the evidence was conflicting, but) accidentally, and, as the jury found, without any fault or negligence on his part, fell down the shaft, and was seriously hurt.

It was argued, that, as the defendant had objected to the plaintiff's working at the place upon a former occasion, he (the plaintiff) could not be considered as having been in the place with the defendant's leave at the time of the accident: but the evidence did not establish a peremptory or absolute objection to the plaintiff's being employed, so as to make the sending of him upon the occasion of the accident any more against the defendant's will than the sending of any other workman: and the employment, and the implied authority resulting therefrom to test the apparatus, were not of a character involving personal preference (dilectus personæ), so as to make it necessary that the patentee should himself attend. It was not suggested that the work was not journeyman's work.

It was also argued that the plaintiff was at best in the condition of a bare licensee or guest who, it was urged, is only entitled to use the place as he finds it, and whose complaint may be said to wear the colour of ingratitude, so long as there is no design to injure him: see Hounsell *v.* Smyth, 7 C. B. N. S. 731.

We think this argument fails, because the capacity in which the plaintiff was there was that of a person on lawful business, in the course of fulfilling a contract in which both the plaintiff and the defendant had an interest, and not upon bare permission. No sound distinction was suggested between the case of the servant and the case of the employer, if the latter had thought proper to go in person; nor between the case of a person engaged in doing the work for the defendant pursuant to his employment, and that of a person testing the work which he had stipulated with the defendant to be paid for if it stood the test; whereby impliedly the workman was to be allowed an onstand to apply that test, and a reasonable opportunity of doing so. Any duty to enable the workman to do the work in safety, seems equally to exist during the accessory employment of testing: and any duty to provide for the safety of the master workman, seems equally owing to the servant workman whom he may lawfully send in his place.

It is observable, that, in the case of Southcote *v.* Stanley, 1 H. & N. 247, upon which much reliance was properly placed for the defendant, Alderson, B., drew the distinction between a bare licensee and a person coming on business, and Bramwell, B., between active negligence in respect of unusual danger known to the host and not to

the guest, and a bare defect of construction or repair, which the host was only negligent in not finding out or anticipating the consequence of.

There is considerable resemblance, though not a strict analogy, between this class of cases and those founded upon the rule as to voluntary loans and gifts, that there is no remedy against the lender or giver, for damage sustained from the loan or gift, except in case of unusual danger known to and concealed by the lender or giver: Macarthy *v.* Younge, 6 H. & N. 329. The case of the carboy of vitriol [Farrant *v.* Barnes, 11 C. B. N. S. 553] was one in which this Court held answerable the bailor of an unusually dangerous chattel, the quality of which he knew, but did not tell the bailee, who did not know it, and who, as a proximate consequence of his not knowing, and without any fault on his part, suffered damage.

The cases referred to as to the liability for accidents to servants and persons employed in other capacities in a business or profession which necessarily and obviously exposes them to danger, as in Seymour *v.* Maddox, 16 Q. B. 326, also have their special reasons. The servant or other person so employed is supposed to undertake not only all the ordinary risks of the employment into which he enters, but also all extraordinary risks which he knows of and thinks proper to incur, including those caused by the misconduct of his fellow-servants, not however including those which can be traced to mere breach of duty on the part of the master. In the case of a statutory duty to fence, even the knowledge and reluctant submission of the servant who has sustained an injury, are held to be only elements in determining whether there has been contributory negligence: how far this is the law between master and servant, where there is danger known to the servant, and no statute for his protection, we need not now consider, because the plaintiff in this case was not a servant of the defendant, but the servant of the patentee. The question was adverted to, but not decided, in Clarke *v.* Holmes, 7 H. & N. 937.

The authorities respecting guests and other bare licensees, and those respecting servants and others who consent to incur a risk, being therefore inapplicable, we are to consider what is the law as to the duty of the occupier of a building with reference to persons resorting thereto in the course of business, upon his invitation, express or implied. The common case is that of a customer in a shop:[2] but it is obvious that this is only one of a class; for, whether

[2] *Polenske* v. *Lit Bros.*, 18 Pa. S. C. 474 (1901); *Bloomer* v. *Snellenberg*, 221 Pa. 25 (1908); *Moore* v. *Korte*, 77 Mo. App. 500 (1898); a customer entering not by the public door but by one not open to the public, may recover if injured after (*Burk* v. *Walsh*, 118 Iowa, 397, 1902), but not if injured before (*Flanagan* v. *Sanders*, 138 Mich. 253, 1904) that part of the store prepared for the reception of customers is reached.

For other examples of persons held to be business guests, see *Davis* v. *Ferris*, 53 N. Y. Supp. 571 (1898), wife of intending purchaser inspecting lumber in yard; *Schniser* v. *Phillips*, 108 N. Y. App. Div. 17 (1905), patrons of restaurant on ocean pier; *True* v. *Meredith Creamery*, 72 N. H. 154 (1903), farmers taking milk to creamery to be separated; *Pauckner* v. *Wakem*, 231 Ill. 276 (1907), servant sent to remove goods stored in warehouse; *Carleton* v. *Franconia Co.*, 99 Mass. 216 (1868), vessel injured by rock at

the customer is actually chaffering at the time, or actually buys or not, he is, according to an undoubted course of authority and practice, entitled to the exercise of reasonable care by the occupier to prevent damage from unusual danger, of which the occupier knows or ought to know, such as a trap-door left open, unfenced, and unlighted:[3] Lancaster Canal Company *v.* Parnaby, 11 Ad. & E. 223; per cur. Chapman *v.* Rothwell, E. B. & E. 168, 27 L. J. (Q. B.) 315, where Southcote *v.* Stanley, 1 H. & N. 247, was cited, and the Lord Chief Justice, then Erle, J., said: "The distinction is between the case of a visitor (as the plaintiff was in Southcote *v.* Stanley), who must take care of himself, and a customer, who, as one of the public, is invited for the purposes of business carried on by the defendant." This protection does not depend upon the fact of a contract being entered into in the way of the shopkeeper's business during the stay of the customer, but upon the fact that the customer has come into the shop in pursuance of a tacit invitation given by the shopkeeper, with a view to business which concerns himself. And, if a customer were, after buying goods, to go back to the shop in order to complain of the quality, or that the change was not right, he would be just as much there upon buisness which concerned the shopkeeper, and as much entitled to protection during this accessory visit, though it might not be for the shopkeeper's benefit, as during the principal visit, which was. And if, instead of going himself, the customer were to send his servant, the servant would be entitled to the same consideration as the master.

The class to which the customer belongs includes persons who go not as mere volunteers, or licensees, or guests, or servants, or persons whose employment is such that danger may be considered as bargained for, but who go upon business which concerns the occupier, and upon his invitation, express or implied.

And, with respect to such a visitor at least, we consider it settled law, that he, using reasonable care on his part for his own

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entrance to dock; *Bennett* v. *R. R.*, 102 U. S. 577 (1880), passengers using wharf as approach to train; *McKee* v. *Bidwell*, 74 Pa. 218 (1873), persons delivering goods at defendant's place of business. No invitation will be implied in favor of one with whom the owner may not lawfully deal. *Rollestone* v. *Cassirer*, 3 Ga. App. 161 (1907), drunken man entering bar-room.

[3] The plaintiff's visit need not be directly profitable to the owner, it is enough that it be connected with and incidental to the business carried on on the premises. *Low* v. *Grand Trunk R. R.*, 72 Me. 313 (1881), custom house officer on steam boat wharf; *Tobin* v. *R. R.*, 59 Me. 183 (1871), hackman bringing passengers to station; *Ill. Cent. R. R.* v. *Hopkins*, 200 Ill. 122 (1902), woman serving meals at station to mail clerks on defendant's trains; *McKone* v. *R. R.*, 51 Mich. 601 (1883); *Watkins* v. *Ry. Co.*, 37 L. T. N. S. 193 (C. P. Eng., 1877), Denman, J., p. 194; *Hamilton* v. *R. R.*, 64 Tex. 251 (1885), man going to station to meet his wife, a passenger; *Axford* v. *Prior*, 14 W. R. 611 (Eng., 1866), averment that plaintiff was lawfully in an inn "as a guest," supported by evidence that he was waiting in the tap-room for a friend who was a guest. As to the status of persons coming on business premises to seek employment, see *McDonough* v. *Reilly Co.*, 90 N. Y. Supp. 358 (1904), such persons held to be business guests when invited in pursuance of a custom to solicit applications, *cf. White* v. *France*, L. R. 2, C. P. D. 308 (1877); *aliter*, if in the absence of invitation or custom the plaintiff comes on mere chance of obtaining employment; but see *Oats* v. *Dock Co.*, 109 N. Y. App. Div. 841 (1905).

safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know; and that, where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as matter of fact.

In the case of Wilkinson *v.* Fairrie, 1 H. & C. 633, relied upon for the defendant, the distinction was pointed out between ordinary accidents, such as falling down stairs, which ought to be imputed to the carelessness or misfortune of the sufferer, and accidents from unusual, covert danger, such as that of falling down into a pit.

It was ably insisted for the defendant that he could only be bound to keep his place of business in the same condition as other places of business of the like kind, according to the best known mode of construction. And this argument seems conclusive to prove that there was no absolute duty to prevent danger, but only a duty to make the place as little dangerous as such a place could reasonably be, having regard to the contrivances necessarily used in carrying on the business. But we think the argument is inapplicable to the facts of this case; first, because it was not shown, and probably could not be, that there was any usage never to fence shafts; secondly, because it was proved, that, when the shaft was not in use, a fence might be resorted to without inconvenience: and no usage could establish that what was in fact unnecessarily dangerous was in law reasonably safe, as against persons towards whom there was a duty to be careful.

Having fully considered the notes of the Lord Chief Justice, we think there was evidence for the jury that the plaintiff was in the place by the tacit invitation of the defendant, upon business in which he was concerned; that there was by reason of the shaft unusual danger, known to the defendant; and that the plaintiff sustanied damage by reason of that danger, and of the neglect of the defendant and his servants to use reasonably sufficient means to avert or warn him of it: and we cannot say that the proof of contributory negligence was so clear that we ought on this ground to set aside the verdict of the jury.

As for the argument that the plaintiff contributed to the accident by not following his guide, the answer may be, that the guide, knowing the place, ought rather to have waited for him; and this point, as matter of fact, is set at rest by the verdict.

For these reasons, we think there was evidence of a cause of action in respect to which the jury were properly directed; and, as every reservation of leave to enter a nonsuit carries with it an implied condition that the Court may amend, if necessary, in such a manner as to raise the real question, leave ought to be given to the plaintiff, in the event of the defendant desiring to appeal or to bring a writ of error, to amend the declaration by stating the facts as proved,—in effect, that the defendant was the occupier of and carried on business at the place; that there was a shaft, very dangerous to persons in the place, which the defendant knew and the plaintiff did not know; that the plaintiff, by invitation and permission of the

defendant, was near the shaft, upon business of the defendant, in the way of his own craft as a gas-fitter, for hire, &c., stating the circumstances, the negligence, and that by reason thereof the plaintiff was injured. The details of the amendment can, if necessary, be settled at chambers.

Rule discharged.

[An appeal having been taken to the Exchequer Chamber.]

KELLY, C. B.[4]—Then what duty is imposed by law on the defendant? It appears that the place was a sugar refinery and Mr. Griffits was correct in alleging that places of that sort have shoots and holes of this description, and which are without any fence or safeguard. That may well be so, but the question is, if a person having premises of that sort enters into a contract for the performance of work, and if in the course of the performance of that work workmen have to go by these places and know nothing of the premises, the employer or occupier is not bound to put up a fence or some safeguard, or to give reasonable and intelligible notice to persons going on the spot;[5] in fact, to give notice that there is an unfenced hole, and so to put them on their guard.

Judgment affirmed.[6]

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[4] 16 L. T. N. S. 293, p. 294 (1867). Somewhat differently reported in L. R. 2, C. P. 311.

[5] "The proposition is, that this was a danger which was known to the defendant, but of which the plaintiff, to the knowledge of the defendant, was ignorant," per Willes, J., L. R., 1 C. P., p. 278, in course of argument. When the plaintiff through coming on the premises on the owner's business has no right to enter save through the consent of the owner, he is only entitled to notice of the actual condition which he is to meet thereon, as known to the owner or as discoverable by reasonable care by the latter; see Lord Atkinson, *Cavalier* v. *Pope*, L. R. 1906, A. C. 428, p. 432.

So an owner is not liable for injuries due to the defective condition of the premises or appurtenance or to the dangerous methods in which the owner carries on his business, if known to the plaintiff, *Sullivan* v. *Gas Co.*, 190 Mass. 288 (1906); *Woodley* v. *R. R.*, L. R. 2, Ex. Div. 384 (1877), but see *Horton* v. *Harvey*, 119 Ga. 219 (1903), or obvious, *Stevens* v. *Gas Co.*, 73 N. H. 159 (1905); *Connolly* v. *Union League*, 221 Pa. 21 (1908); *The Clan Graham*, 163 Fed. 961 (1908), or such as are usually to be met with in the place to which he goes, *Wilkinson* v. *Fairrie*, 1 H. & C. 633 (1862), a plaintiff going along a dark passageway fell down a staircase. A nonsuit was directed by Bramwell, B., on the ground "that if it was so dark he could not see, he ought not to have proceeded without a light, if it was sufficiently light for him to see, he might have avoided the staircase," which says Pollock, C. B., p. 635 "is a very different thing from a hole or a trap door," *cf. Paddock* v. *N. E. Ry. Co.*, 18 L. T. N. S. 60 (1868), and see Beven Negligence, 3rd ed., 450.

One coming on the owner's business to a part of the premises specially prepared for his reception may assume that no dangers exist therein and need not be on the alert to discover its true condition, *Bloomer* v. *Snellenberg*, 221 Pa. 25 (1908), a customer in a shop may assume that the aisles are free from dangerous obstructions and need not exercise the same vigilance as if walking on the highway: *Aliter*, when one goes even on business, as for example to do work thereon, to premises or a part thereof manifestly prepared for the conduct of the owner's private business, and when he must realize that no special preparations have been made for him. *Hotchkin* v. *Erdich*, 214 Pa. 460 (1906); *Connolly* v. *Union League*, 221 Pa. 21 (1908).

[6] So in *Pauckner* v. *Wakem*, 231 Ill. 276 (1907), Vickers, J., says, p. 279, "It will be found that the distinction between a visitor who is a mere li-

TRASK, ADMINISTRATOR *v.* SHOTWELL.

Supreme Court of Minnesota, 1889. 41 *Minn.* 66.

Appeal by plaintiff from an order of the district court for Hennepin County, refusing a new trial, the action having been tried before *Young,* J., and a verdict for defendants.

COLLINS, J. The defendants were wholesale dry goods merchants. In the rear of their store was their shipping room, opening upon an alley. In one corner of this shipping-room was a small office. Plaintiff having purchased goods from them sent his nephew, the deceased, with a team to get them. One package was given him at the main entrance of the store and he was told by the clerk to go to the door of the shipping-room, rap upon it and the shipping clerk would give him the rest of the goods. The clerk testified that he told the deceased to wait outside. The deceased however went into the shipping-room and closed the door and was found a few minutes later in a dying condition upon the basement floor, having fallen down an unguarded elevator shaft situated fifteen feet from the door.[1]

There was considerable testimony offered and received as to the condition of the light, from a window and by artificial means, in this shipping-room at the time Trask entered it. That offered by the plaintiff was to the effect that it was a dark and insufficiently lighted room, while the testimony in defendant's behalf tended to show that the room was well lighted, that the elevator shaft was in plain sight, and, consequently, in any aspect of the case, Trask was guilty of contributory negligence. In our opinion, it is not necessary to consider this branch of the testimony at all.

It is evident that this shipping-room was not used by the general public. The witnesses examined on this point stated, without exception, that no one was allowed to go in there except persons in defendant's employ, teamsters who were specially invited inside to aid the porters in handling heavy packages or cases, and two or three expressmen, who habitually received and delivered goods at that place in the building. When all of the testimony in the case had been laid before the jury, the trial court ordered a verdict for the defendants, and it is this ruling which we are called upon to review. * * * *

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censee and one who is on the premises by invitation turns on the nature of the business that brings him there, rather than on the words or acts of the owner which precede his coming." "The duty to one who comes on the premises by the owner's invitation to transact business in which the parties are mutually interested is to exercise reasonable care for his safety while on that part of the premises required for the purposes of his visit;" see also Gaynor, J., in *Forbrick* v. *Gen. Elec. Co.,* 92 N. Y. Supp. 36 (1904), "the word invitation is carelessly used in some cases. It has no application except in the case of a person invited by another to go on his premises for business or association of some kind with the latter. Permission to go on defendant's premises for his (the plaintiff's) own purposes (to sharpen his plane at defendant's grindstone) was not an invitation." See also *Larmore* v. *Crown Point Iron Co.,* 101 N. Y. 391 (1886), and Knowlton, J., in *Plummer* v. *Dill,* 156 Mass. 426 (1892).

[1] The Court's statement of facts is condensed.

The deceased had not been invited or induced, directly or by implication into the shipping-room. In fact, it is undisputed that he had been told to stay outside. He did not enter the room because he had been led to believe that it was intended for use by customers or others having business at the store, and that such use was not only acquiesced in by the defendant proprietors, but that it was a part of the premises designed for the use of all who might have business with them. He entered this apartment of his own motion, and contrary to express instructions. Going into a place not prepared for visitors or customers, intended for those only who were employed about and were familiar with it and its dangers, he assumed the risk and peril of the act.[2]

Order affirmed.

HUPFER *v.* NATIONAL DISTILLING COMPANY.

Supreme Court of Wisconsin, 1902. 114 Wis. 279.

This is an action to recover damages for negligently causing the death of the plaintiff's intestate, Simon Hupfer, September 13, 1899.

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[2] This is so though the plaintiff be not specifically or inferentially forbidden to go to that part of the premises where he is injured, *Diebold* v. *R. R.*, 50 N. J. L. 478 (1888), truckman injured in freight yard, though safe offices were provided for the transaction of his business; *Peake* v. *Buell*, 90 Wis. 508 (1895), business guest, out of curiosity putting his head through window, struck by elevator; *Shaw* v. *Goodman*, 116 Mo. App. 332 (1905), person sent on business to distant part of premises instead of going by regular passage takes a short cut through a private room.

If however the owner himself or through his servant or agent actively invites the plaintiff into a place, not specially prepared for business guests and where they are usually not received, he is bound to take care that it does not contain danger unusual and unnecessary in such a place, *Reid* v. *Linck*, 206 Pa. 109 (1903), customer following salesman at his request through storeroom not usually open to customers; *Nicholson* v. *Ry.*, 3 H. & C. 534 (1865), passengers told to "go on" when the usual way to exit blocked by the train, held to be entitled to find the only other alternative way out, *i. e.*, by passing around the train, free from hidden danger; *Withers* v. *Brooklyn R. E. Exch.*, 106 N. Y. App. Div. 255 (1905), intending lessee of office in defendant's building finding on office door a sign, "inquire of engineer," went to basement where he was told engineer was and fell into ash pit; *League* v. *Stradley*, 68 S. C. 515 (1903), customer, told by shopkeeper to go behind counter to get a parcel, fell into open trap door; *Newingham* v. *J. C. Blair Co.*, 232 Pa. 511 (1911), a workman permitted or required to use a fire escape as a means of getting to his place of work, injured by a defect therein.

One specially invited into premises in private use of owner takes the risk incident to the normal and proper conduct of owner's business thereon, *McLean* v. *Burnham*, 19 W. N. C. 53 (Pa., 1887); though if an owner chooses to receive his customers in his workshop he must take pains that it contains no hidden and unusual danger; *True* v. *Meridith Creamery*, 72 N. H. 154 (1903); *Edmundson* v. *Monongahela Co.*, 223 Pa. 93 (1909).

Even though expressly invited to use a portion of the premises not usually thrown open to customers, the plaintiff is only protected while using it in a manner and to an extent authorized by the invitation, *Ryerson* v. *Bathgate*, 67 N. J. L. 337 (1901), a butcher opened a door and told the plaintiff who was bringing home his cat to "put her in there," instead plaintiff presuming it was a closet door stepped inside and fell down some steps within.

One coming upon premises for a purpose, incidental to the owner's business but remaining after his business is done for his own convenience is a mere licensee, *Heinlein* v. *R. R.*, 147 Mass. 136 (1888), intending passenger having missed the last train, loiters there till station is closed and is injured in leaving.

At the close of the trial the jury returned a special verdict, to the effect (1) that Simon Hupfer received injuries by the bursting of the defendant's slop vat, September 13, 1899, from which he died; (2) that the hoops on the vat at the time of the accident were rusted, so as to be defective and unfit for the purpose for which they were used; (3) that the defendant did not know of such defective condition of the hoops prior to the accident; (4) that the defendant in the exercise of ordinary care ought to have known of such defective condition of the hoops prior to the accident; (5) that such defective condition of the hoops was the proximate cause of the injury; (6) that September 13, 1899, it was a long-established custom for defendant's customers, desiring to purchase feed to be delivered from the vat in question, to stir the feed for themselves, if they desired to do so; (7) that such custom was known to, and acquiesced in by, the defendant; (8) that the defendant's customers, prior to the accident, did know that the defendant had provided a person whose duty it was to stir up the slop in the vat and deliver the same to the customers of the defendant; (9) that the deceased, prior to the accident, did know that the defendant had made it the duty of John Dardell to stir up the slop in the vat and deliver the same to the customers of the defendant; (10) that the defendant, prior to the accident, did repeatedly suffer the deceased to step upon the back platform and stir up the slop, and did suffer the deceased to do so because it feared to lose the custom of the deceased if it should forbid him; (11) that the deceased, in the exercise of ordinary care, ought not to have known of such defective condition of the hoops prior to the accident; (12) that the deceased was not guilty of a want of ordinary care which proximately contributed to the injury; (13) that they assessed the plaintiff's damages at $1,000.

From the judgment entered thereon for the amount stated, the defendant brings this appeal.

CASSODAY, C. J. Upon such findings and testimony, can we hold that the deceased was a mere licensee within the authorities? * * * In *Bennett* v. *Railroad Co.*, 102 U. S. 577, 584, 585, it is said, quoting from an author, that "the principle appears to be that invitation is inferred where there is a common interest or mutual advantage, while a license is inferred where the object is the mere pleasure or benefit of the person using it". Similar views are expressed in Mr. Thompson's late Commentaries on the Law of Negligence (Vol. 1, p. 968), citing numerous cases in support of the rule. We must hold that, under the findings of the jury, the deceased cannot be regarded as a mere licensee, but that he was there on business for the mutual benefit of himself and the defendant; or, in other words, by invitation.[1] There is evidence tending to support such findings.

By the third and fourth findings the jury found, in effect, that the defendant did not know of the defective condition of the hoops prior to the accident, but that it ought to have known of such defect prior to the accident. It is claimed that the evidence is insufficient to support this last finding. It appears that the tank was constructed

[1] Part of each opinion is omitted.

in 1894; that the average life of such a tank used as that was without necessitating repairs was ten years or more; and that that tank was inspected and found in good condition in June or July prior to the accident. Of course, if the defect was latent and unknown to the defendant, and undiscoverable by the exercise of ordinary care on the part of the defendant, then there would be no liability.[2] *Smith* v. *C. M. & St. P. R. Co.*, 42 Wis. 520; *Morrison* v. *Phillips & C. C. Co.*, 44 Wis. 405; *Spille* v. *Wis. B. & I. Co.*, 105 Wis. 340, 81 N. W. 397. But if the photographs were properly admissible in evidence, then there was evidence tending to prove that some of the hoops on the tank were, at the time of the injury, rusted to such an extent as to destroy or partially destroy the efficiency of such hoops, and that such condition could readily have been discovered by the exercise of ordinary care on the part of the defendant.

By the Court.—The judgment of the superior court of Milwaukee county is reversed, and the cause is remanded for a new trial.

BARDEEN, J. The relation between the deceased and defendant was more than that of a *mere* licensee. The defendant owed him the duty of active vigilance to the extent of using ordinary care in discovering and informing him of dangers. The jury found that the defendant did not know of the defective condition of the hoops on the vat, but that in the exercise of ordinary care it ought to have known of their condition prior to the accident. I think the evidence is overwhelmingly against this last finding.

MARSHALL, J. I agree that the judgment should be reversed. This personal opinion is written, in part because it seems that the opinion of the court does not make the grounds for decision rendered sufficiently plain to prevent misconception on some points, and in part because my views are not in harmony therewith. I understand the court holds that it follows as a matter of law, from the findings of the jury to the effect that the deceased was engaged in a business transaction with the appellant when injured, at a place on the latter's premises where he was permitted to be in the pursuit thereof, that he was not a mere licensee; that though he was not, strictly speaking, an invitee as to the particular place he was in, since he was permitted to be there and it pertained to the business in which he and the respondent were interested, his status was at least that of a licensee coupled with a mutual interest of licensee and licensor, not that of a mere licensee, and that such relation carried with it an implied assurance that the place was free from danger discoverable by the exercise of ordinary care. In other words, that the license, being coupled

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[2] *Accord*: *Pittsburgh, etc., R. R.* v. *Simons*, 168 Ind. 333 (1906), an implied invitation casting on the owner "the duty of exercising ordinary care to construct and keep the place reasonably safe" for the invitee's reception; 1st, "when he by positive acts or inducements entices others to come upon or cross his premises at a particular point," p. 341; 2nd, "where it appears that there is a common interest or mutual advantage in the entry," p. 344; in this case both elements were held to exist, since a gateway was opened in the fence along the tracks and by opening the gate onto the railroad they satisfied the citizens and were not required to provide public street crossings.

with a business relation, so far as legal rights were concerned, was equivalent to an invitation. There is abundance of authority to support that view, but I do not understand that it includes the cases cited by the court. They are, in the main at least, cases of liability to a mere licensee. To point only to such authorities to support the decision here, it seems, is very misleading,—so much so as to almost certainly lead to error by trial courts. In them the element of business relation, generally, distinguishing a mere licensee from a licensee or invitee, was absent, and the liability was sustained upon the ground that one cannot justly set a trap even for a mere licensee, or conduct his business regardless of the license granted;—upon the doctrine that if a railroad company permits, merely by not objecting, persons to habitually walk upon its tracks where there is no highway, and to do so to such an extent as to render it probable that pedestrians may be in the pathway of an approaching train at any time, it should keep a lookout from trains approaching such place and signal such approach when that seems reasonably necessary to warn such pedestrians of its presence. The extent to which that doctrine has been carried by this court is not in entire harmony with authorities elsewhere. Elliott, Railroads, § § 1251, 1252.

There is a broad difference between a trespasser and a mere licensee; also between a licensee and a mere licensee, as the terms are used in the authorities. A trespasser is a wrongdoer,—one who acts in defiance of or regardless of the rights of another. Let that other give permission to do the act, he having no interest therein himself, directly or indirectly, and the trespasser becomes a mere licensee. Add the element of mutual interest or business relation of some kind, with or without advantage to the owner of the property, and the mere license becomes a license or invitation with a suggestion or assurance of safety, according to circumstances. To illustrate: A railroad company prepares a walk for its passengers to use in approaching to or departing from its trains. Such use is said to be by invitation. The preparation of the path is a suggestion to patrons of the road to approach and depart from trains by that particular way, and an assurance that it is reasonably safe to do so. Persons using a different way to approach or depart from trains customarily, with the knowledge of the company and without its protest, do so without any element of invitation, strictly speaking. There is rather an invitation not to use it, plainly suggested by the specially prepared way. The permissive use of the unprepared way, by itself, constitutes but a bare license, as the term is commonly used. The added element of business relation between licensee and licensor increases the degree of duty on the part of the licensor from that due to a trespasser or mere licensee to that due to an invitee, though there is no implied suggestion to go outside the prepared way, hence, strictly, no implied invitation to do so. In that we observe all the elements present in this case as indicated by the verdict of the jury, showing as a matter of law that the deceased was not a mere licensee; nor was he, strictly speaking, an invitee, but he was a licensee with the added element of business relation between licensee and licensor. The duty to him in such circumstances, however, under the authorities, was substantially the same as that due

to an invitee, not that due to a person circumstanced as were the plaintiffs in the cases cited.

Johnson v. Lake Superior T. & T. Co., 86 Wis. 64, 56 N. W. 161, turned on the duty of a railway company to a person walking upon its track, where pedestrians were accustomed to travel by permission of the company and might, under the circumstances, be reasonably expected to be at any time. It was said that he was not a mere trespasser, but it was not intimated that he could be regarded as occupying, in any sense, defendant's premises by invitation. In *Cahill v. Layton*, 57 Wis. 600, 16 N. W. 1, another case cited to support the ruling here, the deceased was a licensee without the element of business relation with the licensor, in every sense a mere licensee, and it was held that bare permission by one person to another to use his premises for any purpose does not carry with it a duty to maintain the premises in a reasonably safe condition for the permitted use. The court there drew a distinction between mere omission to inform a bare licensee of danger in his way, and acts on the part of a licensor rendering enjoyment of the license dangerous, there being breach of duty in the former, but not in the latter. The idea is that expressed in authorities quite generally, that one cannot be actively negligent toward a mere licensee. It is said that much confusion exists in American cases, partly by failure to distinguish between mere passive and active conduct in respect to a mere licensee; that while such a licensee is bound to enjoy his license upon the premises over which his license extends as he finds them, the licensor owes him a duty, while the right of enjoyment exists, not to actively render it dangerous. *Bennett v. Railroad Co.* 102 U. S. 577; *Ellsworth v. Metheney*, 44 C. C. A. 484, 104 Fed. 119; *Felton v. Aubrey*, 20 C. C. A. 436, 74 Fed. 350.

From what has been said it will be seen that appellant's contention that the verdict of the jury and the evidence do not show that it was under any duty of active vigilance to discover those things that were discoverable by the exercise of ordinary care to that end, and to have informed deceased thereof, because he was only a licensee—was not in the place of danger by invitation,—is not satisfactorily answered by pointing to the cases holding that a licensor owes a duty to his mere licensee not to render the enjoyment of his license dangerous by active negligence, as by running a railway train regardless of the probability of the presence of persons on the track where it has been customarily used as a traveled way. No active negligence is claimed in this case. Breach of a duty to be actively vigilant to discover dangers that were discoverable by the exercise of ordinary care, and to inform the licensee thereof, is claimed. If the sole test of liability were whether deceased was in the place of danger by invitation, strictly speaking, either express or implied, the result would necessarily be in favor of the defendant. There is nothing in the evidence to suggest such invitation, but there is ample evidence to show permission. The test of whether the verdict, on its face, shows breach of duty to be actively vigilant is whether the status of the deceased in respect to appellant was other than a trespasser or bare, or mere, licensee. If he was neither because of the relations between the two, it is immaterial whether he

was in the place of danger by permission or by invitation, strictly so called. Counsel for appellant brought this appeal on the theory that if the deceased was not in such place by implied suggestion, he was necessarily a bare licensee. That is wrong. Suggestion, strictly speaking, to go or come into the place, is essential to invitation, not to permission. But where permission, without such suggestion, is coupled with the element that creates the duty of active vigilance as regards the safety of a visitor by invitation, the permission is a legal equivalent to invitation, because it carries with it a similar suggestion of reasonable safety.

If it were necessary much authority could be produced to support the foregoing proposition. I will refer to them but briefly. One of the most satisfactory decisions in the books, as regards the particular circumstances of the case before us, is *Holmes v. N. E. R. Co.* (1869) L. R. 4 Exch. 254. The plaintiff there was injured while unloading coal at the defendant's track, the coal having been shipped over its line. There was a usual and provided way for conducting the unloading operations. Plaintiff, being unwilling to wait for his turn to be accommodated in such way, which was to first shunt the coal from the car into a cell by the side of the track and then draw therefrom, informed the station master that he would take some coal for immediate use directly from the car. That required him to mount the car. He was permitted to do so by mere silence of the master with knowledge of the operation. After removing the coal plaintiff descended from the car to a flagged way along which patrons were accustomed to walk in voluntarily assisting in the unloading operations in the usual way. In doing so he stepped upon a loose flag, of which the defendant knew or ought to have known, and was injured. The defendant claimed that the plaintiff was a mere licensee and could not, therefore, legally charge the former with actionable negligence, since it did not wilfully or wantonly injure him. In defining the plaintiff's status, CHANNELL, B., said:

"Where a person is a mere licensee he has no cause of action on account of dangers existing in the place he is permitted to enter. In one sense the plaintiff was a licensee, but he was not a *mere* licensee, and the word 'mere' has a very qualifying operation; . . . and this prevents the case from being that of one who is a mere licensee."

CLEASBY, B., said, in effect, that the mere fact that the ordinary way of unloading the coal was departed from was not material to the defendant's duty to the plaintiff, since the way chosen by the latter was known and assented to by the former; and further: "The question of a mere license does not arise; for as soon as you introduce the element of business, which has its exigencies and its necessities, all idea of mere voluntariness vanishes." KELLY, C. B., speaking for the court in chief, said, in substance, that since the conduct of the plaintiff was in pursuit of business relations with the defendant, the permission, by not objecting, for the former to depart from the usual way of unloading the coal, made the latter responsible for the safety of the way chosen, to the same extent as that of the usual way. In *Bennett v. Railroad Co.* 102 U. S. 577, the distinction is clearly recognized between a mere licensee and an invitee

in the technical sense, or one in the broad sense of including all persons entering upon the premises of another in the transaction of business with him by some other than the ordinary and suggested way, but one permitted and ordinarily used. It is held that in each of the latter situations there is an implied assurance of safety as regards all dangers known to the proprietor or discoverable by the exercise of ordinary care. Elliott, Railroads, § § 1248, 1249, points out the same distinctions; and that while invitation implies license, license does not necessarily imply invitation; that mere sufferance does not constitute license, nor license invitation. Where there is mere permission by the occupier of property to another to come upon it, there being no mutuality of interest in the subject to which the latter's visit relates, the visitor is a mere licensee. Add the omitted element, and he is a licensee and an invitee. Pursuing the author's line of reasoning, we should say: Add the further element of proceeding, while on the premises by invitation, beyond the region of suggestion, but by permission, the business relation still continuing and the visitor acting in pursuit thereof, and there is license implying assurance of safety so far as legal rights are concerned—invitation, so far as legal liabilities are concerned,—though that element, in the technical sense, is absent.

From what has been said it will be seen that the deceased, according to the verdict, was not a mere licensee, nor was he engaged in manipulating the contents of the tank when the accident occurred by implied suggestion essential to invitation in the general sense of the term; but he was so engaged by the assent of the defendant essential to license, and was lured into the place of danger by reason of his business with appellant. That carried with it legal responsibility for the safety of such place as regards dangers known or discoverable by the exercise of ordinary care. There was the same implied assurance of safety as there would have been if it had been part of the regular duties expected of customers to aid in delivering the subject of the deal between the parties, to do as the deceased was doing when the accident occurred. In this respect the case is precisely like the English case from which we have quoted at considerable length.[8]

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[8] The remainder of the opinion dealing with the admissibility of photographs of the vat as evidence and of the sufficiency of the evidence to support the fourth finding, together with the concurring opinion of Bardeen, J., is omitted.

Accord: Samuelson v. *Cleveland Iron Co.*, 49 Mich. 164 (1882), one inviting another on his premises "assumes to all who accept the invitation the duty to warn them of any danger in coming, which he knows or by the exercise of proper care he ought to have known, and of which they are not aware." Cooley, J., p. 170, and see Beven Negligence, 3rd ed., bottom of page 448, discussing *Southcote* v. *Stanley*. The duty is not to ensure the safety of the business guest but to exercise ordinary care for it.

CHAPTER II.

Vendors and Lessors of Real Estate.

SECTION 1.

Vendors.

PLUMER *v.* HARPER.

Superior Court of Judicature of New Hampshire, 1824. 3 *New Hampshire,* 88.

This was an action of the case for maintaining and continuing a dam across the Pemigewasset brook, from July 8, 1821, to August 6, 1822, whereby the plaintiff's land was covered with water, and injured.

The cause was tried here at September term, 1823, upon the general issue; when it appeared in evidence, that the defendant, in 1818, erected a dam across the Pemigewasset brook, which caused the water to overflow the plaintiff's land, and injure his grass and trees. But it appeared, that the defendant, on the 23d November, 1820, by deed, conveyed to one *John Harper* the dam and the land, on which it stood; and the said *John Harper* has ever since been in possession. Since the said conveyance, however, the defendant has at times occupied the mills, connected with the dam, under said *J. Harper;* and he occupied them between the 8th July, 1821, and August 6, 1822.

A verdict was taken for the plaintiff, subject to the opinion of the court upon the above case.

RICHARDSON, C. J., delivered the opinion of the court.

It is contended, on the part of the defendant, in this case, that he is not liable for the injury, of which the plaintiff complains, because, previous to the time mentioned in the declaration, he conveyed the land, upon which the nuisance had been erected, to a third person; and so the continuance of the nuisance must be deemed, not his act, but the act of such third person; and the question is, whether the defendant is liable for the continuance of the nuisance, after having parted with his title to the land?

He, who is injured by a nuisance, may enter and abate it, or he may have redress by an action. 9 *Coke* 53, *Baten's case.*—5 *ditto* 101, *Penruddock's case.*—2 *Salk.* 459, *Rex vs. Rosewell.*

In ancient times, the remedy by action, for a nuisance, was a *quod permittat,* or an assize of nuisance. In both those actions, the plaintiff had judgment, not only for his damages, but for the abatement of the nuisance. 9 *Coke* 53, *Baten's case.*

But, at the common law, an assize of nuisance was held to lie only against him, who erected the nuisance, and not against him, to whom the tenement had been transferred. The reason assigned for this was, that there was not found in the register any form of writ, in which it was not supposed, that the tenant erected the nuisance. This defect was remedied by the statute of Westminster 2, *cap.* 24,

which made him liable, to whom the person, erecting the nuisance, had conveyed the tenement. This statute was construed to give an assize against him who erected, and him who continued, a nuisance, jointly; and the form of the writ is given in *Baten's case,* 9 *Coke* 53. It is therefore clear, that in *Lord Coke's* time it was held, that he, who erected a nuisance, and then conveyed the tenement, remained liable after the conveyance, for any damage resulting from the continuance of the nuisance.

In the reign of *Queen Elizabeth,* the *quod permittat* and assize began to go out of use, and an action on the case to be brought for a nuisance; and in the 36th year of that reign, the case of *Beswick vs. Combden* was decided in the King's bench. *Moor* 353.—*Croke Eliz.* 402. The facts are stated differently by the two reporters. It was an action on the case, and *Croke* says, that the defendant erected the dam, which caused the water to overflow the land of *J. S.,* who enfeoffed the plaintiff; and the question was, whether the feoffee could maintain case for the continuance of the nuisance? But *Moor* says, that the nuisance was erected by one, who enfeoffed the defendant, and that the question was, whether the feoffee was liable in case for the continuance of a nuisance? Whatever the facts may have been, both *Croke* and *Moor* agree, that the plaintiff had judgment. But two years afterwards, in the case of *Beswick vs. Cumden,* in the court of common pleas, which was an action on the case for the continuance of a nuisance, the action was held not to lie; because the proper action was an assize, or a *quod permittat,* and not case; and because the defendant could not be liable for permitting a nuisance to continue.

Penruddock's case, (5 *Coke* 101,) was a *quod permittat* in the common pleas, brought by the grantee of him, to whose prejudice the nuisance was originally erected, against the grantee of him, who first erected the nuisance; and the question was, whether the defendant was liable; and it was held, that he was, he having continued the nuisance after he had been requested to abate it.

Notwithstanding the decision of the common pleas, case seems after this time to have maintained its ground, and the other two remedies to have gone wholly out of use. The case of *Ryppon vs. Bowles,* (*Croke James* 373,) was an action on the case. The facts were, that one *Thomas Henson* erected a building, by which the plaintiff's window was darkened. Afterwards *Bowles,* the defendant, being in possession, the plaintiff brought an action against him, for continuing the nuisance. *Coke, C. J.,* inclined to the opinion, that the defendant was not liable; but all the court held, that he, who erected the nuisance, was liable.

In *Brent vs. Haddon,* (*Cro. James* 555,) the case was, that one *Quarles* had a mill, and erected a dam, which caused the water to overflow the plaintiff's land; *Quarles* leased the mill to *Haddon,* against whom the plaintiff brought his action, for continuing the nuisance; and *Haddon* was held to be liable.

In *Roswell vs. Prior,* (2 *Salk.* 460.—1 *L. Raym.* 713) it was decided, that where a tenant for years erected a nuisance, for which an action was brought against him, and a recovery had, and he then

underlet to another, an action might still be maintained against him who erected it, for the continuance of the nuisance.

Upon an examination of the cases bearing upon the question now to be decided, it will be found, that, although in the lapse of time, the form of action has entirely changed, yet the books indicate no change in the liability of the wrong doers. No case is to be found, in which it has been doubted, that he, who erects a nuisance, continues liable as long as the nuisance continues. But it has often been made a question, how far, and under what circumstances, he, who adopted the acts of the original wrong doer, shall be liable.

If the question, which this case presents, were now to be decided for the first time, it seems to us, that it would be very difficult to find a good reason, why the original wrong doer should be discharged by conveying the land. The injury has no connection with the ownership of the land. If *A.* enter into the land of *B.* and there erect a dam, which causes the water to overflow *B.'s* land, there can be no doubt, that he will be liable for any damage resulting from such overflowing. So if *A.* enters *B.'s* land, and there erects a nuisance to the prejudice of *C.*, it is clear, that *A.* will be liable to *C.* When he who erects the nuisance conveys the land, he does not transfer the liability to his grantee. For it is agreed, in all the books, that the grantee is not liable, until, upon request, he refuses to remove the nuisance. It does not make the original act less injurious, because the grantee adopts it; and we are not aware, that in any action against an individual for a tort, it can be a good defence to shew, that a third person has assented to the wrong, and thus become liable.

We are therefore of opinion, that the objection, which has been raised in this case, cannot prevail, and that there must be

Judgment on the verdict.[1]

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[1] *Accord*: *Mason* v. *Shrewsbury*, L. R. 6, Q. B. 577 (1871), Blackburn, J., p. 584, *semble*; *Prentiss* v. *Wood*, 132 Mass. 486 (1882); *Dorman* v. *Ames and George*, 12 Minn. 451 (1867), p. 456; *Eastman* v. *Amoskeag Mfg. Co.*, 44 N. H. 143 (1862), p. 156, *semble*; *East Jersey Water* v. *Bigelow*, 60 N. J. L. 201 (1897), p. 204, *semble*. See also Ripley, C. J., in *Cahill* v. *Eastman*, 18 Minn. 324 (1872), p. 330.

Contra: *Blunt* v. *Aiken*, 15 Wend. 522 (N. Y., 1836); however in *Waggoner* v. *Jermaine*, 3 Denio, 306 (N. Y., 1846), p. 311, it is said that *Blunt* v. *Aiken* only applies where there is no covenant of warranty or agreement to uphold the grantee in the occupation of the premises—(*accord*, *E. Jersey Water Co.* v. *Bigelow*, 60 N. J. L. 201 (1897), a water company had conveyed its works to a city expressly reserving the right to maintain the offending dam and to receive all surplus water after the city's needs were satisfied; where the continuance of the nuisance is expressly provided for no question can arise of continuing liability, p. 205), and in *Conhocton Stone Road* v. *R. R.*, 51 N. Y. 573 (1873), Lott, Ch. C., holds that *Waggoner* v. *Jermaine* "decides expressly that such *original* wrongdoer, notwithstanding alienation, remains liable."

So one creating a nuisance upon the land of a stranger is liable for its continuance though he has no power to abate it—*Smith* v. *Elliott*, 9 Barr. 345 (Pa., 1848); though of course he can not be judicially ordered to abate it—*Mayor* v. *Rural Sanitary Authority*, L. R. 1, Ex. D. 344 (1876).

PALMORE *v.* MORRIS, TASKER & CO.

Supreme Court of Pennsylvania, 1897. 182 Pa. 82.

MR. JUSTICE DEAN:

On May 11, 1895, the plaintiff, a boy about ten years old, was standing on the pavement on the north side of Morris street, Philadelphia, looking through a partially opened gate into the large foundry works, before that time carried on at that place by Morris, Tasker & Company, defendants. While so standing the gate fell and seriously injured him. On that day, the works no longer belonged to Morris, Tasker & Company. The accident occurred on Saturday; on Friday, the day previous, they had conveyed the property by deed to George Lodge, and the deed had been put on record the same day. * * *

There was evidence sufficient to warrant the jury in finding the gate was out of repair, and that there was negligence on part of him whose duty it was to repair; but the question on which the case must turn is, were defendants answerable for this neglect, after delivery of the deed, and possession under it taken by Lodge?

At the trial, among many written points, defendants' counsel asked the court to instruct the jury as follows: "2. If Morris, Tasker & Co.'s title had been divested and possession surrendered before the accident, the plaintiff cannot recover against them. *Answer:* I decline that point."

The view the learned judge of the court below took of the law applicable to the facts is best shown by the following excerpt from the general charge:

"The question, however, is not one of the exact time of the transfer, nor one of the delivery of possession. The real question is as to whether or not there was a failure of duty upon the part of the defendants, and whether that failure of duty was the cause of this accident. No doubt, as soon as Mr. Lodge took possession of this property, then a duty would begin with him. He ought within a reasonable time to see that the property which he had purchased, if it was in a dangerous condition to the public, was put in repair, but with that question we have nothing to do in this case. The real question in the case is not as to when there was a transfer of the title, but was there any act of commission or of omission upon the part of the defendants which amounted to that want of reasonable care which the law makes negligence, and whether you find that to be the fact."

Under fuller instructions in accord with this view, the jury found for plaintiff, and we have this appeal by defendants, assigning for error, among others, the refusal of the court to affirm their second point.

It is clear from plaintiff's own testimony that the title and constructive possession of the real estate vested in Lodge, absolutely, on the 10th of May, the day before the accident. It is also clear that in pursuance of the grant by deed he attempted to take formal possession within an hour after delivery; and while the oral stipulation between him and the grantors was that actual possession was

not to be taken until the following Monday, nevertheless, there is evidence that he took possession on Friday, and did not restore it to defendants, who assented to his action, stipulating only for the right of entry and exit for removal of the property which did not pass by the deed. Under the facts, then, unquestionably Lodge acquired title, and in fact took possession of the real estate on which was a defective structure, the day before an accident resulted from neglect to repair it.[1]

The authorities on the exact question are very meager. As between a landlord and tenant at will, or for a term, the weight of authority is, that the landlord continues answerable, though out of possession, for injuries resulting to third parties from negligently constructed buildings and structures on the land where they were erected by the landlord. The very letting by him of to him known defective property, without stipulation for repair, is significant of continuous negligence on his part: Godley v. Hagerty, 20 Pa. 387, and the cases following it down to McKenna v. Paper Co., 176 Pa. 306. But this is not a letting of the land by a landlord to a tenant; it is an absolute sale, whereby the owner divests himself of title and all right to possession, or of re-entry for repairs, or for any other purpose; any future possession in face of his deed, unless there be an independent stipulation to the contrary, would be a palpable trespass; and with his surrender of possession, all the duties incident to ownership, as to him, were at an end; from the moment Lodge took possession under his deed, the duties theretofore incumbent on Morris, Tasker & Company were transferred to him, and he became answerable to the public for neglect in their performance.

The learned judge of the court below adopts a different event for the commencement of liability on the part of the grantee than possession taken under the deed; he says "he ought, within reasonable time, to see that the property which he had purchased, if it was in dangerous condition to the public, was put in repair." That is, he imports into the deed an implied covenant on part of the grantors that they will be answerable to third parties for defects in the building for a reasonable time after the grantee takes possession. Public policy does not demand that such clogs on the transfer of real estate should be imposed by construction; nor does the law warrant such an implication. Before he purchased the real estate the law presumes the grantee examined the property, and was cognizant of its situation, surroundings, the character of the structures upon it and their condition of repair. Without an express covenant by the grantors, as between them and the grantee, there was no duty on the grantors to repair; the purchaser, thereafter, assumed that duty, because he then became the owner and occupant. If the grantors after possession by Lodge, the grantee, owed no duty to him, why should there be neglect in performance on their part as to the public? It is not even the case of no actual occupancy, where the law casts

[1] The detailed statement of the evidence as to the conduct of the various parties concerned and of the correspondence between the defendant and its grantee, Lodge, set forth at length in the opinion is omitted, its substantial effect being adequately stated in the above paragraph.

the duty on the owner, but one where the owner and actual occupant were the same.

If, the accident did not happen during the ownership and occupancy of Morris, Tasker & Company, and the evidence showed that it happened after Lodge took possession, the question for the jury was not whether there was negligence on part of the defendants in maintaining a defective gate; the real question on the evidence was, did Lodge take possession of the property described in his deed on Friday the 10th of May? If he did, then the accident which occured on the 11th must be imputed to the negligence of the owner and occupant of the premises, and not to Morris, Tasker & Company who before that time were owners and occupants. And this is the principle announced in Grier v. Sampson, 27 Pa. 183, Cheetham v. Hampton, 4 T. R. 318, and Blunt v. Aikin, 15 Wendell, 522, although the facts in all these cases are different from those before us. And while laying down this rule in this case, we do not intend to be understood as declaring there can be no exception to it. There may be a case where the grantor conceals from the grantee a defect in a structure known to him alone, and not discoverable by careful inspection, that the owner would be held liable, though out of possession; but that is not this case; the rotten gate, the testimony shows, was as obvious before the accident as afterwards, and the reasonable time for the purchaser to discover it was not limited to the twenty hours after he took possession, but to the weeks and months pending the negotiations, before the delivery of the deed.

On the undisputed evidence the jury should have been instructed to find for defendants.

The judgment is reversed.

SECTION 2.—Lessors.

ROSEWELL *v.* PRIOR.

Court of King's Bench, 1701. *2 Salkeld,* 460.

In an *action upon the case,* for that the plaintiff being seised of an ancient house and lights, the defendant had erected, &c., whereby they were stopped. There was a former recovery for this erection, and this action was for the continuance; and the case was, tenant for years erected a nuisance, and afterwards made an under-lease to F. S. The question was, whether, after a recovery against the first tenant for years for the erection, an action would lie against him for the continuance after he had made an under-lease? *Et per Cur.* It lies; for he transferred it with the original wrong, and his demise affirms the continuance of it: He hath also rent as a consideration for the continuance, and therefore ought to answer the damage it occasions. *Vide Jones* 272. Receipt of rent is upholding. *2 Cro.* 372, 555. The action lies against either at the plaintiff's election.[1]

[1] The landlord is liable where the premises when demised are from their bad repair or faulty construction in themselves a nuisance. *Owings* v. *Jones,*

9 Md. 108 (1856), defective covering over opening into vault dug below sidewalk; *Fisher* v. *Thirkell*, 21 Mich. 1 (1870), similar facts; *Isham* v. *Broderick*, 89 Minn. 397 (1903), defective pipe carrying off water from roof. Also where the premises when leased are in such condition that their use by the tenant for the purposes for which they are leased must necessarily create a nuisance. *Knauss* v. *Brua*, 107 Pa. 85 (1884), defective cesspool; *Fow* v. *Roberts*, 108 Pa. 489 (1885), similar facts, both landlord and tenant liable; *Brown* v. *White*, 202 Pa. 297 (1902), drainage pipes so constructed that tenant's waste water flowed upon sidewalk and froze; *Ingwerson* v. *Rankin*, 47 N. J. L. 18 (1885), defective pipes supplying tenant with water; *Pickard* v. *Collins*, 23 Barb. 444 (N. Y., 1856), barn so built that filth from cattle in it escapes upon adjacent land. So the landlord is liable if the lease contemplates and provides for a use of his land by his tenant which necessarily involves the creation of a nuisance, though the premises as such are in good physical condition. *Harris* v. *James*, 45 L. J. (Q. B.) 545 (1876), landlord held liable for injuries caused by smoke from limekilns erected and operated by his tenant upon land leased as a lime quarry and also for injuries caused by blasting if the lease sanctioned and contemplated it as a mode of quarrying; *Helwig* v. *Jordan*, 53 Ind. 21 (1876); *Fish* v. *Dodge*, 4 Denio, 311 (N. Y., 1847), similar facts; *Terminal Co.* v. *Jacobs*, 109 Tenn. 727 (1902), smoke caused by lessee railroad's use of demised "round house".

The landlord is not liable for nuisances created by some peculiar use of the premises by the tenant not expressly sanctioned in the lease or necessary to the enjoyment of the demised premises. *Met. Savings Bank* v. *Manion*, 87 Md. 68 (1898), stench escaping through windows left open in livery stable; *Fehlhauer* v. *St. Louis*, 178 Mo. 635 (1903), cellardoors left open while premises were in occupation of the tenant.

A very narrow view of what is a use essential to the enjoyment of premises leased, as a shop, is taken in *Rich.* v. *Basterfield*, 4 C. B. 783; 16 L. J. (C. P.) 273 (1847), where it was held that "it being possible for the tenant to occupy the premises without making fires and quite optional on his part to make them or not", the landlord was not liable for the emission of smoke from a defectively constructed chimney; he having at most enabled the tenant to make fires if he pleased—but see *Harris* v. *James*, *supra*, per Blackburn, J., and note that in fact the previous tenant had by burning coke used the chimney without causing annoyance.

Where the premises ruinous when leased fall some time later in the course of nature and through no misuse of them by the lessee, the landlord is liable though the bad conditions have, by lapse of time and natural causes, grown worse in the interim—*Todd* v. *Flight*, 9 C. B. N. S. 377 (1860); and this though the tenant has expressly covenanted to keep the premises in repair, such a covenant does not release the landlord from liability to a stranger, *Ingwerson* v. *Rankin*, *supra*; *Swords* v. *Edgar*, 59 N. Y. 28 (1874); *Ahern* v. *Steele*, 115 N. Y. p. 209 (1889); *Campbell* v. *Portland Sugar Co.*, 62 Me. 552 (1873); *Contra*, *Pretty* v. *Bickmore*, L. R. 8 C. P. 401 (1873); in *Gwinnell* v. *Eager*, L. R. 10 C. P. 658 (1875), emphasis is laid on the landlord's lack of knowledge of the defect, and see *Nelson* v. *Liverpool Brewery*, L. R. 2 C. P. D. 311 (1877). In *Leonard* v. *Storer*, 115 Mass. 86 (1874) and *Clifford* v. *Atlantic Mills Co.*, 146 Mass. 47 (1888), it was held that though a landlord leasing apartments in a house but retaining possession of the roof etc. was liable for the fall of snow collected upon a steeply slanting roof thereof—*Shipley* v. *Associates*, 106 Mass. 194 (1870)—if he had turned over the entire premises to the tenant he was not liable though such a roof was by the working of nature sure to become dangerous unless the tenant cleaned it. The landlord it was held "had a right to rely upon the tenant managing the premises in such a way", by "removing the snow", as to prevent there being a nuisance.

The holding over by a tenant after the expiration of his term though with the consent of the landlord is not a reletting, *Gandy* v. *Jubber*, 5 B. & S. 485 (1865), 9 B. & S. 15 (1865); *Fleischner* v. *Inv. Co.*, 25 Oregon 119 (1893); but if a new lease is given the landlord is liable for nuisances then existing. *Ingwerson* v. *Rankin*, *supra*; *Dalay* v. *Savage*, 145 Mass. 138 (1887).

A lessee who sublets the premises with a nuisance thereon remains liable for all harm resulting from it, *Timlin* v. *Standard Oil Co.*, 126 N. Y. 514 (1891).

CHEETHAM *v.* HAMPSON.

Court of King's Bench, 1791. 4 *Term,* 318.

This was an action on the case against the defendant, who was owner of the fee, for not repairing the fences of a close, whereby the plaintiff was damaged, &c. At the trial before *Thomson,* B. at the last assizes for *Lancaster,* it appeared that another person was tenant in possession under the defendant; whereupon it was objected that the action did not lie against the present defendant. The learned Judge would not nonsuit the plaintiff, and a verdict was taken for him; but he gave leave to the defendant's counsel to move the Court to set that verdict aside and to enter a nonsuit, if they should be of opinion that the objection was well founded. A rule *nisi* having been obtained for that purpose last term.

LORD KENYON, Ch. J.—It is clear that this action cannot be supported against the owner of the inheritance, when it is in the possession of another person. It is so notoriously the duty of the actual occupier to repair the fences, and so little the duty of the landlord, that, without any agreement to that effect, the landlord may maintain an action against his tenant for not so doing, upon the ground of the injury done to the inheritance. And deplorable indeed would be the situation of landlords, if they were liable to be harassed with actions for the culpable neglect of their tenants.

ASHHURST, J., declared himself of the same opinion.

BULLER, J.—With respect to the case of *Rosewell* v. *Prior,* which is the only one cited of an action of a similar nature maintained against the owner out of possession, it is very distinguishable from the present; for there the owner let the premises with the nuisance complained of, which had been before erected upon them. That therefore was a misfeazance of which he himself had been guilty; and say the Court, his demise affirmed the continuance of the nuisance, and therefore might be said to be a continuation of it by himself. And whatever construction the word *tenentes* may bear in the old entries in real actions, that will not affect the present question, which arises on a possessory action on the case against a *wrong-doer;* and the simple question is, whether the landlord can in any sense be called a wrong-doer, because of the neglect of his tenant to repair. The instances of such actions as the present against owners are where the *tenentes* and *occupatores* were the same; but the action lies against them only in the latter capacity.

Rule absolute.[1]

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[1] *Accord: Bears* v. *Ambler,* 9 Pa. 193 (1848); *City of Lowell* v. *Spaulding,* 4 Cush. 277 (Mass., 1849); *Gridley* v. *Bloomington,* 68 Ill. 47 (1873).

But where the landlord covenants to keep the premises in repair, if, owing to a breach of such covenant, the premises become ruinous during the term, the landlord is liable to the owner of adjacent property damaged thereby or to one hurt thereon or while passing upon an adjoining highway—*Bears* v. *Ambler, supra (semble);* *City of Lowell* v. *Spaulding, supra (semble);* *Gridley* v. *Bloomington, supra (semble);* *Boyce* v. *Tallerman,* 183 Ill. 115 (1899); and see *May* v. *Ennis,* 78 N. Y. App. Div. 552 (1903); and this either to avoid the circuity of action as suggested by Heath J., *Payne* v. *Rogers,* 2 H. Blackstone 349 (1794), which would result if the tenant were held liable since

McKENZIE *v.* CHEETHAM.

Supreme Judicial Court of Maine, 1891. 83 *Maine* 543.

VIRGIN, J. Action on the case by a guest of the sole tenant of a second-story tenement, occupied as a dwelling-house, against the landlord to recover damages for a personal injury caused by the defective landing of a stairway which was the only means of ingress and egress to and from the tenement.

The tenancy commenced in October, 1888. On the evening of January, 10, following, the plaintiff made a social call on the tenant; and when in the act of leaving, he reached the landing it fell and caused the injury for which damages are sought.

The foundation of the action is alleged negligence on the part of the defendant; that he did or omitted to do an act in violation of a legal duty or obligation which he owed the plaintiff and consequent damages.

In the purchase of real as well as of personal estate, parties make their own contracts which the law construes and enforces. When one is negotiating for the lease of a dwelling-house the same as when bargaining for a personal chattel, it is his privilege to inspect and ascertain for himself its actual quality and conditions; and the parties make such express agreements relating thereto as they think fit. If the lessee, instead of exacting from the lessor any warranty of its present or future state of repair, elects to rely upon his own judgment, the law in the absence of any fraud or concealment on the part of the lessor, leaves the lessee to the operation of the maxim *caveat emptor* and he takes the premises as he finds them for better or worse. *Hill* v. *Woodman,* 14 Maine, 38, 42; *Gregor* v. *Cady,* 82 Maine, 131; *Keates* v. *Cadogan,* 10 C. B. (70 E. C. L.) 591. For the mere letting, without additional stipulations by the lessor, simply implies that he holds the title and that the lessee shall quietly enjoy the use and occupation during his tenancy; and not that the premises are or shall be in any particular condition or state or repair, or that they are suitable for the purpose for which they were let. *Arden* v. *Pullen,* 10 M. & W. 321; *Sutton* v. *Temple,* 12 M. & W. 52; *Hart* v. *Windsor,* 12 M. & W. 68, 85; *Libbey* v. *Tolford,* 48 Maine, 316; *Gregor* v. *Cady, supra; Foster* v. *Peyser,* 9 Cush. 242; *Willis* v. *Castle,* 3 Gray, 356; *Jaffe* v. *Harteau,* 56 N. Y. 398, 401; *Bowe* v. *Hunking,* 135 Mass. 383; *Tuttle* v. *Gilbert Manf.*

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he could recover over on his covenant against his landlord, or because the landlord having by covenant "reserved the control of the premises to the extent necessary for making repairs, his duty to the public in relation to the property is not affected by the lease, and he remains responsible, under the doctrine of the maxim, *sic utere tuo ut alienum non laedas,* for defects arising from the want of repairs during the continuance of the lease". McIlvaine, J., *Burdick* v. *Cheadle,* 26 Ohio St. 393 (1875) p. 396, and see Henn Collins, M. R., *Cavalier* v. *Pope,* L. R. 1905, 2 K. B. 757, p. 762, and see also *Quinn* v. *Crimmings,* 171 Mass. 255 (1898), a contract between two adjoining owners whereby the division fence is to be maintained by one only, may be shown to relieve the other from liability to a stranger injured by its fall. In *Ahern* v. *Steele,* 115 N. Y. 203 (1889), it was held that a mere right to enter to make repairs does not make the landlord liable, he must be legally under obligation to the tenant to make them.

Co. 145 Mass. 169, 176. Such is the general rule of law in this country as between lessor and lessee. If a lessee in this State would have the result otherwise, he must bring it about by some express stipulation in the lease, until the rule shall become modified by the legislature as it was in England, in 1885, by St. 48 & 49, Vict. c. 72; *Walker* v. *Hobbs,* (L. R.) 23 Q. B. D. 458.[1] It does not apply to premises over which the lessor retains control, as a common passageway by which several tenements are reached. *Toole* v. *Beckett,* 67 Maine, 544; *Sawyer* v. *McGillicudy,* 81 Maine, 318.[2]

The rule is subject to an exception arising from a duty which the law, under certain circumstances, imposes upon the lessor because of the relation subsisting between him and his lessee. For if, at the time of letting, there is some latent or concealed defect in the premises, consisting of original structural weakness, decay or infectious disease, which the lessor knows renders their occupation dangerous and is not known to the lessee or discoverable by his careful inspection, the law makes it the duty of the lessor to disclose it; and a failure to do so is actionable negligence if injury results. *Cowen* v. *Sunderland,* 145 Mass. 363; *Bowe* v. *Hunking,* 135 Mass. 380, and cases there cited; *Scott* v. *Simons,* 54 N. H. 426, 431; *Walden* v. *Fitch,* 70 Pa. St. 460; *Edwards* v. *N. Y. & H. R.*

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[1] The act applies only to tenements let "to persons of the working classes" and creates an implied condition in the lease that they are, when let, reasonably fit for habitation. The tenant's remedy is not confined to a repudiation of the lease on discovering the bad condition of the premises, he may recover for injuries received therefrom, though the defective condition was patent and obvious. *Walker* v. *Hobbs & Co.,* L. R. 23 Q. B. D. 458 (1889). In *Daley* v. *Quick,* 99 Cal. 179 (1893), a statute imposing an obligation upon lessors of property intended for human occupation to put it in a condition fit therefore was held to give the tenant a right of action where the defect is neither open and patent nor discoverable by the inspection which a lessee is bound to make of the premises.

By the code of Georgia a landlord is bound not only to lease his premises in good condition but also to keep them in repair, *White* v. *Montgomery,* 58 Ga. 204 (1877).

[2] A landlord retaining control of a staircase, or other approach common to several offices or flats is bound to keep it in repair [but not to light it, *Huggett* v. *Miers,* L. R. 1908, 2 K. B. 278; *Capen* v. *Hall,* 21 R. I. 364 (1899); *Gleason* v. *Boehm,* 58 N. J. L. 475 (1896)], and is liable to a tenant, *Idel* v. *Mitchell,* 5 N. Y. App. Div. 268 (1896); *Watkins* v. *Goodall,* 138 Mass. 533 (1885); *Hargroves* v. *Hartopp,* L. R. 1905, 1 K. B. 472—or a member of his family, *De Mateo* v. *Perano,* 80 N. J. L. 437 (1910), or a guest of the tenant injured through its defective condition, *Looney* v. *McLean,* 129 Mass. 33 (1880); *Marwedel* v. *Cook,* 154 Mass. 235 (1891); *Dollard* v. *Roberts,* 130 N. Y. 269 (1891); *Miller* v. *Hancock,* L. R. 1893, 2 Q. B. 177; *McMartin* v. *Hanney,* 10 Mac Ph. 411 (Scot., 1872); *a fortiori,* where he places a dangerous obstruction thereon, *Brunker* v. *Cummins,* 133 Ind. 443 (1892). The landlord must keep in repair not only the approaches but also every portion of the premises retained in his control which if in bad condition may endanger the safe use of the demised tenements; *Hargroves* v. *Hartopp,* L. R. 1905, 1 K. B. 472, gutter on roof allowed to become clogged; *Payne* v. *Irvin,* 144 Ill. 482 (1893), sign erected upon roof.

The landlord is bound to keep in repair only so much of the premises retained by him as is necessary to the tenant's use of the demised premises, but not a portion thereof which he allows the tenants to use for their own pleasure or convenience, *Ivay* v. *Hedges,* L. R. 9 Q. B. D. 80 (1882), tenants allowed to dry clothes on the roof; *McAlpin* v. *Powell,* 70 N. Y. 126 (1877), children of tenement playing on fire escape, which in tenement districts are customarily and notoriously used by the inmates as balconies.

Co., 98 N. Y. 245; *Minor* v. *Sharon*, 112 Mass. 477; *Cesar* v. *Karutz*, 60 N. Y. 229; *Wallace* v. *Lent*, 1 Daly, 481.[3]

While the rule *caveat emptor* applies to lessees for the reason that they can, if they will, protect themselves by inspection and contract, no such reason exists for applying it to such third persons as the law denominates strangers and do not stand on the same footing with the lessee. But when a lessee enters into a dwelling-house under a lease for years or as a tenant at will, he, in the absence of any stipulation to the contrary, has full possession and sole control thereof and it is practically his own private property *pro hac*. No one, not even the lessor himself, can lawfully enter without the lessee's permission or invitation express or implied. *Mellen* v. *Millett*, 126 Mass. 545. The law leaves it to the tenant to say who shall be his guest in his private dwelling-house. And if a guest does so enter and while there is injured, without his own fault, by some defect therein, he must seek his damages from him whose invitation impliedly assured him he could enter safely and who alone is responsible for the defect which caused the injury. In such a case the guest can have no greater claim against the lessor than the lessee himself and the members of his family have. *Robbins* v. *Jones*, 15 C. B. (N. S.) 221; *Bowe* v. *Hunking*, 135 Mass. 380, 383; *Burdick* v. *Cheadle*, 20 O. St. 393 (S. C. 20 Am. R. 767); *Moore* v. *Logan, I. & S. Co.* 4 Cent. R. 505-6;[4] *O'Brien* v. *Capwell*, 59 Barb. 497; *Nelson* v. *Liv. B. Co.* (L. R.) 2 C. P. D. 311; 1 Thomp. Neg. 323; Shear. & R. Neg. § 503.

If when let, premises are in a condition which is dangerous to the public, or with a nuisance upon them, the landlord may be liable to strangers for injuries resulting therefrom; for by the letting of them in that condition and receiving rent therefor he is considered as authorizing the continuance of the nuisance. *Nugent* v. *B. C. & M. R. R.* 80 Maine, 62, 77, 78, and cases cited; *Godley* v. *Hagerty*, 20 Pa. St. 387; *Stratton* v. *Staples*, 59 Maine, 94; *Burbank* v. *Bethel, S. M. Co.* 75 Maine, 373, 383; *Nauss* v. *Brua*, 107 Pa. St. 85; *Fow* v. *Roberts*, 108 Pa. St. 489; *Dalay* v. *Savage*, 145 Mass. 38; *Joyce* v. *Martin*, 15 R. I. 558; *Ahern* v. *Steele*, 115 N. Y. 203.

Our opinion, therefore, is that the exceptions must be sustained.

Exceptions sustained.[5]

PETERS, C. J., WALTON, LIBBEY, HASKELL and WHITEHOUSE, JJ., concurred.[6]

[3] *Accord:* also, *Miner, Read and Garrette* v. *McNamara*, 72 Atl. 138 (Conn., 1909); *Coke* v. *Gutkese*, 80 Ky. 598 (1883); *Robinson* v. *Heverin*, 50 Pa. S. C. 546 (1912); *Burdick* v. *Cheadle*, 26 Ohio St. 393 (1875), shelves negligently put up by landlord fell and injured customer of tenant—landlord not liable. See also, *Langabaugh* v. *Anderson*, 68 Ohio St. 131 (1903), lessor of oil land not liable for escape of oil stored by tenant, *cf. Simpson* v. *Stillwater Water Co.*, 62 Minn. 444 (1895), and *Kray* v. *Muggli*, 27 Minn. 231 (1899).

[4] In *Hines* v. *Willcox*, 96 Tenn. 148, 163 (1896); 100 Tenn. 328 (1897), it is held, the landlord is equally liable to a tenant or the tenant's invitee or guest, if he knows or conceals the dangerous defect or if, by reasonable diligence he could have ascertained it, provided the tenant exercises reasonable diligence on his part; and the lessee's servant may recover in such case though the lessee by reason of his fault, neglect or knowledge of the danger could not have maintained an action, *Bailey* v. *Kelly*, 86 Kans. 911 (1912). In *Moore* v. *Steljes*, 69 Fed. 518 (1895), Wheeler, J., held that a landlord leasing premises with a warranty was liable to the child of a tenant for the fall of a ceiling thereon.

OXFORD *v.* LEATHE.

Supreme Judicial Court of Massachusetts, 1896. 165 Mass. 254.

HOLMES, J. This is an action against the owner of a building, for personal injuries caused by the giving way of a platform upon which the plaintiff was standing. Some days before the accident the defendant had made a written agreement that he had "leased the Woburn Rink and seats now therein for four nights, August 2d, 3d, 4th, & 5th, 1893, building to be lighted," to one Gleason, all money in the box office to be under the defendant's control until twenty dollars was paid each night. Gleason's understood purpose was to give exhibitions of horse training. On the evening of August 9, Gleason was holding over on the foregoing terms by an oral understanding. An entertainment was to take place, the plaintiff with others had ascended a flight of stairs to the above mentioned plat-

[4] 7 Atl. 198 (Pa., 1886).

[5] The presiding justice in order to give progress to the case upon the question of damages ruled *pro forma*, as matter of law, that under the facts, as developed by the evidence, the defendant impliedly, at least, invited the plaintiff to pass over the premises on the occasion of his injury,—that there was an implied invitation.

To this ruling and instruction, the defendant excepted. The jury returned a verdict for the plaintiff, and assessed the damages at two hundred and fifty dollars.

[6] *Accord: Lane* v. *Cox*, L. R. 1897 1 Q. B. 415; *Roche* v. *Sawyer*, 176 Mass. 71 (1900), and see charge to jury by Thompson, J., *Dyer* v. *Robinson*, 110 Fed. 99 (6th Circ., 1899).

Article 2322 Civil Code of Louisiana, which provides that "an owner of a building is answerable for the damage caused by its ruin" due to "neglect to repair it" or "a vice in original construction" was construed in *Cristador* v. *Von Behren's heirs*, 119 La. Ann. 1025 (1907), following decisions of the Court of Appeals of Paris, to make a landlord liable to the guests, business or social, of a tenant, limiting *McConnell* v. *Semby*, 48 La. Ann. 1433 (1896), which had followed *McKenzie* v. *Cheetham* and had held the landlord liable only to neighbors and passengers on adjacent highways, to cases when the injury was due to some abnormal use of the demised premises by the tenant.

In *Fellows* v. *Gilhuber*, 82 Wis. 639 (1892) the Court attaches much importance to the fact that the landlord has not covenanted with the tenant to keep in repair the awning by whose fall the plaintiff was injured. However, the rights and obligations arising out of the landlord's promise or covenant to repair are wholly contractual, *Tuttle* v. *Gilbert Co.*, 145 Mass. 169 (1887); *Hahn* v. *Roach*, 7 Northampton Co. Rep. 21 (Pa., 1897). The social or business guest of a tenant or even a member of the latter's family, not being party to the contract, cannot recover for injuries caused by its breach, *Cavalier* v. *Pope*, L. R. 1905, 2 K. B. 757, p. 765, L. R. 1906, A. C. 428; *Clancy* v. *Byrne*, 56 N. Y. 129 (1874); *Davis* v. *Smith*, 26 R. I. 129 (1904); *Miller* v. *Rinaldo*, 21 N. Y. Mis. 470 (1897); *Thompson* v. *Clemens*, 96 Md. 196 (1902); *Contra, Perez* v. *Rabaud*, 76 Tex. 191 (1890); *Sontag* v. *O'Hare*, 73 Ill. App. 432 (1897); *Schwandt* v. *Metzger Oil Co.*, 93 Ill. App. 365 (1900); *Barron* v. *Liedloff*, 95 Minn. 474 (1905), subtenant of lessee. Nor can the tenant himself recover for personal injuries to himself or for the death of a member of his family caused by the landlord's breach of his covenant to repair—the damages in contemplation of the parties as likely to flow from its breach being the tenant's loss of the profitable use of the premises, *Flynn* v. *Hatton*, 43 How. Pr. 333 (N. Y., 1872) or the cost to which the tenant will be put to effect the repairs, himself, *Hamilton* v. *Feary*, 8 Ind. App. 615 (1893); *Collins* v. *Karatopsky*, 36 Ark. 316 (1880); *Shick* v. *Fleischhauer*, 26 N. Y. App. Div. 210 (1898). So in *Dancy* v. *Walz*, 112 N. Y. App. Div. 355 (1906) it was held that a tenant could not recover damages for the death of his child due to his landlord's failure to supply his flat with heat from a central heating plan—but see *Railton* v. *Taylor*, 20 R. I. 279 (1897), where the tenant's property was injured by smoke, etc., from a defective central heating plant.

form, and was waiting upon it, in front of the entrance, for the doors to open, when it fell.

It is not necessary to consider whether the agreement was a lease or a license, although we regard it as a license. *Johnson* v. *Wilkinson,* 139 Mass. 3. *Taylor* v. *Caldwell,* 3 B. & S. 826, 832. Whatever it was, the defendant must be taken, or at least might have been found, to have contemplated the use of the stairs and platform, as they were, by the public for the purpose of going to the show. If the jury found that the use actually made of the platform was something which the defendant was bound to have contemplated, he was liable for any neglect of proper precautions to make it safe, whether Gleason also was to blame or not, just as in the case of premises let with a nuisance upon them. *Daley* v. *Savage,* 145 Mass. 38, 41. *Clifford* v. *Atlantic Cotton Mills,* 146 Mass. 47, 49. *Finnegan* v. *Fall River Gas Works,* 159 Mass. 311. *Edwards* v. *New York & Harlem Railroad,* 98 N. Y. 245, 249, 253. *Carson* v. *Godley,* 26 Penn. St. 111. *Joyce* v. *Martin,* 15 R. I. 558, 562. *Albert* v. *State,* 66 Md. 325, 338. *Foulkes* v. *Metropolitan District Railway,* 5 C. P. D. 157, 159; *S. C.* 4 C. P. D. 267. We do not intend at all to enlarge the liability of landlords in cases where heretofore it has been decided that only the occupants of the land were responsible. We mean by contemplated more than foreseen. A landlord may regard many things as likely to happen for which he will not have to answer, but this case goes much beyond that point. The object of the contract with Gleason was that the public should be invited, since it was from the public that the defendant was to get his pay. At the same time, the short and interrupted character of the occupation allowed to Gleason made it obvious that the safety of the building must be left mainly to the defendant.

There was evidence that the support of the platform was manifestly defective, and, beside what the jury may have found from the description, there was express testimony that it was not properly constructed. See *Lincoln* v. *Commonwealth,* 164 Mass. 368, 379. Such a case could not be taken from the jury.

Exceptions overruled.[1]

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[1] *Accord: Camp* v. *Wood,* 76 N. Y. 92 (1879), defective approaches to a hall let for one night for a dance—plaintiff paid for admission to the lessees —it would appear that the defendant retained full control of the approaches; *Fox* v *Buffalo Park,* 21 N. Y. App. Div. 321 (1897), the defendant leased for $200, to a bicycling club for their race meeting, its track and the stands which it had had erected thereon by a contractor according to the plans and under the supervision of a competent architect. The plaintiff, a ticket having been bought for her, went on the grand stand which collapsed, due to a fault of original construction. Held, that defendant was liable; by Ward, J., because if it choose to erect a structure for the public accommodation, it must answer for its careful construction; by Green, J., because there was evidence of lack of proper inspection. See *Godley* v. *Hagerty,* 20 Pa. 387 (1853) and *Carson* v. *Godley,* 26 Pa. 111 (1856), buildings erected by owner acting as his own architect, for express purpose of leasing to United States government as warehouses for heavy storage, collapsed from faulty construction.

BARRETT, ADMINISTRATOR, *v.* LAKE ONTARIO BEACH IMPROVEMENT CO.

Court of Appeals of New York, 1903. 174 *New York* 310.

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered February 6, 1902, which reversed an order of a Trial Term denying a motion to set aside a verdict in favor of plaintiff and for a new trial and granted a new trial.

The action was brought against the defendant to recover damages for the death of the plaintiff's intestate; which is alleged to have been caused by the negligent construction of a toboggan slide. The plaintiff recovered a verdict; but, upon appeal to the Appellate Division, in the fourth department, the judgment entered upon the verdict was reversed and a new trial was ordered, "upon questions of law only; the facts having been examined and no error found therein."

The defendant is the owner of lands on the beach of Lake Ontario. Among the properties was a bathing establishment to which was appurtenant or incidental a toboggan slide, constructed, as it existed down to the time of the trial in 1896. The slide consisted of a platform, eleven feet square and twenty-five feet from the ground, from which a trough ran on an incline down to the water, on which bathers slid on toboggans. The platform was constantly wet and slippery from the water brought there by the wet suits of the bathers. Around the platform was a railing, the open space between the lower rail and the platform being twenty-one inches. The plaintiff's intestate in using the slide in some way slipped and fell from the platform through the space between it and the lower rail of the railing.

The accident occurred in August, 1900, and the premises were in the possession of one Briggs, under a lease by the defendant for the season, at a fixed rental. By the terms of the lease, the lessee could make no alteration in the premises, without the written consent of the lessor, and reservation was made to the latter of the right to permit its officers and agents to enter upon the premises, at any time, for the purpose of examination, or of doing any work necessary for the care and preservation of the property.[1]

GRAY, J. The appeal from the order of reversal permits of our reviewing any of the questions of law, which were before the Appellate Division. (*Albring* v. *N. Y. C. & H. R. R. R. Co.*, 174 N. Y. 179.)

Upon the facts which have been stated, the first question for our consideration, and one which is much dwelt upon by the defendant respondent, is whether, if the accident complained of is attributable to negligence in the construction of the structure of the platform, to be used in connection with the toboggan slide, the defendant can be held to have been responsible. While, as a general rule, a lessor, in the absence of any agreement, or of fraud, is not liable

[1] The facts are somewhat condensed and arguments of counsel omitted.

to the lessee for the condition, or tenantable use, of premises demised, (*Sutton* v. *Temple*, 12 M. & W. 52; *Jaffe* v. *Harteau*, 56 N. Y. 398), that rule is subject to exceptions. If the premises which are rented are in such a dangerous condition, as to constitute a nuisance at the time of the renting, the lessor remains liable for the consequences of the nuisance, notwithstanding that his lessee may also be liable. (*Swords* v. *Edgar*, 59 N. Y. 28.) If the premises are rented for a public use for which he knows that they are unfit and dangerous, he is guilty of negligence and may become responsible to persons suffering injury, while rightfully using them. Such instances would be where he lets a warehouse, so imperfectly constructed that the floors will not support the weight necessarily upon them; or where he lets a building for public amusements, or exhibitions, or other public purposes,[2] and its construction is so unsafe, structurally, as to be the cause of injury to any one. (*Francis* v. *Cockrell*, L. R. [5 Q. B.] 184, 501; *Fox* v. *Buffalo Park*, 21 App. Div. 321; affirmed, 163 N. Y. 559; *Edwards* v. *N. Y. & H. R. R. Co.*, 98 N. Y. 245.) This liability for injuries, attributable to the unfit condition of premises, which have been let for a specific purpose, rests upon negligence; that is to say, upon the omission of a duty to use due care in their erection, or construction. The law holds the lessor responsible, not upon any contractual obligation, but because of the *delictum*. If, as claimed in this case, a person has erected a structure and designed it for the use of the public, which was either structurally defective, or which was faulty, in failing to afford what, in the judgment of reasonable men, would be a proper and adequate protection to persons using it, then he has incurred the risk of being made responsible for occurrences resulting in injury to any one by reason of the faulty construction. The contention, in this case, is that the toboggan structure was unsafe for the specific use for which the defendant intended and let it to Briggs and the question is, simply, whether the platform was built in so reasonably safe a manner, as to prevent the occurrence of accidents, which men, of ordinary prudence and knowing the nature of the public use to which it was to be put, might have foreseen as pos-

[2] This statement of the effect of *Swords* v. *Edgar* first appears in *Edwards* v. *R. R.*, 98 N. Y. 245 (1885), per Earl, J., p. 254 and per Ruger, C. J., p. 263. In *Swords* v. *Edgar* the decision is primarily based on a much broader ground, that the dock being when leased unfit and dangerous for the only use which could be made of it, namely as a place at which vessels might unload, for which use it was rented and which involved as a necessary incident the presence of such persons as the plaintiff, was a *nuisance* as to him. To him the place was, so far as the defendants were concerned, "as it were a public place or highway upon which he had the right to go". In a word it was a place where the defendants ought to expect that persons such as the plaintiff would rightfully be. The dock was structurally fit and proper, there was no latent defect, its unfitness was due solely to lack of repair and was patent and known to the lessee who had covenanted to repair and was admittedly also liable. *Cf. Edwards* v. *R. R.*, *supra*, where the defendant was held not liable for the fall of a gallery not designed nor specially, certainly not exclusively, adapted for the use to which it was put by lessee who had by the lease the right to make such temporary structural changes as might be necessary to fit it for *his* purposes; as to this last, compare the terms of the lease in the principal case.

sible. There is a difference between this case and other cases in this, that the defect in question was not in the supports of the structure, but in the manner in which the railing around the platform was constructed; which rendered it possible for a person to fall through it to the ground. The difference, however, is not one which affects the doctrine of the lessor's responsibility; for, obviously enough, the essential principle of the doctrine is the omission, or the neglect, of a duty in preparing a structure, to be put to a particular public use, to make it reasonably fit, or safe, for that use.

In my opinion, the defendant, having built the structure for the amusement, or entertainment, of the public, impliedly, warranted that it might be used with such safety to the persons as could reasonably be demanded.

If, then, the defendant could be made responsible for any neglect in the construction in this toboggan slide, the question, then, presents itself whether, upon the evidence, the court could say that, as matter of law, the railing constructed about the platform was a reasonably sufficient protection to the persons using it. However imperfectly described the occurrence of this accident, it is, certainly, evident that the railing was not, as it existed, sufficient to prevent a person falling through its openings. Whether the deceased slipped, or whether, stumbling, he lost his balance, when in the act of making use of the slide, is not material; because, in either event, the particular form of sport to be indulged in rendered slipping, or stumbling, a reasonably possibly occurrence. All persons were invited, upon the payment of an entrance fee, to make use of this structure and the amusement provided for involved some risks. These risks attending an amusement which was prepared to allure the public for their emolument, the proprietors, or lessors, were bound to anticipate and to protect against, so far as they were not necessarily incidental thereto. A stricter measure of duty was involved, in preparing such a structure to induce the public use, and it was required that the risks should be minimized, to the extent that reasonably prudent men might foresee the necessity of doing so. The risk of falling from the platform may have been apparent to persons using it; but those persons had the right to assume that they went there without incurring any risk which might have been reasonably anticipated by the proprietor of the concern. They came there by invitation and with the right to believe that every reasonable care had been taken for their safety, in the erection of the slide. That an accident of the same kind had never before happened furnishes no ground of defense, if it might, in reason, have been anticipated. (*Cleveland* v. *N. J. Steamboat Co.*, 125 N. Y. 299; *Donnelly* v. *City of Rochester*, 166 ib. 315.)

In my opinion, the situation being such that a fall from the platform was a possible occurrence to the majority, if not to all, of the persons who used the toboggan slide, a question of fact was presented upon the evidence whether the platform structure had been constructed with that due care, which, in the judgment of prudent men, in view of the purpose, should have been exercised by the defendant. That question was for the jury to answer.

I think that whether the deceased was free from contributory negligence was properly left to the jury. The circumstances, under which the deceased was seen to fall, furnish no inference that he was careless. He was a lad of some fifteen years of age, concededly bright and active, and he was engaged in doing something to which he was expressly invited. The court could not hold, as matter of law, under the circumstances, that he had contributed to the result.

I think that the order of the Appellate Division should be reversed and that judgment should be ordered to be entered upon the verdict for the plaintiff, with costs in all the courts.

PARKER, Ch. J., O'BRIEN, BARTLETT, HAIGHT, MARTIN and WERNER, JJ., concur.

Order reversed, etc.[2]

GILL *v.* MIDDLETON.

Supreme Judicial Court of Massachusetts, 1870. 105 Mass. 477.

Tort for injuries received by the female plaintiff through falling through the floor of an outhouse. At the trial the following facts appeared.

The defendant had leased a tenement to the husband of the female plaintiff. The floor of an outhouse appurtenant thereto being out of repair the tenant requested the defendant to put it in repair. He said he would do so and himself with the aid of a common laborer made some repairs and told the female plaintiff that he had made it safe, so she need not fear to use it. During the ensuing evening, Mrs. Gill had occasion to go to the outhouse, when the floor gave way and she was injured. There was no evidence of any obligation of the defendant to make repairs in the contract by which he demised the premises to Mr. Gill; nor of any promise on his part to make them, other than above stated.[1]

The defendant requested the judge to instruct the jury, 1. that, "if there was no agreement between the plaintiffs and the defendant that the defendant should make repairs, then the defendant was under no obligation to make the repairs, and the plaintiffs cannot recover;" 2. that "if the defendant made repairs, and such as he believed to be sufficient and proper in order to make the premises safe, then he is not liable for the injury complained of;" and 3. that "the

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[2] *Accord: Albert* v. *State to use of Ryan*, 66 Md. 325 (1887), defective wharf at pleasure park leased by defendant; *State to use of Bashe* v. *Boyce*, 73 Md. 469 (1891), owner of a wharf held to be liable only where he knew or by diligence could have known of the defect when he leased it; *Joyce* v. *Martin*, 15 R. I. 558 (1887), facts substantially similar to those in *Albert* v. *State, supra*, except that lessee was ignorant of the defect when he took possession but learned of it before the accident. See also *Nugent* v. *R. R.*, 80 Me. 62 (1888), *acc. (semble)*; but *cf. Campbell* v. *Portland Sugar Co.*, 62 Me. 552 (1873), and *McKenzie* v. *Cheetham, ante* p. 284.

In *Willcox* v. *Hines*, 100 Tenn. 538 (1897) Wilkes, J., says, p. 558, that he is "unable to see any ground for the application of a different rule in such cases" (premises leased as places of public resort). "The obligation not to expose the individual to danger is the same as not to expose the public to danger."

[1] The facts are restated.

defendant is not liable, unless he knew or believed that the repairs which he made were insufficient, and that the premises were still unsafe and dangerous."

The judge "refused the instructions prayed for, except the first, but did instruct the jury, that a landlord, independently of special contract, is not bound to repair; but if the jury are satisfied, from the evidence, that the defendant agreed to assume the repair of the privy, and did in fact repair the same himself, and thereafter assured the female plaintiff that the same was safe and in good repair, but in point of fact the same was not put in safe repair, by reason of the want of ordinary skill or care in the workmanship or selection of materials on the part of the defendant, and the female plaintiff, relying on the said assurance of the defendant, and using due care herself, was injured, then the plaintiffs may recover." The jury found for the plaintiffs, with damages in the sum of $500; and the defendant alleged exceptions.

AMES, J. In the ordinary contract between landlord and tenant, there is no implied warranty on the part of the former that the demised premises are in tenantable condition. He is under no obligation to make repairs, unless such a stipulation makes a part of the original contract; and any promise to do so, founded merely on the relation of the parties, and not one of the conditions of the lease, would be without consideration, and for that reason would create no liability. But although a gratuitous executory contract of that kind would not be binding upon him, he would place himself in a very different position if he should see fit to treat it as binding, and actually enter upon its fulfilment. He is at liberty to repudiate or to perform it, at his option; but if his choice should be to perform it, he comes under some degree of liability as to the manner of its performance. It is well settled, that, for an injury occasioned by want of due care and skill in doing what one has promised to do, an action may be maintained against him in favor of the party relying on such promise and injured by the breach of it, although there was no consideration for the promise. *Benden* v. *Manning*, 2 N. H. 289. *Thorne* v. *Deas*, 4 Johns. 84. *Elsee* v. *Gatward*, 5 T. R. 143. *Shiells* v. *Blackburne*, 1 H. Bl. 158. *Balfe* v. *West*, 22 Eng. Law & Eq. 506.

In this case, the landlord was told that the building was in an unsafe condition; and what he undertook to do, at the request of his tenant, was to make it safe. He not only assumed to do the work, but he notified the tenant when it was done, and invited him to make use of the building, assuring him that it was perfectly safe. Under these circumstances, it was correctly ruled by the presiding judge, that if on trial it proved to be unsafe, by reason of the want of ordinary care and skill on the part of the defendant in the workmanship or in the selection of the materials used, he might be held responsible in damages.

It is argued, that upon a gratuitous undertaking of this nature the defendant could only be held responsible for bad faith or for gross negligence, and that it was therefore an error to instruct the jury that he was liable for want of ordinary care and skill. But in assuming to make the repairs at the request of the tenant he must be considered as professing to have the requisite skill as a mechanic,

and as undertaking to select and furnish the kind and quality of materials appropriate to the accomplishment of the desired object. It appears to us that this is one of the cases in which there is no practical difference between gross negligence and the want of ordinary care and skill; and that the omission of what Baron Rolfe calls a mere vituperative epithet is not a valid objection to the judge's charge. The true question for the jury was, whether the defendant had discharged the duty which he had assumed, with that due regard to the rights of the other party which might reasonably have been expected of him under all the circumstances. His undertaking required at least the skill of an ordinary mechanic, and his failure to furnish it, either because he did not possess or neglected to use it, would be gross negligence. *Steamboat New World* v. *King*, 16 How. 469.

Exceptions are overruled.[2]

CHAPTER III.

Persons Supplying Chattels for the Use of Others.

SECTION 1. Gratuitously.

MACCARTHY *v.* YOUNG.

In the Court of Exchequer, 1861. 6 *Hurl. & Nor.* 329.

WILDE, B.—In this case the declaration charged the defendant with having undertaken to erect a scaffold, and with having so neg-

[2] *Accord: Gregor* v. *Cady*, 82 Me. 131 (1889), closely similar facts; *Shute* v. *Bills*, 191 Mass. 433 (1906), leaky gutters so imperfectly repaired that it continued to leak. *Contra: Malone* v. *Laskey*, L. R., 1907, 2 K. B. 141, the defendants sent plumbers to brace an insecure cistern, the brackets put in, being insufficient it fell on the plaintiff, a sub-tenant of their lessee—held there was no liability—since there being no contractual relation between them on which to base an action of contract nor any duty owed to do a voluntary task efficiently nor any misrepresentation other than an innocent misrepresentation that the cistern was safely made in full belief that in fact it was so; and *Earl* v. *Lubbock*, L. R. 1905, 1 K. B. 253, defective repair of van.

A fortiori the landlord is liable where the repairs are so badly done as to make the condition worse than before, *Rehder* v. *Miller*, 35 Pa. S. C. 344 (1908), in such case anyone doing the repairs, though not the landlord, is liable, *Toomey* v. *Sanborn*, 146 Mass. 28 (1888).

If the landlord by any act done or directed by him creates a latent and dangerously defective condition upon the demised premises he is bound to replace the premises in as good order as when he interfered with them, whether he is acting for his own benefit, *O'Dwyer* v. *O'Brien*, 13 N. Y. App. Div. 570 (1897, or in performance of his duty as owner, *Little* v. *McAdaras*, 38 Mo. App. 187 (1889), or as a favor to his tenant, *Aldag* v. *Ott*, 28 Ind. App. 542 (1902).

But the injury must be caused by the bad condition of that particular part of the premises which the landlord has proffered to repair, *Galvin* v. *Beals*, 187 Mass. 250 (1905), a porch floor having been gratuitously repaired, plaintiff was injured by the fall of the railing around it; nor is the repair on one occasion of a part an admission of a liability either to re-

ligently and carelessly done so, that the plaintiff, who was lawfully working upon it, was exposed to unreasonable risk and thrown to the ground and injured by the scaffold giving way.

The defendant pleaded first, not guilty; secondly, that he did not undertake to erect the scaffold as alleged.

It was proved on the trial that the plaintiff was a labourer: that he was employed by one Portlock to pull down the party-wall of a house belonging to the defendant: that Portlock said to him, "there is the scaffold for you to go to work".

The scaffold to which the remark applied was erected under the following circumstances:—

The defendant was a builder and had purchased a house which he was about to pull down; he erected the scaffold in question for his own use, and did use it in pulling down the front and back walls of the house; and on being called upon afterwards to pull down the party-wall, he was about to do so, when the said Portlock, who was his carpenter, asked for the job, and accordingly the defendant entered into a written contract with him to pull down the party-wall for 17£. The written contract contained no provision for the use of the scaffold already erected, nor was it in any way understood at the time of making such contract that Portlock was to have the use of the scaffold. But the defendant was aware of its being so used when the wall came to be pulled down; and it may fairly be taken that he allowed Portlock the use of it gratuitously.

One of the putlegs, or cross supports on which the planks of the scaffold rested, turned out to be rotton. There was no evidence whatever that the defendant knew of this defect. The putleg gave way, and was the cause of the accident for which the action was brought. The plaintiff was thrown to the ground and seriously injured.

The jury found the defendant guilty of negligence in the original construction of the scaffold by reason of the defective putleg, and that the plaintiff's injury was caused by such negilgence.

A verdict was entered for the plaintiff for 50£., the defendant having leave to move to enter the verdict for him.

The question that has arisen for this Court is, whether under the foregoing circumstances the defendant is liable in any form of action to the plaintiff for what has occurred; and that the question might be fully raised it was very properly agreed that any necessary amendments in the pleadings might be made. The pleadings therefore become immaterial.

The Court however is of opinion that no such liability exists.

The result of the evidence appears to us to be, that the scaffold in question was lent by the defendant without reward to Portlock, as a ladder or any tool might have been, to assist him in completing the work he had undertaken to perform. And the plaintiff was the servant of Portlock, and nothing more.

So far as the relation of the parties is concerned, it is the case

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pair the whole or to repair even that part again, *Phelan* v. *Fitzpatrick*, 188 Mass. 237 (1905).

of a gratuitous lender for use on the one hand, and the servant of the party to whom the article is lent on the other.

In this relation of parties, and in the absence of all proof of knowledge by the lender of the defect which created the mischief, what are the obligations of the lender towards those to whom the article is lent, or by whom it is afterwards used? When the case was argued, it appeared to the Court that the matter was of sufficient general interest and novelty to make it desirable that time should be taken to consider maturely the terms of the judgment they were prepared to give.

Upon consulting the authorities, however, we find that the whole matter has been fully considered lately in the Court of Queen's Bench, and an elaborate judgment delivered in which we entirely concur.

This makes it unnecessary to do more than refer to that decision.

In *Blakemore v. The Bristol and Exeter Railway Company,* 8 E. & B. 1035, 1050 (E. C. L. R. vol. 92), which was an action for injury by an insufficient crane lent by the defendant, the Court laid down the rule of the lender's responsibility thus:—"It may be safely laid down that the duties of the borrower and lender are in some degree correlative. The lender must be taken to lend for the purpose of a beneficial use by the borrower; the borrower, therefore, is not responsible for reasonable wear and tear; but he is for negligence, for misuse, for gross want of skill in the use, above all, for anything which may be qualified as legal fraud. So, on the other hand, as the lender lends for beneficial use, he must be responsible for defects in the chattel with reference to the use for which he knows the loan is accepted, *of which he is aware,* and owing to which directly the borrower is injured."

And again:—"The principle laid down in *Coggs* v. *Bernard,* and followed by Lord Kenyon and Buller, J., and by Lord Tenterden, in the *Nisi Prius* cases cited in the note 1 Lead. Cas. 162 (4th ed.), that a gratuitous agent or bailee may be responsible for gross negligence or great want of skill, gets rid of the objection that might be urged from want of consideration to the lender. By the necessarily implied purpose of the loan, a duty is contracted towards the borrower not to conceal from him those defects, *known to the lender,* which may make the loan perilous or unprofitable to him."

It is obvious that, upon the above principle, the defendant would not have been liable even to Portlock, to whom the scaffold was lent, if the accident had happened to him, inasmuch as the defendant was not aware of the defect in question; and, without deciding anything as to the position of the plaintiff, it is plain that he at any rate stands in no better position than Portlock would have done. The verdict must therefore be entered for the defendant.

Judgment for the defendant.[1]

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[1] *Accord: Gagnon* v. *Dana,* 69 N. H. 264 (1897). So in *Moffatt* v. *Bateman,* L. R. 3 P. C. 115 (1869) it was held that one gratuitously taking a friend for a drive in his carriage is only liable for gross negligence. See also *Shiells* v. *Blackburne,* 1 Ky. Bl. 158 (1789), one, whose situation

SECTION 2. For Use for the Purpose of the Supplier's Business.

HEAVEN *v.* PENDER.

In the Queen's Bench Division, 1883. *L. R.* 11 *Q. B. D.* 503.

ACTION to recover damages for injuries alleged to have been sustained by the plaintiff through the negligence of the defendant, under the following circumstances:—

The defendant was the owner of a dry dock used for the painting and repairing vessels, and as incident to its being so used he supplied and put up the staging necessary to enable the outside of the vessel to be painted and repaired when in the dock, but after the staging had been handed over to the shipowner it no longer remained under the control of the defendant.

The plaintiff was a ship painter in the employ of one William Gray, a master painter, who had contracted with the owner of a vessel in the defendant's dock to paint the outside of the vessel, and on the 8th of April, 1882, whilst the plaintiff was engaged in painting the vessel, and using for that purpose the staging which the defendant had put up on that same day, one of the ropes by which is was suspended from the vessel gave way, and the plaintiff fell in consequence into the dock and was injured.

The ropes had been supplied by the defendant as part of the machinery of the staging, and there was evidence that they had been scorched and were unfit for use with safety at the time the staging was put up, and that reasonable care had not been taken by the defendant as to their state and condition at that time.

The action was remitted for trial before the Bow County Court under s. 10 of the County Court Act, 1867 (30 & 31 Vict. c. 142). The county court judge gave judgment for the plaintiff for 20*l.*, the amount of damages agreed between the parties.

The Queen's Bench Division, on motion by way of appeal, ordered judgment to be entered for the defendant.[1]

The plaintiff appealed.

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or profession is not such as to imply special skill or knowledge, who gratuitously undertakes to do another a service is only liable if he be guilty of gross negligence or fails in good faith to take as much care as he does in similar undertakings when his own interests are concerned, *acc. Ray* v. *Burbank & Jones,* 61 Ga. 505 (1878). If the lender know that the article lent is latently defective and that because of such defect it was unfit for the purposes for which it was lent, he is liable to the borrower for injuries resulting therefrom to him, *Blakemore* v. *Ry.,* 8 E. & B. 1035 (1858), or to those, but only to those, who the lender has reason to expect will assist the borrower in its use, *ibid.*

[1] L. R. 9 Q. B. D. 302 (1882). The judgment was reversed on the ground that the duty to see that one allowed to use a chattel shall not be exposed to unusual danger "arises out of the possession and control of the thing, not out of the property in it." CAVE, J., p. 307. "The defendant parted with the control of his staging as a landlord does with the control of his property when he lets it." FIELD, J., p. 306, *cf. Burke* v. *Castro,* 11 Hun 354 (N. Y., 1877).

BRETT, M. R. In this case the plaintiff was a workman in the employ of Gray, a ship painter. Gray entered into a contract with a shipowner whose ship was in the defendant's dock to paint the outside of his ship. The defendant, the dock owner, supplied, under a contract with the shipowner, an ordinary stage to be slung in the ordinary way outside the ship for the purpose of painting her. It must have been known to the defendant's servants, if they had considered the matter at all, that the stage would be put to immediate use, that it would not be used by the shipowner, but that it would be used by such a person as the plaintiff, a working ship painter. The ropes by which the stage was slung, and which were supplied as a part of the instrument by the defendant, had been scorched and were unfit for use and were supplied without a reasonably careful attention to their condition. When the plaintiff began to use the stage the ropes broke, the stage fell, and the plaintiff was injured. The Divisional Court held that the plaintiff could not recover against the defendant. The plaintiff appealed. The action is in form and substance an action for negligence. That the stage was, through want of attention of the defendant's servants, supplied in a state unsafe for use is not denied.[2] But want of attention amounting to a want of ordinary care is not a good cause of action, although injury ensue from such want, unless the person charged with such want of ordinary care owed a duty to the person complaining to use ordinary care in respect of the matter called in question. Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff, without contributory negligence on his part, has suffered injury to his person or property. The question in this case is whether the defendant owed such a duty to the plaintiff.

If a person contracts with another to use ordinary care or skill towards him or his property the obligation need not be considered in the light of a duty; it is an obligation of contract. It is undoubted, however, that there may be the obligation of such a duty from one person to another although there is no contract between them with regard to such duty. Two drivers meeting have no contract with each other, but under certain circumstances they have a reciprocal duty towards each other. So two ships navigating the sea. So a railway company which has contracted with one person to carry another has no contract with the person carried but has a duty towards that person. So the owner or occupier of house or land who permits a person or persons to come to his house or land has no contract with such person or persons, but has a duty towards him or them. It should be observed that the existence of a contract between two persons does not prevent the existence of the suggested duty between them also being raised by law independently of the contract, by the facts with regard to which the contract is made and to which it applies an exactly similar but a

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[2] But see the facts appearing on the notes of the trial judge—"there was no evidence to show its (the rope's) condition when the staging was put up." L. R. 9 Q. B. D. p. 303.

contract duty. We have not in this case to consider the circumstances in which an implied contract may arise to use ordinary care and skill to avoid danger to the safety of person or property. We have not in this case to consider the question of a fraudulent misrepresentation express or implied, which is a well recognised head of law. The questions which we have to solve in this case are—what is the proper definition of the relation between two persons other than the relation established by contract, or fraud, which imposes on the one of them a duty towards the other to observe, with regard to the person or property of such other, such ordinary care or skill as may be necessary to prevent injury to his person or property; and whether the present case falls within such definition. When two drivers or two ships are approaching each other, such a relation arises between them when they are approaching each other in such a manner that, unless they use ordinary care and skill to avoid it, there will be danger of an injurious collision between them. This relation is established in such circumstances between them, not only if it be proved that they actually know and think of this danger, but whether such proof be made or not. It is established, as it seems to me, because any one of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill under such circumstances there would be such danger. And every one ought by the universally recognised rules of right and wrong, to think so much with regard to the safety of others who may be jeopardised by his conduct; and if, being in such circumstances, he does not think, and in consequence neglects, or if he neglects to use ordinary care or skill, and injury ensue, the law, which takes cognisance of and enforces the rules of right and wrong, will force him to give an indemnity for the injury. In the case of a railway company carrying a passenger with whom it has not entered into the contract of carriage the law implies the duty, because it must be obvious that unless ordinary care and skill be used the personal safety of the passenger must be endangered. With regard to the condition in which an owner or occupier leaves his house or property other phraseology has been used, which it is necessary to consider. If a man opens his shop or warehouse to customers it is said that he invites them to enter, and that this invitation raises the relation between them which imposes on the inviter the duty of using reasonable care so to keep his house or warehouse that it may not endanger the person or property of the person invited. This is in a sense an accurate phrase, and as applied to the circumstances a sufficiently accurate phrase. Yet it is not accurate if the word "invitation" be used in its ordinary sense. By opening a shop you do not really invite, you do not ask A. B. to come in to buy; you intimate to him that if it pleases him to come in he will find things which you are willing to sell. So, in the case of shop, warehouse, road, or premises, the phrase has been used that if you permit a person to enter them you impose on yourself a duty not to lay a trap for him. This, again, is in a sense a true statement of the duty arising from the relation constituted by the permission to enter. It is not a statement of what causes the relation which raises the duty. What causes the relation is the permission to enter

and the entry. But it is not a strictly accurate statement of the duty. To lay a trap means in ordinary language to do something with an intention. Yet it is clear that the duty extends to a danger the result of negligence without intention. And with regard to both these phrases, though each covers the circumstances to which it is particularly applied, yet it does not cover the other set of circumstances from which an exactly similar legal liability is inferred. It follows, as it seems to me, that there must be some larger proposition which involves and covers both sets of circumstances. The logic of inductive reasoning requires that where two major propositions lead to exactly similar minor premisses there must be a more remote and larger premiss which embraces both of the major propositions. That, in the present consideration, is, as it seems to me, the same proposition which will cover the similar legal liability inferred in the cases of collision and carriage. The proposition which these recognised cases suggest, and which is, therefore, to be deduced from them, is that whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger. Without displacing the other propositions to which allusion has been made as applicable to the particular circumstances in respect of which they have been enunciated, this proposition includes, I think, all the recognised cases of liability. It is the only proposition which covers them all. It may, therefore, safely be affirmed to be a true proposition, unless some obvious case can be stated in which the liability must be admitted to exist, and which yet is not within this proposition. There is no such case. Let us apply this proposition to the case of one person supplying goods or machinery, or instruments or utensils, or the like, for the purpose of their being used by another person, but with whom there is no contract as to the supply. The proposition will stand thus: whenever one person supplies goods, or machinery, or the like, for the purpose of their being used by another person under such circumstances that every one of ordinary sense would, if he thought, recognise at once that unless he used ordinary care and skill with regard to the condition of the thing supplied or the mode of supplying it, there will be danger of injury to the person or property of him for whose use the thing is supplied, and who is to use it, a duty arises to use ordinary care and skill as to the condition or manner of supplying such thing. And for a neglect of such ordinary care or skill whereby injury happens a legal liability arises to be enforced by an action for negligence. This includes the case of goods, &c., supplied to be used immediately by a particular person or persons or one of a class of persons, where it would be obvious to the person supplying, if he thought, that the goods would in all probability be used at once by such persons before a reasonable opportunity for discovering any defect which might exist, and where the thing supplied would be of such a nature that a neglect of ordinary care or skill as to its condition or the manner of supplying

it would probably cause danger to the person or property of the person for whose use it was supplied, and who was about to use it. It would exclude a case in which the goods are supplied under circumstances in which it would be a chance by whom they would be used or whether they would be used or not, or whether they would be used before there would probably be means of observing any defect, or where the goods would be of such a nature that a want of care or skill as to their condition or the manner of supplying them would not probably produce danger of injury to person or property. The cases of vendor and purchaser and lender and hirer under contract need not be considered, as the liability arises under the contract, and not merely as a duty imposed by law, though it may not be useless to observe that it seems difficult to import the implied obligation into the contract except in cases in which if there were no contract between the parties the law would according to the rule above stated imply the duty.

Examining the rule which has been above enunciated with the cases which have been decided with regard to goods supplied for the purpose of being used by persons with whom there is no contract, the first case to be considered is inevitably *Langridge* v. *Levy* (2 M. & W. 519). It is not an easy case to act upon. It is not, it cannot be accurately reported; the declaration is set out; the evidence is assumed to be reported; the questions left to the jury are stated. And then it is said that a motion was made to enter a nonsuit in pursuance of leave reserved on particular grounds. Those grounds do not raise the question of fraud at all, but only the question of remoteness. And although the question of fraud seems in a sense to have been left to the jury, yet no question was, according to the report, left to them as to whether the plaintiff acted on the faith of the fraudulent misrepresentation which is, nevertheless, a necessary question in a case of fraudulent misrepresentation. The report of the argument makes the object of the argument depend entirely upon an assumed motion to arrest the judgment, which raises always a discussion depending entirely on the form of the declaration, and the effect on it of a verdict, in respect of which it is assumed that all questions were left to the jury. If this was the point taken the report of the evidence and of the questions left to the jury is idle! The case was decided on the ground of the fraudulent misrepresentation as stated in the declaration. It is inferred that the defendant intended the representation to be communicated to the son. Why he should have such an intention in fact, it seems difficult to understand. His immediate object must have been to induce the father to buy and pay for the gun. It must have been wholly indifferent to him whether after the sale and payment the gun would be used or not by the son. I cannot hesitate to say that, in my opinion, the case is a wholly unsatisfactory case to act on as an authority. But taking the case to be decided on the ground of a fraudulent misrepresenatation made hypothetically to the son, and acted upon by him, such a decision upon such a ground, in no way negatives the proposition that the action might have been supported on the ground of negligence without fraud. It seems to be a case which is within the proposition enunciated in this judgment, and in which the action

might have been supported without proof of actual fraud. And this seems to be the meaning of Cleasby, B., in the observations he made on *Langridge* v. *Levy* (*supra*) in the case of *George* v. *Skivington*, Law Rep. 5 Ex. 1, 5. In that case the proposition laid down in this judgment is clearly adopted. The ground of the decision is that the article was, to the knowledge of the defendant, supplied for the use of the wife and for her immediate use. And certainly, if he or anyone in his position had thought at all, it must have been obvious that a want of ordinary care or skill in preparing the prescription sold, would endanger the personal safety of the wife.

In *Corby* v. *Hill*, 4 C. B. (N. S.) 556, it is stated by the Lord Chief Justice that an allurement was held out to the plaintiff. And Willes, J. stated that the defendant had no right to set a trap for the plaintiff. But in the form of declaration suggested by Willes, J., on p. 567, there is no mention of allurement, or invitation, or trap. The facts suggested in that form are, "that the plaintiff had license to go on the road, that he was in consequence accustomed and likely to pass along it, that the defendant knew of that custom and probability, that the defendant negligently placed slates in such a manner as to be likely to prove dangerous to persons driving along the road, that the plaintiff drove along the road, being by reason of the licence lawfully on the road, and that he was injured by the obstruction." It is impossible to state a case more exactly within the proposition laid down in this judgment. In *Smith* v. *London and St. Katharine Docks Co.*, Law Rep. 3 C. P. 326, the phrase is again used of invitation to the plaintiff by the defendants. Again, let it be observed that there is no objection to the phrase as applied to the case. But the real value of the phrase may not improperly be said to be, that invitation imports knowledge by the defendant of the probable use by the plaintiff of the article supplied, and therefore carries with it the relation between the parties which establishes the duty. In *Indermaur* v. *Dames*, Law Rep. 1 C. P. 274, reliance is again placed upon a supposed invitation of the plaintiff by the defendant. But again, it is hardly possible to state facts which bring a case more completely within the definition of the present judgment. In *Winterbottom* v. *Wright*, 10 M. & W. 109, it was held that there was no duty cast upon the defendant with regard to the plaintiff. The case was decided on what was equivalent to a general demurrer to the declaration. And the declaration does not seem to shew that the defendant, if he had thought about it, must have known, or ought to have known, that the coach would be necessarily or probably driven by the plaintiff, or by any class of which he could be said to be one, or that it would be so driven within any time which would make it probable that the defect would not be observed. The declaration relied too much on contracts entered into with other persons than the plantiff. The facts alleged did not bring the case within the proposition herein enunciated. It was an attempt to establish a duty towards all the world. The case was decided on the ground of remoteness. And it is as to too great a remoteness that the observation of Lord Abinger is pointed, when he says that the doctrine of *Langridge* v. *Levy* (*supra*) is not to be extended. In *Francis* v. *Cockrell*, Law Rep. 5 Q. B. 184, at p. 501, the decision is put by some of the

judges on an implied contract between the plaintiff and the defendant. But Cleasby, B. (p. 515), puts it upon the duty raised by the knowledge of the defendant that the stand was to be used immediately by persons of whom the plaintiff was one. In other words he acts upon the rule above laid down. In *Collis* v. *Selden,* Law Rep. 3 C. P. 495, it was held that the declaration disclosed no duty. And obviously, the declaration was too uncertain. There is nothing to shew that the defendant knew more of the probability of the plaintiff rather than any other of the public being near the chandelier. There is nothing to shew that the plaintiff was more likely to be in the public-house than any other member of the public. There is nothing to shew how soon after the hanging of the chandelier anyone might be expected or permitted to enter the room in which it was. The facts stated do not bring it within the rule. There is an American case: *Thomas and Wife,* 6 N. Y. 397, cited in Mr. Horace Smith's Treatise on the Law of Negligence, p. 88, note (t), which goes a very long way. I doubt whether it does not go too far. In *Longmeid* v. *Holliday,* 6 Ex. 761, a lamp was sold to the plaintiff to be used by the wife. The jury were not satisfied that the defendant knew of the defect in the lamp. If he did, there was fraud; if he did not, there seems to have been no evidence of negligence. If there was fraud, the case was more than within the rule. If there was no fraud, the case was not brought by other circumstances within the rule. In *Gautret* v. *Egerton,* Law Rep. 2 C. P. 371, at p. 374, the declaration was held by Willes, J., to be bad on demurrer, because it did not shew that the defendant had any reason to suppose that persons going to the docks would not have ample means of seeing the holes and cuttings relied on. He does not say there must be fraud in order to support the action. He says there *must be something like fraud.* He says: "Every man is bound not wilfully to deceive others." And then in the alternative, he says: *"or to do any act which may place them in danger."* There seems to be no case in conflict with the rule above deduced from well admitted cases. I am, therefore, of opinion that it is a good, safe, and just rule.

I cannot conceive that if the facts were proved which would make out the proposition I have enunciated, the law can be that there would be no liability. Unless that be true, the proposition must be true. If it be the rule the present case is clearly within it. This case is also, I agree, within that which seems to me to be a minor proposition—namely, the proposition which has been often acted upon, that there was in a sense, an invitation of the plaintiff by the defendant, to use the stage. The appeal must, in my opinion, be allowed, and judgment must be entered for the plaintiff.

COTTON, L.J. BOWEN, L.J., concurs in the judgment I am about to read.

In this case the defendant was the owner of a dock for the repair of ships, and provided for use in the dock the stages necessary to enable the outside of the ship to be painted while in the dock, and the stages which were to be used only in the dock were appliances provided by the dock owner as appurtenant to the dock and its use. After the stage was handed over to the shipowner it no

longer remained under the control of the dock owner. But when ships were received into the dock for repair and provided with stages for the work on the ships which was to be executed there, all those who came to the vessels for the purpose of painting and otherwise repairing them were there for business in which the dock owner was interested, and they, in my opinion, must be considered as invited by the dock owner to use the dock and all appliances provided by the dock owner as incident to the use of the dock. To these persons, in my opinion, the dock owner was under an obligation to take reasonable care that at the time the appliances provided for immediate use in the dock were provided by him they were in a fit state to be used—that is, in such a state as not to expose those who might use them for the repair of the ship to any danger or risk not necessarily incident to the service in which they are employed. That this obligation exists as regards articles of which the control remains with the dock owner was decided in *Indermaur* v. *Dames* (*supra*), and in *Smith* v. *London and St. Katharine Docks Co.* (*supra*), the same principle was acted on. I think that the same duty must exist as to things supplied by the dock owner for immediate use in the dock, of which the control is not retained by the dock owner, to the extent of using reasonable care as to the state of the articles when delivered by him to the ship under repair for immediate use in relation to the repairs. For any neglect of those having control of the ship and the appliances he would not be liable, and to establish his liability it must be proved that the defect which caused the accident existed at the time when the article was supplied by the dock owner.

Blackmore v. *Bristol and Exeter Ry. Co.*, 8 E. & B. 1035, may be relied on as at variance with the opinion thus expressed by me, but I think that the objection is not well founded. If the plaintiff is to be considered as a volunteer there would be no implied request or invitation to him by the defendant to use the dock and the appliances provided. But he was there for the purpose of work, for the due execution of which the defendant recived the ship into his dock, and the defendant received payment as remuneration for allowing the work to be done in his dock, and for providing the necessary appliances for enabling it to be done. The plaintiff was therefore engaged in work in the performance of which the defendant was interested, and he cannot be looked upon in the light of a volunteer. Whether the Court was right in *Blackmore's Case* (*supra*), in treating the plaintiff as a volunteer may be a question. But as the ground of the decision is that he was so, that circumstance prevents the case being an authority inconsistent in principle with the conclusion at which I have arrived.

This decides this appeal in favour of the plaintiff, and I am unwilling to concur with the Master of the Rolls in laying down unnecessarily the larger principle which he entertains, inasmuch as there are many cases in which the principle was impliedly negatived.

Take for instance the case of *Langridge* v. *Levy* (*supra*), to which the principle if it existed would have applied. But the judges who decided that case based their judgment on the fraudulent representation made to the father of the plaintiff by the defendant. In

other cases where the decision has been referred to judges have treated fraud as the ground of the decision, as was done by Coleridge, J., in *Blackmore* v. *Bristol and Exeter Ry. Co.* (*supra*); and in *Collis* v. *Selden* (*supra*), Willes, J., says that the judgment in *Langridge* v. *Levy* (*supra*), was based on the fraud of the defendant. This impliedly negatives the existence of the larger general principle which is relied on, and the decisions in *Collis* v. *Selden* (*supra*), and in *Longmeid* v. *Holliday* (*supra*), (in each of which the plaintiff failed), are in my opinion at variance with the principle contended for. The case of *George* v. *Skivington* (*supra*), and especially what is said by Cleasby, B., in giving judgment in that case seem to support the existence of the general principle. But it is not in terms laid down that any such principle exists, and that case was decided by Cleasby, B., on the ground that the negligence of the defendant which was his own personal negligence was equivalent, for the purposes of that action, to fraud on which (as he said) the decision in *Langridge* v. *Levy* (*supra*) was based.

In declining to concur in laying down the principle enunciated by the Master of the Rolls, I in no way intimate any doubt as to the principle that anyone who leaves a dangerous instrument, as a gun, in such a way as to cause danger, or who without due warning supplies to others for use an instrument or thing which to his knowledge, from its construction or otherwise, is in such a condition as to cause danger, not necessarily incident to the use of such an instrument or thing, is liable for injury caused to others by reason of his negligent act.

For the reasons stated I agree that the plaintiff is entitled to judgment, though I do not entirely concur with the reasoning of the Master of the Rolls.

Judgment reversed.[a]

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[a] *Accord: Mowbray* v. *Merryweather*, L. R. 1895, 2 Q. B. 640; *Marney* v. *Scott*, L. R. 1899, 1 Q. B. 986, defendants chartered a vessel which, within two hours after receiving possession, the loading began—Defendant held liable to servant of stevedore for failure to inspect ship before turning it over for loading; *Johnston* v. *Ott*, 155 Pa. 17 (1893), trench dug by contractor, in which a subcontractor was employed to do brick work; *Coughtry* v. *Globe Co.*, 56 N. Y. 124 (1874), scaffolding built by an owner upon his own premises for the use of the workmen of a contractor employed by him to put up a cornice in his building; *Hoffner* v. *Prettyman*, 6 Pa. S. C. 20 (1897), similar facts, but the owner is liable only for injuries to workmen for whose use the scaffolding is erected, not to others, who without invitation or permission use it though themselves doing work for him, *Brady* v. *Prettyman*, 193 Pa. 628 (1899), *cf. Blakemore* v. *Ry.*, 8 E. & B. 1035 (1858).

In *Mulchey* v. *Methodist Society*, 125 Mass. 487 (1878), a church was held liable to an employee of a master painter injured by the fall of a scaffold erected for the use of the painters by a builder employed by the church to erect it. In *Stevens* v. *United Gas Co.*, 73 N. H. 159 (1905) it was held that, though the contractor, the plaintiff's master erected the scaffold around defendant's building, the latter was liable if he allowed live electric wires to be within touch of those working on the scaffold and that in such case it was immaterial that the danger was known to the contractor if latent to his workmen, p. 169; and see *Waters Pierce Co.* v. *Deslems*, 29 S. C. R. 271 (U. S., 1909), p. 276, *semble; Clement* v. *Crosby*

ELLIOTT *v.* HALL.

In the Queen's Bench Division, 1885. *L. R.* 15 *Q. B. D.,* 315

The action was in respect of personal injuries alleged to have been occasioned to the plaintiff through the defendant's negligence.

At the trial before Pollock, B., at the last Leicester Summer Assizes, the facts appeared to be as follows:—

The plaintiff was a servant employed by the Leicester Coal Consumers' Company in unloading coal from trucks at their sidings at the West Bridge Station, at Leicester. The defendant was a colliery proprietor who supplied coal to the Leicester Coal Consumers' Company under contracts with them. The defendant had a line from the colliery communicating with the Midland Railway at Bagworth station, near Leicester. The defendant's servants delivered to the Midland Railway Company at Bagworth a truck full of coals consigned to West Bridge Station, Leicester, to the order of the Leicester Coal Consumers' Company. The truck remained on the railway company's sidings at Bagworth for about six weeks: it was then forwarded to West Bridge Station, and placed there on sidings belonging to the Leicester Coal Consumers' Company. Two days afterwards the servants of that company began to unload the truck. The truck had a trap-door in the bottom used when required for the purpose of unloading into a vessel. This door, when shut, was supported by a bar which was kept in its position by means of a fastening called a cotter. The efficiency of this fastening depended upon the existence of a catch or small projection at the end of an iron pin, which prevented the pin, when passed through a slit, from repassing, except when held in a certain position. The plaintiff got into the truck to unload it, and was engaged in so doing when the door fell down and he fell through the opening on to the rails, and thereby sustained the injuries in respect of which the action was brought. Upon inspection of the truck after the accident, it appeared that the catch on the pin above-mentioned was worn away, and probably had been so for some months. The truck in question was rented by the defendant for the purposes of the colliery from the Midland Waggon Company. It was stated by the defendant's manager that, by the contract between the Midland Waggon Company and the defendant, the waggon company were to repair the waggons let out by them,

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Co., 148 Mich 293 (1907), and *Lechman* v. *Hooper*, 52 N. J. L. 253 (1890); but see *Galvin* v. *New York*, *ante.*, p. 120 and cases cited in note 2 thereto.

Where the defendant furnishes to a contractor, whom he employs to do work for him, appliances or machines for the latter's use and agrees to keep them in repair, he is liable to a servant of such contractor, who is injured by reason of a failure to repair the appliances or machine and this though when turned over to the contractor, the machine was in good order. *Toomey* v. *Donovan*, 158 Mass. 232 (1893); *King* v. *R. R.*, 66 N. Y. 181 (1876); *cf. Fish* v. *Kirlin Gray Co.*, 18 S. Dak. 122 (1904); so in *Gross* v. *Carnegie Co.*, 45 Pittsburgh L. J., 318 (1896), a steel company employing a subcontractor to construct a bridge for it and contracting to furnish him with iron, as material therefor, made by a certain process, furnished iron which not being so manufactured, was too weak to stand the strain incident to putting the bridge together—it was held that it was liable to a servant of the subcontractor injured thereby.

and that they kept repairing stations and inspectors of waggons at Bagworth and Leicester for that purpose, but he admitted that it was the practice at the defendant's colliery to do trifling repairs to waggons rather than incur the delay caused by sending them to be repaired by the waggon company. It was proved that it was the duty of an inspector of waggons employed by the Midland Railway Company to inspect waggons at Bagworth and also at Leicester. A servant in the employ of the defendant stated that he had examined the truck in pursuance of his duty before it was passed on to Bagworth sidings, and did not observe any defect in it.

In answer to questions left to them by the learned judge, the jury found that there had been no contributory negligence on the part of the plaintiff, and that the accident had occurred through the negligence of the defendant, and gave a verdict for the plaintiff for 200*l.* damages. The learned judge declined to give judgment, leaving either party to move for judgment. The plaintiff now moved for judgment, and the defendant applied, by way of cross-motion, for a new trial on the ground that upon the facts there was no duty shewn on the part of the defendant towards the plaintiff to use care with regard to the condition of the truck.

GROVE, J. This appears to me a much stronger case in favour of the plaintiff than the case of *Heaven* v. *Pender*, 11 Q. B. D. 503. In that case the real question seems to have been whether the owner of the dock was liable, or whether the plaintiff's proper remedy was against the shipowner with whom the plaintiff's employer had contracted to paint the ship. The decision in the Court below seems really to have been that the plaintiff had sued the wrong person. In my opinion the plaintiff in the present case is entitled to recover quite independently of the decision of the Court of Appeal in *Heaven* v. *Pender* (*supra*). The defendant hired the truck, it is true, from the Midland Waggon Company. The question, however, is not as to the existence or non-existence of any liability on the part of that company, but whether the defendant, who had the entire dominion over the truck, is liable to the plaintiff in respect of its defective condition. It was clearly part of the contract for the sale of the coal to the plaintiff's employers that it should be conveyed in a truck to the buyers, and it must necessarily have been contemplated that, when it arrived at its destination, the truck would be unloaded by the buyers' servants. I think it is plain that under these circumstances a duty arose on the part of the defendant towards the plaintiff. If vendors of goods forward them to the purchasers, and for that purpose supply a truck or other means of conveyance for the carriage of the goods, and the goods are necessarily to be unloaded from such means of conveyance by the purchaser's servants, it seems to me perfectly clear that there is a duty on the part of the vendors towards those persons who necessarily will have to unload or otherwise deal with the goods to see that the truck or other means of conveyance is in good condition and repair so as not to be dangerous to such persons. I do not say that the vendors would be responsible for latent defects, or matters that they could not reasonable foresee, but they are, in my opinion, bound to see that the machinery of the truck is apparently in good

order. It is contended that there is no duty because there was no contract with the plaintiff, but the plaintiff was acting as the servant of the company with whom the contract was made, and the defendant must have known that the buyers would not unload the coal themselves and that their servants would do so. Under these circumstances it seems to me clear that there was a duty not to be guilty of negligence with regard to the state and condition of the truck. It is urged that the truck stood for six weeks at the station of the Midland Railway Company, and that the inspector of that company ought to have examined it there, but we are not inquiring now whether there was any negligence or liability on the part of the Midland Railway Company, but whether the defendant is liable for having sent out a defective truck, and I am clearly of opinion that he is.

A. L. SMITH, J. I am of the same opinion, and I have not much to add. The case seems to me, I must say, a very clear one. The plaintiff sues the defendant for breach of duty in negligently allowing a truck which the plaintiff had to unload to be in a defective condition. It was said that the defendant was not the owner of the truck, but the evidence was that it was and had for some time been in his possession, and that it was the duty of the defendant's servants to examine it, and that they did examine it before it went out from the colliery. It is true that the waggon owners repaired the trucks which they let out, but I do not think that that fact, or the fact that the waggon was delayed for six weeks at Bagworth station makes any difference. There was evidence that the truck was insecure when it left the defendant's colliery, and that, if due care had been taken, the defendant's servants would have found out the cause of the insecurity, viz., that the catch on the pin was worn out, and probably had been so for some time. There was also evidence for the jury that the accident did not occur by reason of any contributory negligence of the plaintiff. It was argued, however, that, though the defendant was guilty of negligence, the plaintiff cannot succeed because there was no duty owed by the defendant to the plaintiff to take care with regard to the condition of the truck. But it appears to me that there was such duty. Look first at the position of the plaintiff. He is not merely one of the general public, or a bare licensee, or stranger. He is not a person who had no business in the truck. It was his duty to unload the truck. Then what is the position of the defendant? The defendant had entered into a contract for the supply of coal to the plaintiff's employers, and sent the truck loaded with coal for the purpose of being unloaded by the buyer or his servants. Those being the respective positions of the plaintiff and defendant, I cannot see how it can be said that there was no duty owing from the defendant to the plaintiff to see that the truck, which the plaintiff was to unload, was in a safe state. It seems to me to make no difference that the truck was six weeks upon the journey. The duty existed when the truck started from the colliery, and the truck was unsound then. If it could have been made out that something had happened in the six weeks which rendered the truck unsound, the case would have been different. But I cannot see how it can be said that, because the truck was six

weeks on the road, the duty which otherwise would have existed was got rid of. Again, it was argued for the defendant that a duty such as this has never been held to exist except as against a person occupying or in possession of premises or property. I do not think that this is so. It seems to me that the case of *Foulkes* v. *Metropolitan District Ry. Co.*, 4 C. P. D. 267; 5 C. P. D. 157, was very similar to the present case. There the plaintiff sued a railway company from whom he had not taken his ticket, and it was urged that he could not sue the defendants, because they had not contracted with him. But the Court held that there was a duty towards the plaintiff on the part of the defendants, because they had allowed him to come into their carriage. The principle on which that case was decided seems to me to apply to the present case. If the judgment of Thesiger, L.J., in the Court of Appeal is considered, it will I think be found that it is not essential to the existence of the duty that the defendant should be in the occupation or possession of the property through the defect in which the injury arises.

For these reasons I think it clear that there was in this case a duty on the part of the defendant towards the plaintiff.

Judgment for plaintiff, and application for new trial refused.[1]

CALEDONIAN RAILWAY CO. *v.* MULHOLLAND.

In the House of Lords, 1897. *L. R.* 1898, *App. Cas.* 216.

LORD HERSCHELL. My Lords, the question which arises upon this appeal is whether upon this record there is a case established as against the Caledonian Railway Company. The action was brought in respect of an accident that happened to a servant of the Glasgow and South Western Company by which he lost his life, the action being brought by his widow to recover damages in respect of the loss she had thereby sustained. Not only are the Caledonian Railway

[1] *Accord: Hayes* v. *P. & R. Co.*, 150 Mass. 457 (1890), plaintiff, assisting a customer to unload defendant's coal barge, injured by defective appliances supplied with it for use in unloading; *Sweeney* v. *Rosell*, 31 N. Y. Misc. 640 (1900), defective tackle supplied with truck of baled hay; *Rick* v. *New York C. & St. L. R. Co.*, 232 Pa. 553 (1911), railroad company liable to the servant of a consignee for injury received while unloading a defective and ill inspected car, though the car was not owned by it and had been last hauled by a connecting line, which in pursuance of a traffic arrangement did the switching into the consignee's yards; but see *McCallion* v. *Missouri Pac. R. Co.*, 74 Kans. 785 (1906), defective car furnished to a quarry for loading—the defect being known to the quarry owner—it was held that the railroad was not liable to a servant of such owner injured while loading the car; *Roddy* v. *R. R.*, 104 Mo. 234 (1891), a railroad furnishing cars to a quarry owner to be loaded by his servants for carriage over its line is held bound to take care that they are in fit order for safe loading. "What was to be done by the respective parties was for their mutual profit;" *Standard Oil Co.* v. *Wakefield's Adm.*, 102 Va. 824 (1904), a company shipping explosives in its own cars must take care that they are safe for normal transportation and unloading, though it is not liable if a fire or explosion results from some abnormal and unusual method adopted in transporting or unloading them; *Goodlander Mill Co.* v. *Standard Oil Co.*, 63 Fed. 400 (C. C. A. 7th Cir. 1894); *Bright* v. *Barnett & Record Co.*, 88 Wis. 299 (1894), scaffold builder putting up defective scaffold liable to workmen injured by its fall; *Fish* v. *Kirlin-Gray Co.*, 18 S. Dak. 122 (1904), an electric light company is answerable for the condition of an arc light sold by it to a church and placed by it therein, which it uses for suppling electric light under a contract and which it has bound itself to keep in repair and is liable if it falls and injures one of the congregation; *Maysville St. R. R. Co.* v. *Thomas*, 22 Ky. L. R. 1645 (1901), a gas company supplying a street railway company with electricity is liable for the bad condition of the wires through which it is supplied, though owned by the latter company.

Company sued, but the Glasgow and South Western Railway Company also; and as against the Glasgow and South Western Company it is not contested that a relevant case is shown upon the pleadings.

Now, my Lords, the facts that appear upon this record are these. The Caledonian Railway Company carried certain coals to the Dumfries Station and as soon as those coals arrived in the wagons at the Dumfries Station every obligation undertaken by the Caledonian Company in respect of them was at an end. That was the place of delivery, and the parties might, if they had pleased, have taken delivery of them there; they might have emptied the wagons of their coals at the place where the Caledonian engine left them; and the Caledonian Company, of course, would have had nothing to say to their doing so. But for their own purposes and their own convenience the Glasgow and South Western Company made an arrangement with the Dumfries Gas Commissioners by which they were to haul the coals from the place of delivery under the contract with the Caledonian Company, namely, the station, to the premises of the Gas Commissioners, which were about 400 yards, or something like a quarter of a mile, distant. Between the place where the Caledonian Company left these trucks of coals and the premises of the Gas Commissioners there was a tramway passing along the public streets. The trucks were hauled two at a time along this tramway to the Gas Commissioners' premises. Whilst two trucks were being so hauled, it is alleged that the husband of the plaintiff lost his life by reason of some imperfection in the breaks connected with those trucks. It became necessary in passing along this tramway to check the motion of the trucks, and the motion of these trucks was not checked rapidly enough to prevent the one coming against the other so that the plaintiff's husband was crushed.

I think I have stated all the facts which appear upon the record, except that perhaps I ought to add that it is averred that it is by the permission, sanction, and consent of the Caledonian Company that the Glasgow and South Western Company, or the Gas Commissioners, do not take delivery of the coals out of the wagons at the station, but haul those wagons on so that the coals may be discharged direct into the premises of the Gas Commissioners.

My Lords, the question is whether these facts establish any duty on the part of the Caledonian Company, a breach of which has led to the damage complained of by the plaintiff. It is said that the duty is this—that the Caledonian Railway Company, inasmuch as they knew how the Glasgow and South Western Company were going to use these wagons, were bound when they handed them over to examine them in order to see that they were in a proper condition, and if they had examined them they would have seen that they were not in a proper condition; they were, therefore, handing over wagons which they had not so examined, and which were not in a proper condition for use by the Glasgow and South Western Company; and that was a duty which entitled any person in the employment of the Glasgow and South Western Company, who might be injured whilst they were being used by the Glasgow and South

Western Company, to sue the Caledonian Railway if there was a breach of it.

My Lords, I do not think any such duty has been established by the arguments of either of the learned counsel for the respondent. The Caledonian Company had performed all their obligations when they handed these wagons over; and I think it would be altogether unreasonable to maintain that there was a duty on the part of the Caledonian Company, after they had fulfilled their contract of carriage, to examine these wagons and see that the breaks connected with them were in a fit condition for a subsequent journey on which for their purposes the Glasgow and South Western Company were going to haul them into the premises of the Gas Commissioners. With that haulage the Caledonian Railway Company had nothing to do—their contract was at an end; it was a new journey along an entirely different railway, and with the incidents of that journey the Caledonian Railway Company were altogether unconnected.

Can it be said that, because they handed these wagons over under the circumstances I have mentioned to the Glasgow and South Western Railway Company, they became liable to any workman of the Glasgow and South Western Railway Company who might be injured whilst the Glasgow and South Western Railway Company were using them on what, for this purpose, I may call their line and their purposes, because they were not when they were handed over to the Glasgow and South Western Railway Company in a condition suitable for use on that journey? My Lords, it seems to me impossible to maintain that there was any such duty owed by the Caledonian Company, to persons in the employment of the Glasgow and South Western Company. I think, if we were to hold that such an obligation existed, some very strange consequences would ensue—consequences so unreasonable, it seems to me, as to show that the duty cannot exist.

Reliance was placed upon certain authorities to which your Lordships' attention was called, and particularly upon the case of *Heaven* v. *Pender* (11 Q. B. D. 503). That case really seems to me totally different. There some apparatus of a dock company was being used for what I may call dock purposes. It was part of the facilities which the dock afforded, just as they did their cranes, their warehouses, or any other appliances, to the vessels that came to use their docks. This particular appliance was in such a condition that a person going upon it, trusting, as he would have a right to trust, that he might go upon it safely because it would bear his weight, was led into what has been called a trap by which he sustained an injury. He was there upon the invitation of the dock company; and, although it is true that this staging was used for painting a ship, it was part of the appliances supplied by the dock company for purposes connected with the carrying on of their business. It was one of the facilities given by which they induced vessels to use their docks that they did supply these appliances. It was said that they had invited the plaintiff to come upon that staging, and that they were responsible if the man so invited was led into the trap by means of which he was injured. That was the case of *Heaven* v. *Pender, supra.*

Now, my Lords, I am quite unable to see that that case has any

application to the present case at all. This wagon, at the time it was being used, was being used on a new journey initiated by the Glasgow and South Western Company for their purposes, and there was nothing in it which can be said to be comparable to a trap created by or permitted to exist by the Caledonian Company into which they invited and led the deceased man to come. Therefore the case of *Heaven* v. *Pender, supra,* seems to me entirely without application to the present case; and, as I have said, I am quite unable to see any duty resting upon the Caledonian Company to the deceased man, a breach of which has caused the loss of his life, and consequently a right of action in the plaintiff.

My Lords, in the Court of Sessions there was a difference of opinion between the learned judges. The majority were of opinion that this statement, these condescendences, did shew that there was a case, and judgment was given accordingly by Lord Young, in which the Lord Justice Clerk concurred. Now, with all respect, I think the judgment of Lord Young is founded upon the supposition that it was enough if there might have been a contract under which the Caledonian Company were under some obligation during the haulage of these wagons, and that, there being an uncertainty whether there was such a contract or not, the case ought to go to trial to see whether there was such a contract, because he says it is absurd to suppose that they were led by favour and affection to let their wagons be used, and therefore they must have been used under some contract. That, I think, is what was in the learned judge's mind—it is only in that sense that I can interpret his language and appreciate the view he has taken. But I think it is for the plaintiff to make out a relevant case. If it rests upon a contract, though we may not know what has passed between the parties, and it may be a matter of speculation, still if a contract is necessary to a relevant case, then a contract must be alleged; and of course it may be that the plaintiff will not succeed in proving it. But in the present case I can find nothing alleged in the whole of this claim to shew that any responsibility rested upon the Caledonian Railway Company after they had delivered the goods at the station, or that they had anything to do, or any sort of connection, with the haulage which took place afterwards from the station to the works of the Gas Commissioners.

My Lords, for these reasons I think the judgment must be reversed. I may add that my noble and learned friend the Lord Chancellor (Lord Halsbury), who heard the whole of the argument of the leading counsel for the respondent, desires me to say that he takes entirely the same view.

I move your Lordships that the interlocutor appealed from be reversed, and the action as against the appellants dismissed.

LORD SHAND. My Lords, it appears from the pursuer's statement that the only part which the Caledonian Company took in reference to the use of these wagons was this: they, under a contract of carriage which they had entered into, carried the coal in their wagons from its place of departure (I do not know that it is very distinctly stated where that was) to its place of destination, and that place of destination was Dumfries. The moment the wagons arrived, hauled by the Caledonian Company, under that contract of carriage, at the

station at Dumfries, and were placed in the station of the Glasgow and South Western Company there, the Caledonian Company had done with their contract. It appears, however, that a separate arrangement was made for a subsequent journey. I call it a journey, although it was short in distance; it might have been for twenty or thirty miles, but it so happens that it was not so long, but was only a distance of 400 yards through the streets of Dumfries to the works of the Dumfries Gas Commissioners. But for this separate journey, as I call it, there was a separate undertaking between two different parties: I mean between the Dumfries Gas Commissioners, to whom the coals belonged and to whose premises they were carried, and the Glasgow and South Western Company. It was in the execution of that contract of carriage between the Gas Commissioners and the Glasgow and South Western Company that this unfortunate man, an employee of the Glasgow and South Western Company, met with the accident which led to the action. The only connection, as it appears to me, which the Caledonian Company had with this matter, after delivering the wagons at the station, was that they were the owners of the wagons. Beyond that I can see nothing which can be suggested to fix responsibility upon them.[1]

SECTION 3. By Lease and for Hire.

GLENN *v.* WINTERS.

Supreme Court of New York, 1896. 40 *N. Y. Supp.,* 659.

DALY, P. J. The plaintiff was injured by the overturning of a coach belonging to defendant, and driven by his employés, and hired by him to a social club for a day's excursion. The plaintiff, a minor, was invited by a member of the club to ride in the coach on the return journey. The questions to be determined by the justice on the evidence were whether the overturning of the coach was caused by its condition when it left the defendant's stable, or by overloading, and the disorderly conduct of the passengers. The finding of the justice was in favor of the plaintiff, on conflicting testimony as to the facts, and is sustained by competent proof. It was proved by two witnesses (Keane and Petty) that one or both hind wheels of the coach dragged before the coach started on the excursion in the morning, and that this was due to want of greasing of the axles. This testimony, if believed, afforded reasonable ground for inferring that ordinary care had not been exercised in preparing the vehicle

[1] *Accord: Kemp and Dougall* v. *Darngavil Coal Co.,* L. R. 1909 S. C. 1314, coal company contracting to deliver coal alongside ship, held not liable to servant of the stevedore who for his own convenience ran defective cars up a steep grade to the tilting cranes. Where a freight car is in use for the transportation of through freight under a contract which requires it to be carried by several connecting lines, the decisions differ as to whether a carrier turning over such freight to a connecting carrier owes to the servants of the latter a duty to inspect the car containing it and in which it is to be forwarded. See *Union Stockyards Co.* v. *C. B. & Q. R. R.,* 196 U. S. 217 (1904), *Moon* v. *R. R.,* 46 Minn. 106 (1891), and *Pa. R. R.* v. *Snyder,* 55 Ohio St. 342 (1896), hold that the duty exists, while *Glynn* v. *R. R.,* 175 Mass. 510 (1900), and *Mo., Kan. & T. R. R.* v. *Merrill,* 65 Kan. 436 (1902), reversing its former decision in the same case, 61 Kan. 671 (1900), deny its existence.

for the work before it left the defendant's stable.[1] * * * These witnesses, who were experts, testified that the dragging of one wheel would cause the upsetting of the coach. It was shown that, just before the accident, sparks were seen coming from the wheel.

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As the accident to the coach was not caused by the mismanagement of the drivers, no question as to whether they were or were not while driving for the club on this excursion, the servants of the club, and not of the defendant, can affect the right of plaintiff to recover. The injury sustained was due to the breach of defendant's duty to furnish a reasonably safe machine, in good order for the purpose for which it was hired. For this breach of duty the defendant is liable to a guest of the club, as well as to one of its members, and plaintiff was lawfully on the coach as a guest of a member. The coach was hired by a social club for an excursion, without any stipulation against inviting guests. There were women in the party, and it would be repugnant to reason to hold that for an injury to the wife, family or friend of a member, there could be no recovery against the owner of the coach under circumstances which would justify a recovery by the member. It might fairly be implied from the hiring of the coach for an excursion that there was an understanding on both sides that it was to be used, not only by members of the club, but by their guests; and the same duty was owing to one as to the other, namely, the exercise of reasonable care in providing a machine fit for the purpose for which it was hired. The defendant would not be liable to a stranger; that is, a person not connected with the club, or a member of the club, and not carrying out some right which the club or its members had in using the coach pursuant to the contract.[2] * * * A recovery for an injury sustained through the use of a defective machine let for a particular purpose must be confined, therefore, to the lessee, or a person connected with him, in carrying out some right which he had under the contract of hire. The distinction is alluded to in a late case where a landlord was sued for an injury to a child visiting a tenant, and who was injured through the landlord's neglect to repair a skylight which he might have been under an obligation to repair. As the visitor was not, when injured, upon a part of the premises where she had a right to go, which was a roof used for hanging out clothes, and was not at the time "connected with her [the tenant], *i. e.* carrying out some right which she herself had", a recovery was denied. *Miller* v. *Woodhead,* 104 N. Y. 471, 11 N. E. 57. In the present case the boy injured was a guest of a member of a social club which had hired the coach for an excursion, and was

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[1] The statement of the evidence, which the Court holds justified the Justice's finding that the overturning of the coach was due to its bad condition and not to the carelessness of the driver nor to overcrowding or misconduct of the club members and their guests, is omitted.

[2] A part of the opinion discussing *Winterbottom* v. *Wright,* 10 M. & W. 109 (1842) *post* p. 315; *Bank* v. *Ward,* 100 U. S. 195 (1879); *Losee* v. *Clute,* 51 N. Y. 494 (1873); *Daugherty* v. *Herzog,* 145 Ind. 255 (1896); *Curtin* v. *Somerset,* 140 Pa. 70 (1891); *Thomas* v. *Winchester,* 6 N. Y. 397 (1852) and *Loop* v. *Litchfield,* 42 N. Y. 351 (1870) is omitted.

using it as contemplated by the contract of hiring, and therefore carrying out some right which the club and its members had. Judgment affirmed with costs. All concur.[8]

WINTERBOTTOM *v.* WRIGHT.

In the Court of Exchequer, 1842. 10 *Meeson & Welsby*, 109.

CASE.—The declaration stated, that the defendant was a contractor for the supply of mail-coaches, and had in that character contracted for hire and reward with the Postmaster-General, to provide the mail-coach for the purpose of conveying the mail-bags from Hartford, in the county of Chester, to Holyhead: That the defendant, under and by virtue of the said contract, had agreed with the said Postmaster-General that the said mail-coach should, during the said contract, be kept in a fit, proper, safe, and secure state and condition for the said purpose, and took upon himself, to wit, under and by virtue of the said contract, the sole and exclusive duty, charge, care, and burden of the repairs, state, and condition of the said mail-coach; and it had become and was the sole and exclusive duty of the defendant, to wit, under and by virtue of his said contract, to keep and maintain the said mail-coach in a fit, proper, safe, and secure state and condition for the purpose aforesaid: That Nathaniel Atkinson and other persons, having notice of the said contract, were under contract with the Postmaster-General to convey the said mail-coach from Hartford to Holyhead, and to supply horses and coachmen for that purpose, and also not, on any pretence whatever, to use or employ any other coach or carriage whatever than such as should be so provided, directed, and appointed by the Postmaster-General: That the plaintiff, being a mail-coachman, and thereby obtaining his livelihood, and whilst the said several contracts were in force, having notice thereof, and trusting to and confiding in the contract made between the defendant and the Postmaster-General, and believing that the said coach was in a fit, safe, secure, and proper state and condition for the purpose aforesaid, and not knowing and having no means of knowing to the contrary thereof, hired himself to the said Nathaniel Atkinson and his co-contractors as mail-coachman, to drive and take the conduct of the said mail-coach, which but for the said contract of the defendant he would not have done. The declaration then averred, that the defendant

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[8] *Accord: Semble, Haigh* v. *Edelmeyer & Morgan Co.*, 107 N. Y. Supp. 936 (1908), it was the duty of one leasing a hod hoisting elevator "to furnish an elevator which was safe and suitable for the uses to which it was to be put," p. 939; *Davies* v. *Pelham Hod Co.*, 65 Hun, 573 (N. Y., 1892). A livery stable keeper letting horses and carriages for hire is bound to exercise the utmost diligence to see that the horses and carriages are safe for the hirer's use, *Hadley* v. *Cross*, 34 Vt. 586 (1861). In *Hyman* v. *Nye*, L. R. 6 Q. B. D. 685 (1881) it was held that a "job master" (livery stable keeper) is bound to take as much care as coach proprietors and railways and like them "is an insurer against all defects (in the vehicle let) which care and skill can guard against" and it is no defense to show that the defect could not have been discovered by an ordinarily careful inspection but see *Vogan* v. *Oulton*, 79 L. T. 384 (1898) and *Jones* v. *Page*, 15 L. T. N. S. 619 (1867).

so improperly and negligently conducted himself, and so utterly disregarded his aforesaid contract, and so wholly neglected and failed to perform his duty in this behalf, that heretofore, to wit, on the 8th of August, 1840, whilst the plaintiff, as such mail-coachman so hired, was driving the said mail-coach from Hartford to Holyhead, the same coach, being a mail-coach found and provided by the defendant under his said contract, and the defendant then acting under his said contract, and having the means of knowing and then well knowing all the aforesaid premises, the said mail-coach being then in a frail, weak, infirm, and dangerous state and condition, to wit, by and through certain latent defects in the state and condition thereof, and unsafe and unfit for the use and purpose aforesaid, and from no other cause, circumstance, matter, or thing whatsoever, gave way and broke down, whereby the plaintiff was thrown from his seat, and, in consequence of injuries then received, had become lamed for life.

To this declaration the defendant pleaded several pleas, to two of which there were demurrers; but as the Court gave no opinion as to their validity, it is not necessary to state them.

Peacock, who appeared in support of the demurrers, having argued against the sufficiency of the pleas,—

Byles, for the defendant, objected that the declaration was bad in substance.—This is an action brought, not against Atkinson and his co-contractors, who were the employers of the plaintiff, but against the person employed by the Postmaster-General, and totally unconnected with them or with the plaintiff. Now it is a general rule, that wherever a wrong arises merely out of the breach of a contract, which is the case on the face of this declaration, whether the form in which the action is conceived be ex contractu or ex delicto, the party who made the contract alone can sue: *Tollit* v. *Sherstone,* 5 M. & W. 283. If the rule were otherwise, and privity of contract were not requisite, there would be no limit to such actions. If the plaintiff may, as in this case, run through the length of three contracts, he may run through any number or series of them; and the most alarming consequences would follow the adoption of such a principle. For example, every one of the sufferers by such an accident as that which recently happened on the Versailles railway, might have his action against the manufacturer of the defective axle. So, if the chain-cable of an East Indiaman were to break, and the vessel went aground, every person affected, either in person or property, by the accident, might have an action against the manufacturer, and perhaps also against every seller also of the iron.

Peacock, contra.—This case is within the principle of the decision in *Levy* v. *Langridge.* Here the defendant entered into a contract with a public officer to supply an article which, if imperfectly constructed, was necessarily dangerous, and which, from its nature and the use for which it was destined, was necessarily to be driven by a coachman. That is sufficient to bring the case within the rule established by *Levy* v. *Langridge.* In that case the contract made by the father of the plaintiff with the defendant was made on behalf of himself and his family generally, and there was nothing to show that the defendant was aware even of the existence of the particular son

who was injured. Suppose a party made a contract with government for a supply of muskets, one of which, from its misconstruction, burst and injured a soldier: there it is clear that the use of the weapon *by a soldier* would have been contemplated, although not by the particular individual who received the injury, and could it be said, since the decision in *Levy* v. *Langridge,* that he could not maintain an action against the contractor? So, if a coachmaker, employed to put on the wheels of a carriage, did it so negligently that one of them flew off, and a child of the owner were thereby injured, the damage being the natural and immediate consequence of his negligence, he would surely be responsible. So, if a party entered into a contract to repair a church, a workhouse, or other public building, and did it so insufficiently that a person attending the former, or a pauper in the latter, were injured by the falling of a stone, he could not maintain an action against any other person than the contractor; but against him he must surely have a remedy. It is like the case of a contractor who negligently leaves open a sewer, whereby a person passing along the street is injured. It is clear that no action could be maintained against the Postmaster-General: *Hall* v. *Smith,* 2 Bing. 156; *Humphreys* v. *Mears,* 1 Man. & R. 187; *Priestly* v. *Fowler.* But here the declaration alleges the accident to have happened through the defendant's negligence and want of care. The plaintiff had no opportunity of seeing that the carriage was sound and secure. [*Alderson,* B.—The decision in *Levy* v. *Langridge* proceeds upon the ground of the knowledge and fraud of the defendant.] Here also there was fraud: the defendant represented the coach to be in a proper state for use, and whether he represented that which was false within his knowledge, or a fact as true which he did not know to be so, it was equally a fraud in point of law, for which he is responsible.

Lord Abinger, C. B.—I am clearly of opinion that the defendant is entitled to our judgment. We ought not to permit a doubt to rest upon this subject, for our doing so might be the means of letting in upon us an infinity of actions. This is an action of the first impression, and it has been brought in spite of the precautions which were taken, in the judgment of this Court in the case of *Levy* v. *Langridge,* to obviate any notion that such an action could be maintained. We ought not to attempt to extend the principle of that decision, which, although it has been cited in support of this action, wholly fails as an authority in its favour; for there the gun was bought for the use of the son, the plaintiff in that action, who could not make the bargain himself, but was really and substantially the party contracting. Here the action is brought simply because the defendant was a contractor with a third person; and it is contended that thereupon he became liable to every body who might use the carriage. If there had been any ground for such an action, there certainly would have been some precedent of it; but with the exception of actions against innkeepers, and some few other persons, no case of a similar nature has occurred in practice. That is a strong circumstance, and is of itself a great authority against its maintenance. It is however contended, that this contract being made on the behalf of the public by the Postmaster-General, no action could

be maintained against him, and therefore the plaintiff must have a remedy against the defendant. But that is by no means a necessary consequence—he may be remediless altogether. There is no privity of contract between these parties; and if the plaintiff can sue, every passenger, or even any person passing along the road, who was injured by the upsetting of the coach, might bring a similar action. Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue. Where a party becomes responsible to the public, by undertaking a public duty, he is liable, though the injury may have arisen from the negligence of his servant or agent. So in cases of public nuisances, whether the act was done by the party as a servant, or in any other capacity, you are liable to an action at the suit of any person who suffers. Those, however, are cases where the real ground of the liability is the public duty, or the commission of the public nuisance. There is also a class of cases in which the law permits a contract to be turned into a tort; but unless there has been some public duty undertaken, or public nuisance committed, they are all cases in which an action might have been maintained upon the contract. Thus, a carrier may be sued either in assumpsit or case; but there is no instance in which a party, who was not privy to the contract entered into with him, can maintain any such action. The plaintiff in this case could not have brought an action on the contract; if he could have done so, what would have been his situation, supposing the Postmaster-General had released the defendant? that would, at all events, have defeated his claim altogether. By permitting this action, we should be working this injustice, that after the defendant had done every thing to the satisfaction of his employer, and after all matters between them had been adjusted, and all accounts settled on the footing of their contract, we should subject them to be ripped open by this action of tort being brought against him.

ALDERSON, B.—I am of the same opinion. The contract in this case was made with the Postmaster-General alone; and the case is just the same as if he had come to the defendant and ordered a carriage, and handed it at once over to Atkinson. If we were to hold that the plaintiff could sue in such a case, there is no point at which such actions would stop. The only safe rule is to confine the right to recover to those who enter into the contract: if we go one step beyond that, there is no reason why we should not go fifty. The only real argument in favour of the action is, that this is a case of hardship; but that might have been obviated, if the plaintiff had made himself a party to the contract. Then it is urged that it falls within the principle of the case of *Levy* v. *Langridge*. But the principle of that case was simply this, that the father having bought the gun for the very purpose of being used by the plaintiff, the defendant made representations by which he was induced to use it. There, a distinct fraud was committed on the plaintiff; the falsehood of the representation was also alleged to have been within the knowledge of the defendant who made it, and he was properly held liable for the consequences. How are the facts of that case applicable to those of the present? Where is the allegation of misrepresentation or fraud

in this declaration? It shows nothing of the kind. Our judgment must therefore be for the defendant.

GURNEY, B., concurred.

ROLFE, B.—The breach of the defendant's duty, stated in this declaration, is his omission to keep the carriage in a safe condition; and when we examine the mode in which that duty is alleged to have arisen, we find a statement that the defendant took upon himself, to wit, under and by virtue of the said contract, the sole and exclusive duty, charge, care, and burden of the repairs, state, and condition of the said mail-coach, and, during all the time aforesaid, it had become and was the sole and exclusive duty of the defendant, to wit, under and by virtue of his said contract, to keep and maintain the said mail-coach in a fit, proper, safe, and secure state and condition. The duty, therefore, is shown to have arisen solely from the contract; and the fallacy consists in the use of that word "duty". If a duty to the Postmaster-General be meant, that is true; but if a duty to the plaintiff be intended, and in that sense the word is evidently used, there was none. This is one of those unfortunate cases in which there certainly has been damnum, but it is damnum absque injuriâ; it is, no doubt, a hardship upon the plaintiff to be without a remedy, but, by that consideration we ought not to be influenced. Hard cases, it has been frequently observed, are apt to introduce bad law.

Judgment for the defendant.[1]

SECTION 4. By Sale.

LONGMEID *v.* HOLLIDAY.

In the Court of Exchequer, 1851. 6 *Exchequer,* 761.

At the trial, before MARTIN, B., at the Middlesex Sittings in last Michaelmas Term, it appeared that the defendant, who kept a shop in London for the sale of lamps (but who was not himself a manufacturer), sold a lamp, called "Holliday's Patent Lamp," to the plaintiff's wife, for the purpose of being used by him and his wife.[1]

[1] *Accord: Earl* v. *Lubbock,* 91 L. T. R. 73; *ibid* 830; L. R. 1905, 1 K. B. 253, the defendant being under contract with the plaintiff's employer to repair his vans, took for repair a van with a twisted axle, he did not repair the axle but did some minor repairs in the course of which he placed a piece of zinc over the hub; while the plaintiff was driving the van a wheel came off and plaintiff was seriously injured—held that a non suit was properly directed. Compare *Haigh* v. *Co.,* 107 N. Y. Supp. 936 (1908), p. 939.

Where the defendant makes a contract to have work done for him by an independent contractor with his, the owner's apparatus, which he, the owner, agrees to keep in repair, he is liable to a servant of such contractor injured by reason of a failure to repair. *Toomey* v. *Donovan,* 158 Mass. 232 (1893); *King* v. *R. R.,* 66 N. Y. 181 (1876), *semble.*

[1] The declaration was in every respect like that in an action of deceit upon a *Warrantizando vendedit.* It alleged that the male plaintiff (the vendee) had, by a false warranty that the lamp was fit and proper to be lighted, been induced to purchase the lamp and that the female plaintiff, wife of the vendee, had, knowing and confiding in the said warranty, lighted the lamp when it exploded and the naptha therein burned her.

There was evidence that the lamp was defectively constructed, but no proof that the defendant (who did not personally construct it himself, but had it put together by others in parts purchased from third parties) knew of the defect; and the jury found that he was not guilty of any fraudulent or deceitful representation, but sold the lamp in good faith. In using the lamp with naphtha it exploded, and the plaintiff's wife met with considerable personal injury, for which the two plaintiffs brought this action, the plaintiff Frederick Longmeid having previously recovered damages in another action for the defendant's breach of implied warranty of sale. The jury found all the facts for the plaintiffs, except the allegation of fraud, they being not satisfied that the defendant knew of the defects. The defendant's counsel thereupon objected, that, as fraud was not proved, the action would not lie. The learned Judge inclined to that opinion, but declined to stop the case, and directed a verdict to be entered for the plaintiffs, reserving to the defendant liberty to move to enter the verdict for him, or for a nonsuit.

PARKE, B.—(His Lordship stated the pleadings and facts as above set forth, and proceeded)—The case was fully argued before my Lord Chief Baron, my brother MARTIN, and myself, and we took time to consider. The result of that consideration has been, that we think the rule ought to be made absolute.

There is no doubt, that if the defendant had been guilty of a fraudulent representation that the lamp was fit and proper to be used, knowing that it was not, and intending it to be used by the plaintiff's wife or any particular individual, the wife (joining her husband for conformity) or that individual would have had an action for the deceit, upon the principle on which all actions for deceitful representation are founded, and which was strongly illustrated in the case of Langridge *v.* Levy, 2 M. & W. 519, in error, 4 M. & W. 337, viz., that if any one knowingly tells a falsehood, with intent to induce another to do an act which results in his loss, he is liable to that person in an action for deceit. But the fraud being negatived in this case, the action cannot be maintained on that ground by the party who sustained damage.

There are other cases, no doubt, besides those of fraud, in which a third person, though not a party to the contract, may sue for the damage sustained, if it be broken. These cases occur where there has been a wrong done to that person, for which he would have had a right of action, though no such contract had been made.[2] As for

[2] One not party to a contract can acquire no rights under it. So a plaintiff can not show a contract between third persons as creative of legal rights in him or of duty toward him. But such contracts often establish the status of plaintiff or defendant (as a deed or lease) or show that a landlord has retained the control of a part of the demised premises and so is bound to repair such part (*McKenzie* v. *Cheetham, ante n.* 2) or has covenanted to do the repairs (*Cheetham* v. *Hampson, ante n.* 1) or that a division fence is repairable by one of the adjoining owners (*Quinn* v. *Crimmings,* 171 Mass., 255.) So, in *Coughtry* v. *Globe Co.,* 56 N. Y. 124 (1874), a contract by which the defendant agreed to furnish such stagings as might be necessary without expense to the contractor, the plaintiff's employer, was held to operate "to preclude the defendant setting up that the defective structure was not its own but that of the contractor," and so, in *Gross* v.

example, if an apothecary administered improper medicines to his patient, or a surgeon unskilfully treated him, and thereby injured his health, he would be liable to the patient, even where the father or friend of the patient may have been the contracting party with the apothecary or surgeon; for though no such contract had been made,[3] the apothecary, if he gave improper medicines, or the surgeon, if he took him as a patient and unskilfully treated him, would be liable to an action for a misfeasance: Pippin *v.* Sheppard, 11 Price, 40, Gladwell *v.* Steggall, 8 Scott, 60, 5 Bing. N. C. 733. A stage-coach proprietor, who may have contracted with a master to carry his servant, if he is guilty of neglect, and the servant sustains personal damage, is liable to him; for it is a misfeasance towards him, if, after taking him as a passenger, the proprietor or his servant drives without due care, as it is a misfeasance towards any one travelling on the road. So, if a mason contract to erect a bridge or other work in a public road, which he constructs, but not according to the contract, and the defects of which are a nuisance to the highway, he may be responsible for it to a third person, who is injured by the defective construction,[4] and he cannot be saved from the consequences of his illegal act, in committing the nuisance on the highway, by showing that he was also guilty of a breach of contract, and responsible for it.[5] And it may be

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Carnegie Co., 45 Pittsb. L. J., 318 (1896), it was held that the defendant, who had agreed to furnish its subcontractor with iron made in a certain manner, "should know that the latter would naturally put his men to work on the assumption that the defendant had manufactured the iron with as much care with respect to strength, at least, as the contract called for," per *McClung, J.;* but see *Osten* v. *Morris, Tasker Co.*, 17 Phila., 219 (1885), the contract by which an iron cylinder was sold for use as a gas receiver, was held no evidence that such use was one contemplated by the maker, *cf. George* v. *Skivington, post.*

As to the vendees right, as between himself and his vendor, to rely on the latter's warranty—and to put the article to immediate use without inspection, see *Mowbray* v. *Merryweather*, L. R. 1895, 2 Q. B. 640, and *Boston Woven Hose Co.* v. *Kendall*, 178 Mass. 232 (1901). "The very purpose of the warranty was that the boiler should be used in the (vendee's) works with reliance upon the (vendor's) judgment in a matter as to which the (vendors) were experts and the (vendee) presumably was not," Holmes, C. J., p. 237.

[3] It is highly doubtful whether a surgeon was bound to more than the exercise of good faith, unless he had undertaken the cure for a reward. See Y. B. 19 Henry, VI, pl. 5, *ante* p. 141 and n. 1 thereto, but it was immaterial by whom it was paid. See note 1 to *Marshall* v. *York, etc Co., ante* p. 146.

[4] *Contra: Mayor of Albany* v. *Cunliff*, 2 N. Y. 165 (1849), per Bronson, J., p. 174, and Strong, J., p. 180, *semble,* and see *Daugherty* v. *Herzog*, 145 Ind. 255 (1896), where a contractor was held to be released, by turning over the premises to his employer, from all liability for so badly altering a building that its front wall fell into the street—and *Congregation* v. *Smith*, 163 Pa. 561 (1894), independent contractor, building a sewer so badly that it burst and flooded adjacent property, not liable after the city had with knowledge or means of knowledge of the condition of the sewer accepted it and put it into use.

[5] This applies wherever the plaintiff is injured by any act of the defendant which, while done under a contract with a third party, is intended to injure, or is such as to threaten probable injury to, the plaintiff's person or property—which in a word constitutes a breach of the duty which every man owes to every other, "not to injure (that other's person or property) by any

the same when any one delivers to another without notice an instrument in its nature dangerous, or under particular circumstances, as a loaded gun which he himself loaded, and that other person to whom it is delivered is injured thereby, or if he places it in a situation easily accessible to a third person, who sustains damage from it. A very strong case to that effect is Dixon *v.* Bell, 5 M. & Selw. 198. But it would be going much too far to say, that so much care is required in the ordinary intercourse of life between one individual and another, that, if a machine not in its nature dangerous,—a carriage for instance,—but which might become so by a latent defect entirely unknown, although discoverable by the exercise of ordinary care, should be lent or given by one person, even by the person who manufactured it, to another, the former should be answerable to the latter for a subsequent damage accruing by the use of it. Could it be contended with justice in the present case, that if the lamp had been lent or given by the defendant to the plaintiff's wife, and used by her, he would have been answerable for the personal damage which she sustained, the defendant not knowing or having any reason to believe it was not perfectly safe, although liable to the party to whom he contracted to sell it, upon an implied warranty that it was fit for use, so far as reasonable care could make it, for the breach of that contract as to all damage sustained by him?

We are of opinion, therefore, that if there had been in this case a breach of contract with the plaintiffs, the husband might have sued for it; but there being no misfeasance towards the wife independently of the contract, she cannot sue and join herself with her husband. Therefore a nonsuit must be entered.

Rule absolute.

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wrongful or negligent act". *Bickford* v. *Richards*, 154 Mass. 163 (1891), a sub-contractor for the moving of plaintiff's house held liable for injuries sustained by it because of the unworkmanlike manner in which he did the work; *Lechman* v. *Hooper*, 52 N. J. L. 253 (1890), a wall, negligently built by a sub-contractor, fell upon a servant employed by another sub-contractor; *Hayn, et al.* v. *Culliford*, L. R. 4 C. P. D. 182 (1879) *ante*, p. 145; *Dalyell* v. *Tyrer*, E. B. & E. 899 (1858), owner of a tug, hired for a day by ferryman to carry the latter's passengers, liable for injury to one of them due to careless acts of the crew; *Smith* v. *Seward*, 3 Pa. 342 (1846). The distinction between nonfeasance and active misconduct by one doing work under contract with a third party is lost sight of in *Cobb* v. *Clark Co.*, 118 Ga. 483 (1903), where it is held that a contractor employed by the plaintiff's neighbors to remove the party wall between their premises was not liable not only for the loss caused by their contractor's failure to erect a sufficient temporary wall, but also for injuries to the plaintiff's fixtures, which they had to remove to do the work, caused by the careless manner in which his servants handled them in so doing.

CHAPTER IV.

Liability of Manufacturers of Chattels to Persons Not in Privity of Contract with Them.

HUSET *v.* CASE THRESHING MACHINE COMPANY.

Circuit Court of Appeals of the United States, 1903. 120 *Fed.* 865.

SANBORN, Circuit Judge, delivered the opinion of the court.

Is a manufacturer or vendor of an article or machine which he knows, when he sells it, to be imminently dangerous, by reason of a concealed defect therein, to the life and limbs of any one who shall use it for the purpose for which it was made and intended, liable to a stranger to the contract of sale for an injury which he sustains from the concealed defect while he is lawfully applying the article or machine to its intended use?

The argument of this question has traversed the whole field in which the liability of contractors, manufacturers, and vendors to strangers to their contracts for negligence in the construction or sale of their articles has been contested. The decisions which have been cited are not entirely harmonious, and it is impossible to reconcile all of them with any established rule of law. And yet the underlying principle of the law of negligence, that it is the duty of every one to so act himself and to so use his property as to do no unnecessary damage to his neighbors, leads us fairly through the maze. With this fundamental principle in mind, if we contemplate the familiar rules that every one is liable for the natural and probable effects of his acts; that negligence is a breach of a duty; that an injury that is the natural and probable consequence of an act of negligence is actionable, while one that could not have been foreseen or reasonably anticipated as the probable effect of such an act is not actionable, because the act of negligence in such a case is the remote, and not the proximate, cause of the injury; and that, for the same reason, an injury is not actionable which would not have resulted from an act of negligence except from the interposition of an independent cause (*Chicago, St. Paul, Minneapolis & Omaha R. Co.* v. *Elliott,* 55 Fed. 949)—nearly all the decisions upon this subject range themselves along symmetrical lines, and establish rational rules of the law of negligence consistent with the basic principles upon which it rests.

Actions for negligence are for breaches of duty. Actions on contracts are for breaches of agreements. Hence the limits of liability for negligence are not the limits of liability for breaches of contracts, and actions for negligence often accrue where actions upon contracts do not arise, and vice versa. It is a rational and fair deduction from the rules to which brief reference has been made that one who makes or sells a machine, a building, a tool, or an article of merchandise designed and fitted for a specific use is liable to a person who, in the natural course of events, uses it for the purpose for which it was made or sold, for an injury which is the

natural and probable consequence of the negligence of the manufacturer or vendor in its construction or sale. But when a contractor builds a house or bridge, or a manufacturer constructs a car or a carriage, for the owner thereof, under a special contract with him, an injury to any other person than the owner for whom the article is built and to whom it is delivered cannot ordinarily be foreseen or reasonably anticipated as the probable result of the negligence in its construction. So, when a manufacturer sells articles to the wholesale or retail dealers, or to those who are to use them, injury to third persons is not generally the natural or probable effect of negligence in their manufacture, because (1) such a result cannot ordinarily be reasonably anticipated, and because (2) an independent cause—the responsible human agency of the purchaser—without which the injury to the third person would not occur, intervenes, and, as Wharton says, "insulates" the negligence of the manufacturer from the injury to the third person. Wharton on Law of Negligence (2d Ed.) § 134. For the reason that in the cases of the character which have been mentioned the natural and probable effect of the negligence of the contractor or manufacturer will generally be limited to the party for whom the article is constructed, or to whom it is sold, and, perhaps more than all this, for the reason that a wise and conservative public policy has impressed the courts with the view that there must be a fixed and definite limitation to the liability of manufacturers and vendors for negligence in the construction and sale of complicated machines and structures which are to be operated or used by the intelligent and the ignorant, the skillful and the incompetent, the watchful and the careless, parties that cannot be known to the manufacturers or vendors, and who use the articles all over the country hundreds of miles distant from the place of their manufacture or original sale, a general rule has been adopted and has become established by repeated decisions of the courts of England and of this country that in these cases the liability of the contractor or manufacturer for negligence in the construction or sale of the articles which he makes or vends is limited to the persons to whom he is liable under his contracts of construction or sale. The limits of the liability for negligence and for breaches of contract in cases of this character are held to be identical. The general rule is that a contractor, manufacturer, or vendor is not liable to third parties who have no contractual relations with him for negligence in the construction, manufacture, or sale of the articles he handles.[1]

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[1] "*Winterbottom* v. *Wright*, 10 M. & W. 109; *Longmeid* v. *Holliday*, 6 Exch. 764, 765; *Blackmore* v. *Ry. Co.*, 8 El. & Bl. 1035; *Collis* v. *Selden*, L. R. 3 C. P. 495, 497; *Bank* v. *Ward*, 100 U. S. 195, 204; *Bragdon* v. *Perkins-Campbell Co.*, 87 Fed. 109; *Goodlander* v. *Standard Oil Co.*, 63 Fed. 400, 406; *Loop* v. *Litchfield*, 42 N. Y. 351, 359; *Losee* v. *Clute*, 51 N. Y. 494; *Curtain* v. *Somerset*, 140 Pa. 70; *Heiser* v. *Kingsland & Douglass Mfg. Co.*, 110 Mo. 605, 615, 617; *Daugherty* v. *Herzog*, 145 Ind. 255; *Burke* v. *DeCastro*, 11 Hun 354; *Swan* v. *Jackson*, 55 Hun 194; *Barrett* v. *Mfg. Co.*, 31 N. Y. Super. Ct. 545; *Carter* v. *Harden*, 78 Me. 528; *McCaffrey* v. *Mfg. Co.* (R. I.) 50 Atl. 651; *Marvin* v. *Ward*, 46 N. J. Law 19; *Burdick* v. *Cheadle*, 26 Ohio St.

In these cases third parties, without any fault on their part, were injured by the negligence of the manufacturer, vendor, or furnisher of the following articles, while the parties thus injured were innocently using them for the purposes for which they were made or furnished, and the courts held that there could be no recovery, because the makers, vendors, or furnishers owed no duty to strangers to their contracts of construction, sale, or furnishing.[2]

In the leading case of *Winterbottom* v. *Wright* this rule is placed upon the ground of public policy, upon the ground that there would be no end of litigation if contractors and manufacturers were to be held liable to third persons for every act of negligence in the construction of the articles or machines they make after the parties to whom they have sold them have received and accepted them. In that case the defendant had made a contract with the Postmaster General to provide and keep in repair the stagecoach used to convey the mail from Hartford to Holyhead. The coach broke down, overturned, and injured the driver, who sued the contractor for injury resulting from his negligence. LORD ABINGER, C. B., said:

"There is no privity of contract between these parties; and, if the plantiff can sue, every passenger, or even any person passing

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393; *Davidson* v. *Nichols*, 11 Allen 514; *J. I. Case Plow Works* v. *Niles & Scott Co.* (Wis.) 63 N. W. 1013."

See also *Fish* v. *Kirlin-Gray Elec. Co.*, 18 S. Dak. 122 (1904), *semble*, and *Slattery* v. *Colgate*, 55 Atl. 639 (R. I., 1903).

[2] "A stagecoach, *Winterbottom* v. *Wright*, 10 M. & W. 109; a leaky lamp, *Longmeid* v. *Holliday*, 6 Exch. 764, 765; a defective chain furnished one to lead stone, *Blakemore* v. *Ry. Co.*, 8 El. & Bl. 1035; an improperly hung chandelier, *Collis* v. *Selden*, L. R. 3 C. P. 495, 497; an attorney's certificate of title, *Bank* v. *Ward*, 100 U. S. 195, 204; a defective valve in an oil car, *Goodlander* v. *Standard Oil Co.*, 63 Fed. 401, 406; a porch on a hotel, *Curtain* v. *Somerset*, 140 Pa. 70; a defective side saddle, *Bragdon* v. *Perkins-Campbell Co.*, 87 Fed. 109; a defective rim in a balance wheel, *Loop* v. *Litchfield*, 42 N. Y. 351, 359; a defective boiler, *Losee* v. *Clute*, 51 N. Y. 494; a defective cylinder in a threshing machine, *Heizer* v. *Kingsland & Douglass Mfg.*, 110 Mo. 605, 615; a defective wall which fell on a pedestrian, *Daugherty* v. *Herzog*, 145 Ind. 255; a defective rope on a derrick, *Burke* v. *Refining Co.*, 11 Hun 354; a defective shelf for a workman to stand upon in placing ice in a box, *Swan* v. *Jackson*, 55 Hun 194; a defective hoisting rope of an elevator, *Barrett* v. *Mfg. Co.*, 31 N. Y. Super. Ct. 545; a runaway horse, *Carter* v. *Harden*, 78 Me. 528; a defective hook holding a weight in a drop press, *McCaffrey* v. *Mfg. Co.* (R. I. 50 Atl. 651; a defective bridge, *Marvin Safe Co.* v. *Ward*, 46 N. J. Law 19; shelves in a dry goods store, whose fall injured a customer, *Burdick* v. *Cheadle*, 26 Ohio St. 393; a staging erected by a contractor for the use of his employés, *McGuire* v. *McGee* (Pa.) 13 Atl. 551; defective wheels, *J. I. Case Plow Works* v. *Niles & Scott Co.* (Wis.) 63 N. W. 1013."

It may be noted that in *Blakemore* v. *Ry.* the plaintiff was not allowed to recover because the defendant, who had loaned to a third party a crane which he knew was defective, had no reason to expect the plaintiff to use it; in *Carter* v. *Harden*, a vendor who had sold a horse, falsely representing it as sound, was held not liable for injury to vendee's wife caused by its running away while she was driving it; in *Marvin* v. *Ward*, the injury resulted from a bridge, which the defendant had built according to the precise terms of his contract, being put to a use for which, as planned, it was unfit; in *Maguire* v. *Magee*, the plaintiff without invitation, or even permission, used a temporary scaffolding put up by defendant's workmen for their own use, and that *Case Co.* v. *Niles & Scott* was a suit by the vendee against the vendor who was also the maker.

along the road, who was injured by the upsetting of the coach, might bring a similar action. Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue."

BARON ALDERSON said:

"I am of the same opinion. The contract in this case was made with the Postmaster General alone; and the case is just the same as if he had come to the defendant and ordered a carriage, and handed it at once over to Atkinson. If we were to hold that the plaintiff could sue in such a case, there is no point at which such actions would stop. The only safe rule is to confine the right to recover to those who enter into the contract. If we go one step beyond that, there is no reason why we should not go fifty."

The views expressed by the judges in this case have prevailed in England and in the United States, with the exception of two decisions which are in conflict with the leading case and with all the decisions to which reference has been made. Those cases are *Devlin* v. *Smith*, 89 N. Y. 470, in which Smith, a painter, employed Stevenson, a contractor, to build a scaffold 90 feet in height, for the express purpose of enabling the painter's workmen to stand upon it to paint the interior of the dome of a building, and the Court of Appeals of New York held that Stevenson was liable to a workman of Smith, the painter, who was injured by a fall, caused by the negligence of Stevenson in the construction of the scaffold upon which he was working; and *Schubert* v. *J. R. Clark Co.*, 49 Minn. 331, in which a painter purchased of a manufacturer a stepladder, and one of the painter's enployés, who was injured by the breaking of a step caused by the negligence of the manufacturer, was permitted to recover of the latter for the injuries he had sustained.[8]

It is, perhaps, more remarkable that the current of decisions throughout all the courts of England and the United States should be so uniform and conclusive in support of this rule, and that there should, in the multitude of opinions, be but one or two in conflict with it, than it is that such sporadic cases should be found. They are insufficient in themselves, or in the reasoning they contain, to overthrow or shake the established rule which prevails throughout the English speaking nations.

But while this general rule is both established and settled, there are, as is usually the case, exceptions to it as well defined and settled as the rule itself. There are three exceptions to this rule.

The first is that an act of negligence of a manufacturer or vendor which is eminently dangerous to the life or health of mankind, and

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[8] "The decision in *Devlin* v. *Smith* may perhaps, be sustained on the ground that the workmen of Smith were the real parties in interest in the contract, since Stevenson was employed and expressly agreed to construct the scaffold for their use. But the case of *Schubert* v. *J. R. Clarke Co.* is in direct conflict with the side saddle case, *Bragdon* v. *Perkins-Campbell Co.*, 87 Fed. 109; the porch case, *Curtain* v. *Somerset*, 140 Pa. 70; the defective cylinder case, *Heizer* v. *Kingsland & Douglass Mfg. Co.*, 110 Mo. 617; the defective hook case, *McCaffrey* v. *Mfg. Co.*, 23 R. I. 381; and with the general rule upon which all these cases stand."

which is committed in the preparation or sale of an article intended to preserve, destroy, or affect human life, is actionable by third parties who suffer from the negligence.[4] The leading case upon this subject is *Thomas* v. *Winchester*, 6 N. Y. 397, 57 Am. Dec. 455. A dealer in drugs sold to a druggist a jar of belladona, a deadly poison, and labeled it "Extract of Dandelion". The druggist filled a prescription of extract of dandelion, prepared by a physician for his patient. The patient took the prescription thus filled, and recovered of the wholesale dealer for the injuries she sustained. In *Norton* v. *Sewall*, 106 Mass. 143, 8 Am. Rep. 298, a recovery was had by a third party for the sale of laudanum as rhubarb; in *Bishop* v. *Weber*, for the furnishing of poisonous food for wholesome food; in *Peters* v. *Johnston*, for the sale of saltpetre for epsom salts; and in *Dixon* v. *Bell*, for placing a loaded gun in the hands of a child. In all these cases of sale the natural and probable result of the act of negligence—nay, the inevitable result of it—was not an injury to the party to whom the sales were made, but to those who, after purchasers had disposed of the articles, should consume them. Hence these cases stand upon two well-established principles of law: (1) That every one is bound to avoid acts or omissions imminently dangerous to the lives of others, and (2) that an injury which is the natural and probable result of an act of negligence is actionable. It was the natural and probable result of the negligence in these cases that the vendees would not suffer, but that those who subsequently purchased the deleterious articles would sustain the injuries resulting from the negligence of the manufacturers or dealers who furnished them.

The second exception is that an owner's act of negligence which causes injury to one who is invited by him to use his defective appliance upon the owner's premises may form the basis of an action against the owner.[5]

The third exception to the rule is that one who sells or delivers an article which he knows to be imminently dangerous to life or limb to another without notice of its qualities is liable to any person who suffers an injury therefrom which might have been reasonably anticipated, whether there were any contractual relations between the parties or not.[6]

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Turning now to the case in hand, it is no longer difficult to dispose of it. The allegations of the complaint are that the defendant prepared a covering for the cylinder of the threshing machine, which was customarily and necessarily used by those who operated it to walk upon, and which was so incapable of sustaining the least weight that it would bend and collapse whenever any one stepped upon it; that

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[4] "*Dixon* v. *Bell*, 5 Maule & Sel. 198; *Thomas* v. *Winchester*, 6 N. Y. 397; *Norton* v. *Sewall*, 106 Mass. 143; *Elkins* v. *McKean*, 79 Pa. 493, 502; *Bishop* v. *Weber*, 139 Mass. 411; *Peters* v. *Johnson* (W. Va.) 41 S. E. 190, 191."

[5] "*Coughtry* v. *Globe Woolen Co.*, 56 N. Y. 124; *Bright* v. *Barnett & Record Co.* (Wis.) 60 N. W. 418, 420; *Heaven* v. *Pender*, L. R. 11 Q. B. Div. 503; *Roddy* v. *Railway Co.*, 104 Mo. 234, 241."

[6] "*Langridge* v. *Levy*, 2 M. & W. 519; *Wellington* v. *Oil Co.*, 104 Mass. 64, 67; *Lewis* v. *Terry* (Cal.) 43 Pac. 398."

it concealed this defective and dangerous condition of the threshing rig so that it could not be readily discovered by persons engaged in operating or working upon it; that it knew that the machine was in this imminently dangerous condition when it shipped and supplied it to the employer of the plaintiff; and that the plaintiff has sustained serious injury through this defect in its construction. The case falls fairly within the third exception. It portrays a negligence imminently dangerous to the lives and limbs of those who should use the machine, a machine imminently dangerous to the lives and limbs of all who should undertake to operate it, a concealment of this dangerous condition, a knowledge of the defendant when it was shipped and supplied to the employer of the plaintiff that the rig was imminently dangerous to all who should use it for the purpose for which it was made and sold, and consequent damage to the plaintiff. It falls directly within the rule stated by Mr. Justice Gray that when one delivers an article, which he knows to be dangerous to another person, without notice of its nature and qualities, he is liable for an injury which may be reasonably contemplated as likely to result, and which does in fact result therefrom, to that person or to any other who is not himself in fault. The natural, probable, and inevitable result of the negligence portrayed by this complaint in delivering this machine when it was known to be in a condition so imminently dangerous to the lives and limbs of those who should undertake to use it for the purpose for which it was constructed was the death, or loss of one or more of the limbs, of some of the operators. It is perhaps improbable that the defendant was possessed of the knowledge of the imminently dangerous character of this threshing machine when it delivered it, and that upon the trial of the case it will be found to fall under the general rule which has been announced in an earlier part of this opinion. But upon the facts alleged in this complaint, the act of delivering it to the purchaser with a knowledge and a concealment of its dangerous condition was so flagrant a disregard of the rule that one is bound to avoid any act imminently dangerous to the lives and health of his fellows that it forms the basis of a good cause of action in favor of any one who sustained injury threfrom.

The judgment of the Circuit Court must be reversed, and the cause must be remanded to the court below for further proceedings not inconsistent with the views expressed in this opinion.[1]

SCHUBERT *v.* CLARK CO.

Supreme Court of Minnesota, 1892. 49 *Minnesota* 331.

DICKINSON, J. The sufficiency of the complaint as showing a right to recover against the defendant is here for decision. The facts of the case, as shown by the complaint, may be thus stated:

The plaintiff, a house painter, was in the employ of one Phelps. He was engaged in the work of painting the interior of a certain building. His employer, Phelps, as a purchaser, ordered from a retail merchant a new ten-foot stepladder, directing that it be delivered

[1] See 44 Am. L. Reg. N. S. 349-370.

to the plaintiff at the place where he was at work. The merchant, not having such a ladder in his stock of goods, ordered the defendant corporation to deliver such a stepladder to the plaintiff for his use. The defendant delivered a ladder to the plaintiff pursuant to that order. This we construe to have been a purchase by the merchant from the defendant. The defendant was a manufacturer of such goods, and the ladder so delivered had "theretofore" been manufactured by it, "to be sold for the purpose of being used. * * *" It was made of poor, crossgrained, and decayed lumber, and "was so insufficient in strength as to be dangerous to the life and limb of this plaintiff and whoever might use the same." It is alleged that the defendant knew, or ought to have known, such defects and insufficiency. Neither the plaintiff nor his employer nor the merchant from whom the latter ordered the ladder knew such defects, and it was so varnished, oiled, and painted that they could not discover them. The plaintiff, supposing the ladder to have been made of good material, and to be of sufficient strength, proceeded to use it in the performance of his work, and while he was standing on it, seven feet above the floor, it broke without his fault, causing him to fall, and he was thereby injured.

The complaint is defective in not stating, but leaving it only to be inferred, that the ladder broke by reason of the alleged defects; but this fault is not relied upon by the appellant, and we pass it over to consider the real merits of the case.

Let us consider more particularly wherein the defendant is shown to have been guilty of a wrong towards the plaintiff, of which the latter may complain, or what legal duty the defendant owed to the plaintiff, or generally to any one who, in the ordinary course of events, might procure the ladder for use.

There was no contract relation between the plaintiff and the defendant, and hence no contract obligation for the violation of which the plaintiff can recover. Neither the plaintiff nor even his employer was a party to the contract of sale pursuant to which the ladder was delivered to the plaintiff. He did not stand in any relation of privity with the contracting parties,—the retail merchant, who purchased, and the defendant, who sold the ladder. The contract was not entered into nor executed for his benefit; and, if there was any breach of the contract, the plaintiff has no right of action merely for that. If the defendant is liable, it must be upon the ground that the circumstances under which the ladder was manufactured and delivered were such that the neglect to disclose the existence of the defect was a wrong,—a neglect of a duty recognized by law independent of contract.

Accepting the allegations of the complaints as true, we assume that by reason of the defects complained of the ladder was dangerous to the life or limb of a person using it in the way in which such articles are ordinarily used. If there was any legal duty resting on the defendant for the breach of which the plaintiff can complain it will be more apparent if the alleged negligence and consequent injury are brought into close proximity. Hence we will for the present assume that when the ladder was delivered directly to the plaintiff for his use by the defendant the latter knew the concealed

defects, and had reason to apprehend that the use of it by the plaintiff, or by any one, would be attended by serious personal injury. It would constitute an actionable wrong for the defendant to thus knowingly and unnecessarily do what it had reason to suppose would result in injury to the plaintiff without the intervention of any fault or neglect on his part or on the part of any other person. If the defendant knowingly delivered such an article for the plaintiff's use, it was his duty to warn him of the danger by disclosing the hidden defects; and neglect of that duty would constitute actionable negligence.[1] Every one may be supposed to understand that such articles are manufactured, sold, and disposed of, with a view to their being used. They are valuable and salable only because of their supposed fitness for use. One who procures such an article, either from a manufacturer or from a retail dealer, ordinarily assumes

[1] *Accord: Lewis* v. *Terry*, 111 Cal. 39 (1896), a furniture dealer sold to a boarding house keeper a folding bed, which to the vendor's knowledge had a concealed defect rendering it dangerous for use and which, when used by a guest of the boarding house, collapsed and injured her; *Wellington* v. *Downer Oil Co.*, 104 Mass. 64 (1870), naptha known to be highly explosive put on market as illuminating oil; *Elkins, Bly & Co.* v. *McKean*, 79 Pa. 493 (1875), very similar facts, vendor liable if, and only if, he knew the oil sold to be explosive and unsafe; *Skinn* v. *Reutter*, 135 Mich. 57 (1903), hogs, known by vendor to be diseased, infected drove of plaintiff who purchased them for defendant's vendee; see *Marsh* v. *Webber*, 13 Minn. 109 (1868) and *Jeffrey* v. *Bigelow*, 13 Wend. 518 (N. Y., 1835), where it had been held that such a vendor was liable to his own vendee for infection of latter's stock; *Clement* v. *Crosby & Co.*, 148 Mich. 293 (1907), stove polish, known to be inflammable; *Weiser* v. *Holsman*, 33 Wash. 87 (1903), champagne cider alleged to be known by vendor to be a dangerous explosive; *McCaffrey* v. *Mossberg etc. Mfg. Co.*, 23 R. I. 381 (1901); *Slattery* v. *Colgate*, 55 Atl. 639 (R. I., 1903), *semble.*

In *Kuelling* v. *Lean Mfg. Co.*, 183 N. Y. 78 (1905), the maker and vendor of a heavy roller, who had actively concealed by plugging, painting and varnishing certain knot holes which dangerously weakened the tongue thereof, was held liable to a farmer who had purchased it from a retailer who had himself bought it of another intermediate dealer; *accord: Woodward* v. *Miller*, 119 Ga. 618 (1903), buggy, with defects painted and varnished over, sold to city for use of its employees. In *Carter* v. *Harden*, 78 Me. 528 (1886) it is held that one who sells a horse, falsely representing it as kind and gentle, is not liable to the purchaser's wife for injuries received by her while driving it, it not appearing that he knew when it was sold that it was bought by the purchaser for his wife's use, *cf. Langridge* v. *Levy*, 2 M. & W. 519 (1837).

In *State, to use of Hartlove* v. *Fox*, 79 Md. 514 (1894) it was held that a vendor fraudulently selling, as sound, a horse known by him to be affected with glanders was not liable for the death of the purchaser's stableman infected while caring for the horse, since it does not appear that a glandered horse is *imminently* dangerous to human life since there is no great or imminent danger of a human being catching glanders from a horse.

Where, however, the sale of a particular article is prohibited as dangerous, it is enough that the vendor knows that he is selling such an article; it is immaterial that he believes that the violation is so slight that the article is not in fact dangerous, *Waters Pierce Co.* v. *Deselms*, 29 S. C. R. 270 (U. S. 1909), 5% of gasolene by error mixed with oil, local agent instructed to sell it as coal oil as so small an amount of gasolene would not affect its burning qualities; *Stowell* v. *Standard Oil Co.*, 139 Mich. 18 (1905), and in *Hourigan* v. *Nowell*, 110 Mass. 470 (1872) it is held that the law throws on the vendor the burden of keeping himself, at his peril, within the terms of the statute and that it is no defense to prove that he was not aware that the oil he sold was below test or even that it had been certified as approved by an auhorized inspector.

without inquiry, and without any express warranty, that it is what it appears to be,—a thing intended for actual use; and that it has not been so negligently manufactured that by reason of concealed defects its use will be attended with danger of serious injury. And this must be supposed to be understood by the person who disposes of it; and if, knowing the existence of such defects, he neglects to disclose them, so that the other party may be warned of his danger, such neglect amounts to bad faith.[2] Under such circumstances, silence partakes of the nature of an assurance that the thing has not any such known but concealed dangerous defect. Silence has the effect and the quality of deceit.

We have heretofore assumed that the defendant knew the defects when it delivered the ladder to the plaintiff. But our statement of the case shows that such was not the fact, or at least it does not appear from the complaint that it was so. It seems from the complaint that at some time prior to the ordering and delivery of the article the defendant in the course of its business of manufacturing such goods had negligently constructed this ladder for sale, but not (as we will assume in favor of the defendant) with any specific intention or anticipation as to who might purchase or use it; but only intending that it should go into its stock of goods of that kind, to be sold in the usual course of business, and thus at length come to the hands of some one who would purchase it for actual use. The defendant is to be deemed to have known the fact alleged,—that the dangerous defects were concealed by the application of oil, paint, and varnish,—although we do not understand that this was applied *for the purpose* of concealing such defects. It would seem that after that was done the defendant could not have distinguished this ladder from any other of its manufactured goods of the like kind. If, then, the defendant did not know, and could not have discovered, at the time of delivering this ladder to the plaintiff, that it was defective, there could be no wrong in not then disclosing the existence of defects in this particular article, which were neither known nor discoverable; and the question of the defendant's liability reaches back to the time of manufacturing and putting into its stock of goods for sale an article then known to be dangerously defective, the defects being concealed, and not likely to be discovered, either by any intermediate purchaser standing between the defendant and the per-

[2] This duty is not confined to vendors nor does it arise out of any implied term or warranty of fitness in the contract of sale, *Clarke* v. *Army & Navy Stores*, L. R. 1903, 1 K. B. 155, p. 164. "It is well settled", says Gray, J., in *Wellington* v. *Downer Oil Co.*, *supra n.* 1, "that a man who delivers an article, which he knows to be dangerous or noxious, to another person, without notice of its nature and its qualities, is liable for any injury which may reasonably be contemplated as likely to result, and which does in fact result, therefrom, to that person or any other, who is not himself in fault. Thus a person who delivers a carboy, which he knows to contain nitric acid, to a carrier, without informing him of the nature of its contents, is liable for an injury occasioned by the leaking out of the acid upon another carrier, to whom it is delivered by the first, in the ordinary course of business, to be carried to its destination; *Farrant* v. *Barnes*, 11 C. B. (N. S.) 533, p. 67." Nor can the shipper complain that the carrier was negligent in treating the package as though it were what it appeared to be, ordinary innocuous freight, *Barney* v. *Burstenbinder*, 7 Lans. 210 (N. Y., 1872), explosion caused by opening an unlabeled parcel containing nitro-glycerine.

son who might procure the ladder for use, or by the latter person.[3] We shall assume, then, that there was no wrongful conduct when the ladder was delivered, but only, if at all, when it was manufactured, and put in the defendant's general stock for sale. In this view of the case, the wrongful conduct of the defendant and the injury resulting therefrom would be somewhat more widely separated in time and in the order of events than in the case as we have heretofore assumed it to have been; but it would not change their real relation as cause and effect, nor so qualify that relation that the law would regard the injury as being so remote from the wrong that for that reason responsibility should cease.

When the defendant manufactured and put the dangerously faulty article in its stock for sale, it is to be deemed to have anticipated that, in the ordinary course of events, it would come to the hands of a purchaser, either directly from the defendant or from some intermediate dealer, for actual use, and with the consequences which actually were suffered. It must have been deemed probable that any intervening dealer would not discover the defect, and that nothing would be likely to occur to avert the danger to which the person who might use the ladder would be subjected by the defendant's negligence. Hence it would be difficult to distinguish such a case in principle from one where the transaction is directly between the wrong-doer, then knowing the danger, and the party who is injured. If any distinction is to be made it must rest upon the grounds of expediency, the arbitrary fixing of a limit to the liability of the wrong-doer. But we consider that in principle the defendant should be held to responsibility for an injury resulting proximately, and without any intervening wrongful agency,[4] from its confessedly negligent act, which was such as to expose another to great bodily harm; and that no reason of policy forbids this. The authorities which have been cited we deem to be sufficient to justify this conclusion, although it is to be admitted that there are others tending to an opposite result.

Order affirmed.[5]

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[3] It is not necessary that the vendor know that the particular article sold is actually dangerous. It is enough that he knows it to be "potentially dangerous", as forming part of a lot or consignment, some of which have been to the knowledge of the vendor, defective, *Clarke* v. *Army & Navy Stores, supra note* 2; see *Weiser* v. *Holsman, supra note* 1; so if the vendor or any one in charge of his business knows of any fact which renders it probable that the article may be unusually dangerous, he is bound to see that notice thereof is given to the vendee, *Clarke* v. *Army & Navy Stores, supra;* so if the vendor know that a dangerous defect has existed, he can not excuse a failure to disclose it by showing an ineffectual attempt to remedy or remove it, even though he honestly believe he has succeeded, *French* v. *Vining,* 102 Mass. 132 (1869).

[4] As to whether knowledge by or notice to an intermediate vendee, who buys for the evident purpose of resale, of the true condition of the article will relieve from liability a vendor who sells it with knowledge that it is dangerously defective and that it appears safe—see *Clement* v. *Crosby & Co., supra note* 1, and *Waters Pierce Co.* v. *Deselms, supra note* 1—where it is held that it does not; *contra* (*semble*) *Lewis* v. *Terry, n.* 1, *supra.* Where the article though defective is nonetheless safe for some, if not all of the purposes, for which if perfect it is fitted, knowledge by or notice to the first vendee relieves the vendor from further liability—see *Loop* v. *Litchfield, post* p. 333 and notes thereto, and *Miner, Read & Garrette* v. *McNamara,* 72 Atl. 138 (Conn., 1909).

[5] See *Torgesen* v. *Schultz,* 192 N. Y. 156 (1908).

LOOP *v.* LITCHFIELD.

Court of Appeals of New York, 1870. 42 N. Y. 351.

HUNT, J. A piece of machinery already made and on hand, having defects which weaken it, is sold by the manufacturer to one who buys it for his own use. The defects are pointed out to the purchaser and are fully understood by him. This piece of machinery is used by the buyer for five years, and is then taken into the possession of a neighbor, who uses it for his own purposes. While so in use, it flies apart by reason of its original defects, and the person using it is killed. Is the seller, upon this state of facts, liable to the representatives of the deceased party? I omit at this stage of the inquiry the elements, that the deceased had no authority to use the machine; that he knew of the defects and that he did not exercise proper care in the management of the machine. Under the circumstances I have stated, does a liability exist, supposing that the use was careful, and that it was by permission of the owner of the machine?

To maintain this liability, the appellants rely upon the case of *Thomas* v. *Winchester* (6 N. Y., 2 Seld., 397). * * *

The appellants recognize the principle of this decision, and seek to bring their case within it, by asserting that the fly wheel in question was a dangerous instrument. Poison is a dangerous subject. Gunpowder is the same. A torpedo is a dangerous instrument, as is a spring gun, a loaded rifle or the like. They are instruments and articles in their nature calculated to do injury to mankind, and generally intended to accomplish that purpose. They are essentially, and in their elements, instruments of danger. Not so, however, an iron wheel, a few feet in diameter and a few inches in thickness, although one part may be weaker than another. If the article is abused by too long use, or by applying too much weight or speed, an injury may occur, as it may from an ordinary carriage wheel, a wagon axle, or the common chair in which we sit. There is scarcely an object in art or nature, from which an injury may not occur under such circumstances. Yet they are not in their nature sources of danger, nor can they, with any regard to the accurate use of language, be called dangerous instruments. That an injury actually occurred by the breaking of a carriage axle, the failure of the carriage body, the falling to pieces of a chair or sofa, or the bursting of a fly wheel, does not in the least alter its character.

It is suggested that it is no more dangerous or illegal to label a deadly poison as a harmless medicine than to conceal a defect in a machine and paint it over so that it will appear sound. Waiving the point that there was no concealment, but the defect was fully explained to the purchaser, I answer, that the decision in *Thomas* v. *Winchester* was based upon the idea that the negligent sale of poisons is both at common law and by statute an indictable offence.[1] If the

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[1] In *Losee* v. *Clute*, 51 N. Y. 494 (1873), decided largely on the authority of *Loop* v. *Litchfield*, it was held that the maker of a defectively constructed boiler was not liable for its explosion while being used by his vendee, the

act in that case had been done by the defendant instead of his agent, and the death of Mrs. Thomas had ensued, the defendant would have been guilty of manslaughter, as held by the court. The injury in that case was a natural result of the act. It was just what was to have been expected from putting falsely labeled poisons in the market, to be used by whoever should need the true articles. It was in its nature an act imminently dangerous to the lives of others. Not so here. The bursting of the wheel and the injury to human life was not the natural result or the expected consequence of the manufacture and sale of the wheel. Every use of the counterfeit medicines would be necessarily injurious, while this wheel was in fact used with safety for five years. * * *

Upon the facts as stated, assuming that the deceased had no knowledge of the defects complained of, and assuming that he was in the rightful and lawful use of the machine, I am of the opinion that the verdict cannot be sustained. The facts constitute no cause of action.[2]

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purchaser being held alone bound to see that it was fit for the use to which he put it, but there was evidence to show that while the purchaser did not know the exact condition of the boiler, he knew it was defective and had ordered the pressure to be kept low in the hope of preventing any explosion. In *Wyllie* v. *Palmer,* 137 N. Y. 248 (1893) these two cases are cited to support the proposition that makers of dangerous articles (in that case fireworks) "could not be made liable for an injury resulting from the negligent or improper use of the article by the purchaser or by third persons"—and see *Davidson* v. *Nichols,* 93 Mass. 514 (1866), sulphide of antimony sold as black oxide of manganese, exploding when mixed with chlorate of potassia by purchaser from maker's vendee", but *cf., Waters Pierce Co.* v. *Deselms,* 29 S. C. Rep. 271 (U. S., 1909), where it was held that the vendor of petroleum, having knowledge of the local custom of using it to start fires, was liable for a conflagration caused by the use, for this purpose, of petroleum sold by it, with which gasolene had, to its knowledge, been mixed.

[2] A manufacturer making an article to a purchaser's order or a contractor constructing a building or other structure according to his employer's plans and specifications is not liable, after the article is delivered or the structure turned over, for injuries arising not from bad workmanship but from the unfitness of the article or structure as planned for the purposes to which the purchaser or employer puts it thereafter—*Pearson* v. *Zable,* 78 Ky. 170 (1879), contractor who had graded a street as required by his contract with the city held not liable for flooding of adjacent land, after the street was turned over to the city, because of failure to provide necessary outlets for surface water; *Willis* v. *White and Co.,* 63 S. E. 942 (N. C., 1909), contractor for railroad embankment not liable to adjacent owners under similar circumstances; *Marvin* v. *Ward,* 46 N. J. L. 19 (1884), builder of a temporary bridge built in accordance with the plans and specifications of county officers and accepted by them, held not liable for its collapse when devoted by them to the carriage of heavier traffic than such a bridge was fitted to stand; and in *Miner, Read & Garrette* v. *McNamara,* 72 Atl. 138 (Conn., 1909) it was held that acceptance by the owner of a building, which to his knowledge had been constructed of inferior material and in violation of the requirements of the building commissioners, relieved the builder of liability to a tenant of the owner.

THOMAS *v.* WINCHESTER.

Court of Appeals of New York, 1852. 6 New York Appeals, 397.

RUGGLES, Ch. J. delivered the opinion of the court. This is an action brought to recover damages from the defendant for negligently putting up, labelling and selling as and for the extract of *dandelion,* which is a simple and harmless medicine, a jar of the extract of *belladonna,* which is a deadly poison; by means of which the plaintiff Mary Ann Thomas, to whom, being sick, a dose of dandelion was prescribed by a physician, and a portion of the contents of the jar, was administered as and for the extract of dandelion, was greatly injured, &c.

The facts proved were briefly these: Mrs. Thomas being in ill health, her physician prescribed for her a dose of dandelion. Her husband purchased what was believed to be the medicine prescribed, at the store of Dr. Foord, a physician and druggist in Cazenovia, Madison county, where the plaintiffs reside.

A small quantity of the medicine thus purchased was administered to Mrs. Thomas, on whom it produced very alarming effects; such as coldness of the surface and extremities, feebleness of circulation, spasms of the muscles, giddiness of the head, dilation of the pupils of the eyes, and derangement of mind. She recovered however, after some time, from its effects, although for a short time her life was thought to be in great danger. The medicine administered was *belladonna, and not dandelion.* The jar from which it was taken was labeled "*½ lb. dandelion, prepared by A. Gilbert, No.* 108, *John-street, N. Y. Jar* 8 *oz.*" It was sold for and believed by Dr. Foord to be the extract of dandelion as labeled. Dr. Foord purchased the article as the extract of dandelion from Jas. S. Aspinwall, a druggist at New-York. Aspinwall bought it of the defendant as extract of dandelion, believing it to be such. The defendant was engaged at No. 108 John-street, New-York, in the manufacture and sale of certain vegetable extracts for medicinal purposes, and in the purchase and sale of others. The extracts manufactured by him were put up in jars for sale, and those which he purchased were put up by him in like manner. The jars containing extracts manufactured by himself and those containing extracts purchased by him from others, were labeled alike. Both were labeled like the jar in question, as "prepared by A. Gilbert." Gilbert was a person employed by the defendant at a salary, as an assistant in his business. The jars were labeled in Gilbert's name because he had been previously engaged in the same business on his own account at No. 108 John-street, and probably because Gilbert's labels rendered the articles more salable. The extract contained in the jar sold to Aspinwall, and by him to Foord, was not manufactured by the defendant, but was purchased by him from another manufacturer or dealer. The extract of dandelion and the extract of belladonna resemble each other in color, consistence, smell and taste; but may on careful examination be distinguished the one from the other by those who are well acquainted with these articles. Gilbert's labels were paid for by Winchester and used in his business with his knowledge and assent.

The defendants' counsel moved for a nonsuit on the following grounds: [*inter alia.*]

1. That the action could not be sustained, as the defendant was the remote vendor of the article in question: and there was no connection, transaction or privity between him and the plaintiffs, or either of them.

2. That this action sought to charge the defendant with the consequences of the negligence of Aspinwall and Foord.

4. That according to the testimony Foord was chargeable with negligence, and that the plaintiffs therefore could not sustain this suit against the defendant: if they could sustain a suit at all it would be against Foord only.

The judge overruled the motion for a nonsuit, and the defendant's counsel excepted.

The judge among other things charged the jury, that if they should find from the evidence that either Aspinwall or Foord was guilty of negligence in vending as and for dandelion, the extract taken by Mrs. Thomas, or that the plaintiff Thomas, or those who administered it to Mrs. Thomas, were chargeable with negligence in administering it, the plaintiffs were not entitled to recover; but if they were free from negligence, and if the defendant Winchester was guilty of negligence in putting up and vending the extracts in question, the plaintiffs were entitled to recover, provided the extract administered to Mrs. Thomas was the same which was put up by the defendant and sold by him to Aspinwall and by Aspinwall to Foord. That if they should find the defendant liable, the plaintiffs in this action were entitled to recover damages only for the personal injury and suffering of the wife, and not for loss of service, medical treatment or expense to the husband, and that the recovery should be confined to the actual damages suffered by the wife.

The case depends on the first point taken by the defendant on his motion for a nonsuit; and the question is, whether the defendant, being a remote vendor of the medicine, and there being no privity or connection between him and the plaintiffs, the action can be maintained.

If, in labeling a poisonous drug with the name of a harmless medicine, for public market, no duty was violated by the defendant, excepting that which he owed to Aspinwall, his immediate vendee, in virtue of his contract of sale, this action cannot be maintained. If A. build a wagon and sell it to B., who sells it to C., and C. hires it to D., who in consequence of the gross negligence of A. in building the wagon is overturned and injured, D. cannot recover damages against A., the builder. A.'s obligation to build the wagon faithfully, arises solely out of his contract with B. The public have nothing to do with it. Misfortune to third persons, not parties to the contract, would not be a natural and necessary consequence of the builder's negligence; and such negligence is not an act imminently dangerous to human life.

So, for the same reason, if a horse be defectively shod by a smith, and a person hiring the horse from the owner is thrown and injured in consequence of the smith's negligence in shoeing; the smith is not liable for the injury. The smith's duty in such case

grows exclusively out of his contract with the owner of the horse; it was a duty which the smith owed to him alone, and to no one else.[1] And although the injury to the rider may have happened in consequence of the negligence of the smith, the latter was not bound, either by his contract or by any consideration of public policy or safety, to respond for his breach of duty to any one except the person he contracted with.

This was the ground on which the case of *Winterbottom* v. *Wright*, (10 *Mees. & Welsb.* 109,) was decided. A. contracted with the postmaster general to provide a coach to convey the mail bags along a certain line of road, and B. and others, also contracted to horse the coach along the same line. B. and his co-contractors hired C., who was the plaintiff, to drive the coach. The coach, in consequence of some latent defect, broke down; the plaintiff was thrown from his seat and lamed. It was held that C. could not maintain an action against A. for the injury thus sustained. The reason of the decision is best stated by Baron Rolfe. A.'s duty to keep the coach in good condition, was a duty to the postmaster general, with whom he made his contract, and not a duty to the driver employed by the owners of the horses.

But the case in hand stands on a different ground. The defendant was a dealer in poisonous drugs. Gilbert was his agent in preparing them for market. The death or great bodily harm of some person was the natural and almost inevitable consequence of the sale of belladonna by means of the false label.

Gilbert, the defendant's agent, would have been punishable for manslaughter if Mrs. Thomas had died in consequence of taking the falsely labeled medicine. Every man who, by his culpable negligence, causes the death of another, although without intent to kill, is guilty of manslaughter. (2 *R. S.* 662, § 19.) A chemist who negligently sells laudanum in a phial labeled as paregoric, and thereby causes the death of a person to whom it is administered, is guilty of manslaughter. (*Tessymond's case*, 1 *Lewin's Crown Cases*, 169.) "So highly does the law value human life, that it admits of no justi-"fication wherever life has been lost and the carelessness or negli-"gence of one person has contributed to the death of another. (*Regina* v. *Swindall*, 2 *Car. & Kir.* 232-3.) And this rule applies not only where the death of one is occasioned by the negligent act of another, but where it is caused by the negligent omission of a duty of that other. (2 *Car. & Kir.* 368, 371.) Although the defendant Winchester may not be answerable criminally for the negligence of his agent, there can be no doubt of his liability in a civil action, in which the act of the agent is to be regarded as the act of the principal.

In respect to the wrongful and criminal character of the negligence complained of, this case differs widely from those put by the defendant's counsel. No such imminent danger existed in those cases. In the present case the sale of the poisonous article was made to a dealer in drugs, and not to a consumer. The injury therefore was not likely to fall on him, or on his vendee who was also a dealer;

[1] But see Fitzherbert Abr. Tresp. *sur le* case, 94 D., *ante* p. 132 and note 1.

but much more likely to be visited on a remote purchaser, as actually happened. The defendant's negligence put human life in imminent danger. Can it be said that there was no duty on the part of the defendant, to avoid the creation of that danger by the exercise of greater caution? or that the exercise of that caution was a duty only to his immediate vendee, whose life was not endangered? The defendant's duty arose out of the nature of his business and the danger to others incident to its mismanagement. Nothing but mischief like that which actually happened could have been expected from sending the poison falsely labeled into the market;[2] and the defendant is justly responsible for the probable consequences of the act. The duty of exercising caution in this respect did not arise out of the defendant's contract of sale to Aspinwall. The wrong done by the defendant was in putting the poison, mislabeled, into the hands of Aspinwall as an article of merchandise to be sold and afterwards used as the extract of dandeloin, by some person then unknown. The owner of a horse and cart who leaves them unattended in the street is liable for any damage which may result from his negligence. (*Lynch* v. *Nurdin*, 1 *Ad. & Ellis, N. S.* 29; *Illidge* v. *Goodwin*, 5 *Car. & Payne*, 190.) The owner of a loaded gun who puts it into the hands of a child by whose indiscretion it is discharged, is liable for the damage occasioned by the discharge. (5 *Maule & Sel.* 198.) The defendant's contract of sale to Aspinwall does not excuse the wrong done to the plaintiffs. It was a part of the means by which the wrong was effected. The plaintiffs' injury and their remedy would have stood on the same principle, if the defendant had given the belladonna to Dr. Foord without price, or if he had put it in his shop without his knowledge, under circumstances which would probably have led to its sale on the faith of the label.

In *Longmeid* v. *Holliday*, (6 *Law and Eq. Rep.* 562,) the distinction is recognized between an act of negligence imminently dangerous to the lives of others, and one that is not so. In the former case, the party guilty of the negligence is liable to the party injured, whether there be a contract between them or not; in the latter, the negligent party is liable only to the party with whom he contracted, and on the ground that negligence is a breach of the contract.

The defendant, on the trial, insisted that Aspinwall and Foord were guilty of negligence in selling the article in question for what it was represented to be in the label; and that the suit, if it could be sustained at all, should have been brought against Foord. The judge charged the jury that if they, or either of them, were guilty of negligence in selling the belladonna for dandelion, the verdict must be for the defendant; and left the question of their negligence to the jury, who found on that point for the plaintiff. If the case

[2] In *Heizer* v. *Kingsland etc. Co.*, 110 Mo. 605 (1892), Black, J., says, p. 615, "In these cases [*Thomas* v. *Winchester* and *Norton* v. *Sewall, infra* n. 3] the articles sold were necessarily and inherently dangerous to human life, and they did not by their color or otherwise *disclose* their dangerous character, and, hence, the duty on the part of the vendor to make known to the vendee their true nature."

really depended on the point thus raised, the question was properly left to the jury. But I think it did not. The defendant, by affixing the label to the jar, represented its contents to be dandelion; and to have been "prepared" by his agent Gilbert. The word 'prepared' on the label, must be understood to mean that the article was manufactured by him, or that it had passed through some process under his hands, which would give him personal knowledge of its true name and quality. Whether Foord was justified in selling the article upon the faith of the defendant's label, would have been an open question in an action by the plaintiffs against him, and I wish to be understood as giving no opinion on that point.[3] But it seems to me to be clear that the defendant cannot, in this case, set up as a defense, that Foord sold the contents of the jar as and for what the defendant represented it to be. The label conveyed the idea distinctly to Foord that the contents of the jar was the extract of dandelion; and that the defendant knew it to be such. So far as the defendant is concerned, Foord was under no obligation to test the truth of the representation. The charge of the judge in submitting to the jury the question in relation to the negligence of Foord and Aspinwall, cannot be complained of by the defendant.

GARDINER, J. concurred in affirming the judgment, on the ground that selling the belladonna without a label indicating that it was a *poison,* was declared a misdemeanor by statute; (*2 R. S.* 694, § 23;) but expressed no opinion upon the question whether, independent of the statute, the defendant would have been liable to these plaintiffs.[4]

GRIDLEY, J. was not present when the cause was decided. All the other members of the court concurred in the opinion delivered by Ch. J. RUGGLES.

Judgment affirmed.

[3] A druggist, selling a drug in the unbroken original package on the faith of the label of a reputable manufacturer, is not guilty of negligence in not breaking the package in order to satisfy himself as to its true character, *Howes* v. *Rose,* 13 Ind. App. 674 (1895) *semble*; nor is he negligent in selling without analysis a patent medicine, though not in unbroken packages, called for by his customers, *West* v. *Emanuel,* 198 Pa. 180 (1901). But when the drug is a common one and not a secret preparation, and the original package is broken and its contents handled and sold in small quantities, the druggist having had the opportunity of observing the nature of the drug is bound to exercise care proportionate to the danger to ascertain if it is what it purports to be, *Howes* v. *Rose, supra.*

Druggists are required to use "the highest degree of care known to practical men", *Howes* v. *Rose, supra; Walton* v. *Booth,* 34 La. Ann. 913 (1882); *Peters* v. *Johnson & Co.,* 50 W. Va. 644 (1902); or what is much the same thing, a care proportionate to the danger, *Beckwith* v. *Oatman,* 43 Hun 265 (N. Y., 1887); though in *Simonds* v. *Henry,* 39 Me. 155 (1855) only ordinary care is said to be required (*semble*).

[4] *Accord: Davis* v. *Guarnieri,* 45 Ohio 470 (1887), oil of bitter almonds sold by retail druggist in mistake for oil of sweet almonds—taken by wife of purchaser; *Peters* v. *Johnson & Co.,* 50 W. Va. 644 (1902), similar facts; *Norton* v. *Sewell,* 106 Mass. 143 (1870), laudanum sold for rhubarb, taken by purchaser's servant; *Darks* v. *Scudder-Gale Grocery Co.,* 146 Mo. App. 246 (1910), ginger extract containing wood alcohol in poisonous quantities, sold as medicine; *Burk* v. *Creamery Package Mfg. Co.,* 126 Iowa 730 (1905), sulphuric acid sold in unlabelled bottle, purchaser put it on the shelf with other bottles containing buttermilk, and by mistake sold it as buttermilk to the plaintiff, who drank it and died; *Osborne* v. *McMasters,* 40 Minn. 103 (1889), *semble; Fisher* v. *Golladay,* 38 Mo. App. 531 (1889); *Heiser* v. *Kingsland, etc., Co.,* 110 Mo. 605 (1892), p. 615, *semble; McCaffrey* v. *Mossberg, etc., Co.,* 23 R. I. 381 (1901), *semble.* Where a druggist sells poison improperly labelled or

GEORGE *v.* SKIVINGTON.

In the Court of Exchequer, 1869. L. R. 5 Exch. 1.

KELLY, C. B.—I am of opinion that our judgment should be for the plaintiffs. The facts alleged by the declaration are shortly these;— that the plaintiff, Joseph George, purchased a chemical compound of the defendant as a hair wash for the use of his wife, which was made up of ingredients known only to the defendant, and by him represented to be "fit and proper to be used for washing the hair;" and there is also an express statement that the defendant knew the purpose for which the article was bought. The declaration further alleges that the defendant "so unskilfully, negligently, and improperly conducted himself in and about selling and making the said compound" as to cause the damage complained of to the female plaintiff. Now, under these circumstances, the question is whether an action at the suit of the plaintiff, Emma George, her husband being joined for conformity, will lie. It is contended that it will not. There was no warranty, it is said, either express or implied, towards the purchaser himself. But it is not necessary to enter into that question, because the contract of sale is only alleged by way of inducement, the cause of action being, not upon that contract, but for an injury caused to the wife of the purchaser by reason of an article being sold to him for the use of his wife, and so sold to the defendant's knowledge, turning out to be unfit for the purpose for which it was bought. There is, therefore, no question of warranty to be considered, but whether the defendant, a chemist, compounding the article sold for a particular purpose, and knowing of the purpose for which it was bought, is liable in an action on the case for unskilfulness and negligence in the manufacture of it whereby the person who used it was injured. And I think that, quite apart from any question of warranty, express or implied, there was a duty on the defendant, the vendor, to use ordinary care in compounding this wash for the hair. Unquestionably there was such a duty towards the purchaser, and it extends, in my judgment, to the person for whose use the vendor knew the compound was purchased. In Langridge v. Levy, 2 M. & W. 519, in Ex. Ch. 4 M. & W. 337; the defendant sold a gun to the plaintiff's father for the use, to his knowledge, of the plaintiff, and it was held that a duty arose towards the plaintiff that the gun should be safe; and here a similar duty arose towards the person who was known to the defendant to be about to use this wash; namely, a duty that the article sold should be reasonably fit for the purpose

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without any label, the negligence of the immediate vendee or his knowledge of the real nature of the drug sold will not defeat the right of the consumer to recover, *Davis* v. *Guarnieri, supra*; *Fisher* v. *Golladay, supra*; in each case, while a statute required poison to be labelled, the Court was of opinion that at common law such sale was wrongful; see as to sale, contrary to statute, of gasolene in unmarked vessel, *Ives* v. *Welden*, 114 Iowa 476 (1901), immediate vendee's knowledge or negligence held immaterial where his daughter and not he himself was injured; and see note 4, to *Schubert* v. *Clark, ante* p. 332.

it was bought for and compounded with reasonable care. Under these circumstances, there being in the declaration a direct allegation of negligence and unskilfulness, our judgment ought to be for the plaintiffs. With regard to Longmeid *v.* Holliday, 7 Ex. 761, that case is entirely distinguishable, for there the jury found bona fides and no negligence on the part of the vendor. My brother Channell [1] wishes me to add that he concurs in this judgment.

PIGOTT, B.—I am of the same opinion. The action is, in effect, against a tradesman for negligence and unskilfulness in his business. Such an action by the purchaser himself is clearly maintainable. Then, where the thing purchased is for the use not of the purchaser himself but, to the defendant's knowledge, of his wife, does the defendant's duty extend to her? I can see no reason why it should not. She cannot contract for herself alone, but that is no reason why the defendant's duty should stop short of her. The case, no doubt, would have been very different if the declaration had not alleged that the defendant knew for whom the compound was intended. Suppose, for example, a chemist sells to a customer a drug, without any knowledge of the purpose to which it is to be applied, which is fit for a grown person, and that drug is afterwards given by the purchaser to a child and does injury, it could not be contended that the chemist was liable. That, however, is widely different from this case; for, here, there is an express allegation that the defendant knew the purpose for which, and the person for whom, this compound was bought.

CLEASBY, B.—I also think the declaration shows a good cause of action in the female plaintiff. No person can sue on a contract but the person with whom the contract is made; and this undoubted proposition was attempted to be taken advantage of in Langridge *v.* Levy, 2 M. & W. 519, in Ex. Ch. 4 M. & W. 337. The answer was that, admitting the proposition to be true, still a vendor who has been guilty of fraud or deceit is liable to whomsoever has been injured by that fraud, although not one of the parties to the original contract, provided at least that his use of the article was contemplated by the vendor. It was therefore held in that case that the boy who used the defective gun, and for whose use the defendant knew it was destined, had a good cause of action. Substitute the word "negligence" for "fraud," and the analogy between Langridge *v.* Levy and this case is complete. The real question is whether the allegations in the declaration are sufficient to raise a duty towards the female plaintiff. Now it is alleged that the defendant himself manufactured this wash of ingredients known only to him, and that he held it out and professed it to be of a certain quality, and it was not of that quality; and that he knew it was purchased for the purpose of being used by the female plaintiff. Under the circumstances I think there was a duty imposed upon him to use due and ordinary care, and of the breach of that duty I am of opinion the female plaintiff, who was injured, can take advantage. The two

[1] Channell, B., had left the court at the close of the arguments.

things concur here; negligence and injury flowing therefrom. There was, therefore, a good cause of action in the person injured similar to that which was held to be good in Langridge *v.* Levy.

Judgment for the plaintiffs.[2]

BISHOP *v.* WEBER.

Supreme Judicial Court of Massachusetts, 1885. 139 Mass. 411.

The declaration alleged that the plaintiff attended a ball, having a ticket therefor; that the defendant, who was a caterer, was employed to cater for all who might attend the ball, and to furnish for all who might wish, good and wholesome food, for a certain sum to be paid therefor by each person who partook of the same; that the defendant undertook and agreed to cater and to furnish good and wholesome food at the ball to whomsoever wished and paid therefor; that the defendant was himself present at the ball, and superintended the catering, and furnished the waiters who supplied the food eaten by each person; that the plantiff, having a ticket therefor bought of and paid for to the defendant, ate of the food furnished by the defendant, and given to the plaintiff by the defendant's waiters, believing that the same was wholesome and good and safe to be eaten, and had been properly prepared by the defendant; and that the food was not good and wholesome and properly prepared, but was improperly and negligently prepared, and was unwholesome, poisonous, dangerous, and unfit to be eaten, and, by reason thereof, the plaintiff was poisoned and injured.[1]

The Superior Court sustained the demurrer, and ordered judgment for the defendant; and the plaintiff appealed to this court.

C. ALLEN, J. If one who holds himself out to the public as a caterer, skilled in providing and preparing food for entertainments, is employed as such, by those who arrange for an entertainment, to furnish food and drink for all who may attend it, and if he undertakes to perform the service accordingly, he stands in such a relation of duty towards a person who lawfully attends the entertainment, and partakes of the food furnished by him, as to be liable to an action of tort for negligence in furnishing unwholesome food, whereby such person is injured. This liability does not rest so much upon an implied contract, as upon a violated or neglected duty voluntarily assumed. Indeed, where the guests are entertained without pay, it would be hard to establish an implied contract with each individual. The duty, however, arises from the relation of the caterer to the guests. The latter have a right to assume that he will furnish for their consumption provisions which are not unwholesome and injurious through any neglect on his part. The furnishing of pro-

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[2] *Accord: Blood Balm Co.* v. *Cooper,* 83 Ga. 457 (1889), a manufacturer of a patent medicine, made according to a secret formula and put upon the market to be taken in doses prescribed in the label upon the bottle, is bound to take the utmost care that the dose so prescribed does not contain any drug in such quantity as to be poisonous or injurious; *Darks* v. *Scudders Gale Co.,* 146 Mo. App. 246 (1910).

[1] The statement of facts is as appears in the head note.

visions which endanger human life or health stands clearly upon the same ground as the administering of improper medicines, from which a liability springs irrespective of any question of privity of contract between the parties. *Norton* v. *Sewall,* 106 Mass. 143. *Longmeid* v. *Holliday,* 6 Exch. 761. *Pippin* v. *Sheppard,* 11 Price, 400.

The plaintiff's action was originally entitled "in an action of tort." The plaintiff obtained leave to amend by adding the words "or contract, the plaintiff being doubtful to which class of actions this action belongs." This amendment was unnecessary, and may be disregarded, all the amended counts upon which the plaintiff relies being in tort. It is not necessary to sustain the demurrer on account of this lack of literal precision in entitling the action.

The defendant relies on several other extremely fine points of objection, but, without dwelling on them in detail, it may be said, in general terms, that the several counts sufficiently set forth the facts from which the duty of the defendant towards the plaintiff sprung, and it is not necessary to state formally and in terms that the defendant occupied such a relation towards the plaintiff that the law cast upon him the duty; they also sufficiently aver that the defendant neglected that duty, and that the plaintiff was injured by reason thereof. It is not necessary to aver that the defendant knew of the injurious quality of the food. It is sufficient if it appears that he ought to have known of it, and was negligent in furnishing unwholesome food, by reason whereof the plaintiff was injured.

Judgment reversed.[2]

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[2] *Accord: Craft* v. *Parker, Webb & Co.,* 96 Mich. 245 (1893), the plaintiff who was poisoned by a slice of bacon bought by his brother, a boarder in his house, from the defendants, wholesale and retail meat dealers, held entitled to recover if "the defendants knew or by proper care could have known its condition." So in *Watson* v. *Augusta Brewing Co.,* 124 Ga. 121 (1905), it was held that a bottler of soda water must take care that the bottles when filled are clean and free from dangerous foreign substances, such as pieces of glass. In *Tomlinson* v. *Armour & Co.,* 75 N. J. L. 748 (1908), it was held that a declaration was good which alleged that "the defendants were engaged in the business of canning and vending ham, but that in disregard of this duty they had negligently put in a certain can diseased ham" and sold it to a retail dealer, "of whom the plaintiff purchased it for food, and upon eating a piece of the ham was rendered sick of ptomaine poison." In *Salmon* v. *Libby, McNeil & Libby,* 219 Ill. 421 (1905), defendants, who made a certain brand of mince meat and put it on the market through a wholesale dealer, were held liable for the negligent preparation of a parcel of it, purchased from a retail grocer by the plaintiff, made into a pie and eaten by a member of the purchaser's family; *contra: Nelson* v. *Armour Packing Co.,* 76 Ark. 352 (1905).

A dealer in provisions who neither prepares nor selects them himself but merely offers for sale to be selected by the buyer, provisions purchased by him from others, is not bound to exercise care to procure fit articles for his customer's inspection and approval, *Farrell* v. *Manhattan Market Co.,* 198 Mass. 271 (1908), p. 285.

As to the duty of a bottler of effervescent drinks, see *Guinea* v. *Campbell,* 22 Quebec Off. R., S. C. 257 (1902), held bound to take every care to provide bottles stout enough to prevent explosions, *acc., Torgesen* v. *Schultz,* 192 N. Y. 156 (1908), *Glaser* v. *Seitz,* 71 N. Y. S. 942 (1901); but the bursting of a bottle is no evidence of a lack of such care, *Guinea* v. *Campbell,* 22 Quebec Off. R., S. C. 257 (1902); *Glaser* v. *Seitz,* 71 N. Y. S. 942 (1901); *O'Neill* v. *James,* 138 Mich. 567 (1904).

DEVLIN *v.* SMITH.

Court of Appeals of New York, 1882. 89 N. Y. 470.

Action for negligence causing the death of Hugh Devlin, plaintiff's intestate.

Defendant Smith contracted with the supervisors of the county of Kings to paint the inside of the dome of the court-house, in that county. Smith was not a scaffold-builder, and employed defendant Stevenson, an experienced scaffold-builder, and who had been previously employed by Smith, to build the necessary scaffold. This was to be of the best materials, and first class in every way. Stevenson built the scaffold of poles, in sections. To the poles used for uprights, horizontal poles were lashed with ropes: these were called ledgers. Upon these ledgers plank were placed, and upon the top of each section so constructed was placed another similarly constructed. When the scaffolding reached the curve of the dome it was necessary to lessen the width of the upper section. For this purpose a strip of plank was used as an upright to support the end of the shorter ledger. This upright was called a cripple; but instead of fastening the ledger to it by lashing it was fastened by nailing. The scaffold was ninety feet in height. Devlin, a workman in Smith's employ, was working on the curve of the dome, and sitting on a plank laid upon a ledger which was nailed to an upright or cripple, when the ledger gave way and broke. He was precipitated to the floor below, and so injured that he died soon after.

Judgment for defendant.

RAPALLO, J. Under the recent decisions in this State, it may be that if Smith had undertaken to erect the scaffold through agents, or workmen acting under his direction, he would have been liable for negligence on their part in doing the work, provided that in doing it they were not fellow-servants of the party injured. But in this case he did not so undertake. Stevenson was not the agent or servant of Smith, but an independent contractor, for whose acts or omissions Smith was not liable. (*Blake* v. *Ferris*, 5 N. Y. 48; 55 Am. Dec. 304.) Smith received the scaffold from him as a completed work, and we do not think that it was negligence to rely upon its sufficiency and permit his employes to go upon it for the purpose of performing their work. Stevenson was, as appears from the evidence, much more competent than Smith to judge of its sufficiency. He had undertaken to construct a first-class scaffold, and had delivered it to Smith in performance of this contract, and we do not think that Smith is chargeable with negligence for accepting it without further examination. All that such examination would have disclosed would have been that the upright was nailed to the ledger, and Smith, not being an expert, would have been justified in relying upon the judgment of Stevenson as to the propriety of that mode of fastening. The defect was not such as to admonish Smith of danger.

If any person was at fault in the matter it was the defendant Stevenson. It is contended however, that even if through his negligence the scaffold was defective, he is not liable in this action because there was no privity between him and the deceased, and he owed no duty to the deceased, his obligation and duty being only to Smith, with whom he contracted.

As a general rule the builder of a structure for another party, under a contract with him, or one who sells an article of his own manufacture, is not liable to an action by a third party who uses the same with the consent of the owner or purchaser, for injuries resulting from a defect therein, caused by negligence. The liability of the builder or manufacturer for such defects is, in general, only to the person with whom he contracted. But, notwithstanding this rule, liability to third parties has been held to exist when the defect is such as to render the article in itself imminently dangerous, and serious to any person using it is a natural and probable consequence of its use. As where a dealer in drugs carelessly labeled a deadly poison as a harmless medicine, it was held that he was liable not merely to the person to whom he sold it, but to the person who ultimately used it, though it had passed through many hands. This liability was held to rest, not upon any contract or direct privity between him and the party injured, but upon the duty which the law imposes on every one to avoid acts in their nature dangerous to the lives of others. (*Thomas* v. *Winchester*, 6. N. Y. 397; 57 Am. Dec. 455.) In that case *Mayor* v. *Cunliff*, 2 N. Y. 165, was cited as an authority for the position that a builder is liable only to the party for whom he builds. Some of the examples there put by way of illustration were commented upon, and among others the case of one who builds a carriage carelessly and of defective materials, and sells it, and the purchaser lends it to a friend, and the carriage, by reason of its original defect, breaks down and the friend is injured, and the question is put, can he recover against the maker? The comments of Ruggles, Ch. J., upon this supposititious case, in *Thomas* v. *Winchester*, and the ground upon which he answers the question in the negative, show clearly the distinction between the two classes of cases. He says that in the case supposed, the obligation of the maker to build faithfully arises only out of his contract with the purchaser. The public have nothing to do with it. Misfortune to third persons, not parties to the contract, would not be a natural and necessary consequence of the builder's negligence, and such negligence is not an act imminently dangerous to human life.

Applying these tests to the question now before us, the solution is not difficult. Stevenson undertook to build a scaffold ninety feet in height, for the express purpose of enabling the workmen of Smith to stand upon it to paint the interior of the dome. Any defect or negligence in its construction, which should cause it to give way, would naturally result in these men being precipitated from that great height. A stronger case where misfortune to third persons not parties to the contract would be a natural and necessary

consequence of the builder's negligence can hardly be supposed, nor is it easy to imagine a more apt illustration of a case where such negligence would be an act imminently dangerous to human life. These circumstances seem to us to bring the case fairly within the principle of *Thomas* v. *Winchester*.

We think there should be a new trial as to the defendant Stevenson, and that it will be for the jury to determine whether the death of the plaintiff's intestate was caused by negligence on the part of Stevenson in the construction of the scaffold.

The judgment should be affirmed.[1]

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[1] While it is by no means easy to reconcile all the New York cases which cite and profess to follow *Devlin* v. *Smith*, it may be said that a maker, vendor, or supplier of an article is not only liable for negligence in its preparation, where it is an "instrument or article which in its very nature is calculated to do injury to mankind and is generally intended to accomplish that result", but "although a machine may not be in its nature inherently dangerous, yet if it is made so by the neglect of a manufacturer having notice and knowledge that it is to be used by others than the purchaser, and injury results to others than the purchaser, directly traceable to that negligence, such manufacturer is liable to the person injured, because of that negligence," Patterson J., *Kahner* v. *Otis Elevator Co.*, 96 N. Y. App. Div. 169 (1904), pp. 173-174, elevator in building of plaintiff's employer put in bad order by the negligence of defendants employed to repair it. The following articles have been held imminently dangerous: a defective scoop in steam shovel leased by defendant to the plaintiff's employer, *Connors* v. *Gt. Northern Elevator Co.*, 90 N. Y. App. Div. 311 (1904); a defective rope rigged upon derrick supplied for hoisting granite foundation stones, *Davies* v. *Pelham Hod Co.*, 65 Hun 573 (1892); a boiler having latent defect due to negligent construction by the defendant Co., its maker and vendor, *Statler* v. *Ray Mfg. Co.*, 125 N. Y. App. Div. 69 (1908), *aff.*, 195 N. Y. 478 (1909). In *Swan* v. *Jackson*, 55 Hun 194 (1889), it was, however, held that a defective platform six feet high, intended to sustain the weight of a man while filling an ice chest, was not "imminently" dangerous.

In the great majority of American jurisdictions, however, in the absence of knowledge and nondisclosure of a concealed defect, unfitting it for the use for which it is sold, the vendor of an article owes no duty unless the articles sold are like drugs, medicines and explosives, in themselves and from their very nature "necessarily and inherently dangerous to human life", and not articles which are only dangerous if improperly constructed—*Bailey* v. *Gas Co.*, 4 Ohio C. C. 471 (1890), p. 483. See cases cited in *Huset* v. *Case etc. Co.*, note 2, *ante*, p. 325, and *Slattery* v. *Colgate*, 55 Atl. 639 (R. I., 1903), toilet soap, containing excess of alkali; *Young* v. *Smith & Kelly Co.*, 124 Ga., 475 (1905), vessel, turned over after partial loading, with hatches imperfectly fastened, and *Osten* v. *Morris Tasker Co.*, 17 Phila. 219 (1885), gas receiver warranted to stand high pressure.

In *Heizer* v. *Kingsland Co.*, 110 Mo. 605 (1892), it is held that a vendor of goods owes no duty of care toward persons not party to the contract of sale other than to correctly label, or otherwise make known the nature of articles, which like drugs, poisons and explosives, do not by their appearance disclose what they are, and which are inherently dangerous for use unless their true character be known. Articles like threshing machines (the article there in question), not being in and of themselves dangerous and plainly showing what they are and for what use they are designed, need no label; but see Vann, J., *Kuelling* v. *Lean Co.*, 183 N. Y. 78 (1905), p. 90, "While the machine [a heavy two horse roller] was not inherently dangerous, that fact is not controlling, for the danger was in the concealed defect in an implement sold as sound, and which appeared * * * to be so", and Kennedy, J., in *Earl* v. *Lubbock*, 91 L. T. 73 (1904), p. 76, intimating that where goods are sold for a known purpose there is or is intended to be in effect a warranty

PARRY *v.* SMITH.

In the Common Pleas Division, 1879. L. R. 4 C. P. D. 325.

LOPES, J.

This action was brought by the plaintiff to recover damages in the following circumstances:—The plaintiff was in the employ of Messrs. Moses & Son, as one of their housekeepers. The defendant was a gas-fitter employed by Moses & Son to repair a gas-meter in a cellar belonging to Moses & Son on the premises where the plaintiff was employed. The defendant found it necessary to take away the meter to repair it, and replaced it by a temporary connection consisting of a flexible tube, one end of which was pushed into the inlet pipe and the other end into the pipe communicating with the house. The ends of both the pipes were bound with rags and string and puttied up, and a drawer was put under the curve of the tube so as to support it and take the weight off the fastenings. After the temporary connection had been so placed by the defendant, and he had gone away, the plaintiff, whose duty it was to turn on and light the gas in the cellar, went there for the purpose with a light. Directly the plaintiff opened the cellar door an explosion took place, and he was knocked down and seriously injured.

There was a large body of evidence called on both sides; the plaintiff's evidence going to shew that the mode of connection was unsafe; the defendant's that it was safe. It was agreed that the damages, if the plaintiff recovered, should be 50*l.*

I left three questions to the jury,—first, was the defendant negligent in doing the work,—secondly, did the accident proceed entirely from the defendant's negligence,—and, thirdly, was the plaintiff also negligent, and was his negligence such that but for his negligence the accident would not have happened. I told the jury that, if they answered both the first questions affirmatively, they need not consider the third. The jury answered these questions in the affirmative, and found a verdict for the plaintiff for 50*l.*

Mr. Waddy at the end of the plaintiff's evidence had submitted that there was no case for the jury. I thought there was, and did not stop the case, but said I would reserve judgment and consider the points of law. I also consented to make any amendments which might be necessary to raise the real question between the parties.

Subsequently the points of law were argued before me. Mr. Waddy contended, on the part of the defendant, that there was no cause of action, unless there was privity between the plaintiff and the defendant, or unless what was done by the defendant amounted to a public nuisance, or unless there had been on the part of the defendant fraud, misrepresentation, or concealment. It was contended by Mr. Finlay, on the part of the plaintiff, that the action would lie, because the defendant knew he was dealing with gas, a thing highly dangerous in itself unless great care and caution were

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that it is safe for use therefor, and that not only those who get contractual rights in it but anyone who, it may be fairly inferred, was intended to act upon it, may recover against the vendor if through his lack of care it is unfit for such purpose. See also 53 Am. L. Reg. 357, *et seq.*, especially p. 359, n. 50.

used in its management; that the plaintiff's right of action was founded, not on contract, but on the duty which attaches to the use or dealing with a thing in its nature highly dangerous and likely to cause damage, unless managed with great care and caution.

I think the plaintiff's right of action is founded on a duty which I believe attaches in every case where a person is using or is dealing with a highly dangerous thing, which, unless managed with the greatest care, is calculated to cause injury to by-standers. To support such a right of action, there need be no privity between the party injured and him by whose breach of duty the injury is caused, nor any fraud, misrepresentation, or concealment; nor need what is done by the defendant amount to a public nuisance. It is a misfeasance independent of contract.

It is strange that there is no direct authority on the point. A large number of cases were cited, but none of them directly in point. The case of *Collis* v. *Selden* (Law Rep. 3 C. P. 495) was relied on by Mr. Waddy in argument. This was a demurrer to a declaration; and it was held that the declaration was bad, because it did not disclose any duty by the defendant towards the plaintiff for the breach of which an action would lie. Willes, J., in his judgment, seems to have contemplated an action like the present; for, he says: "The declaration is not founded upon any duty of the occupier to protect persons lawfully coming there against any hidden danger of which the defendant knew or ought to have known, but is founded on alleged carelessness in doing an act, viz. hanging a chandelier. The chandelier is to be regarded as movable property; and the declaration should have shewn either that it was *a thing dangerous in itself* and likely to do damage, or that it was so hung as to be dangerous to persons frequenting the house."

Rapson v. *Cubitt* (9 M. & W. 710) is in point. There, the defendant, a builder, was employed by the committee of a club to execute certain alterations at the club-house, including the preparation and fixing of gas-fittings. He made a sub-contract with B., a gas-fitter, to execute part of the work. In the course of doing it, through B.'s negligence the gas exploded, and injured the plaintiff, who was the butler of the club. It was held that the defendant was not liable, on the ground that B. was not his servant, but an independent sub-contractor. It seems, however, to have been assumed that an action against B. would have been maintainable.

All the other cases cited are distinguishable from this case. They are not cases where the alleged cause of action is in respect of a breach of duty in using or dealing with a thing in its nature dangerous and likely to cause injury unless great care is used.

There must be judgment for the plaintiff for 50*l.* and costs.

Judgment accordingly.[1]

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[1] *Accord: Van Winkle* v. *American Boiler Insurance Co.*, 52 N. J. L. 240 (1890), the defendant company which had insured a boiler in a building adjacent to the plaintiff's mill, by a policy in which they stipulated for access to the boiler for the purpose of inspection and that the policy should be void if the assured continued to use the boiler after notice that it was unsafe, having made an inspection issued to the assured a certificate that the boiler, which in fact was defective, was in good order; in consequence the assured continued to use the boiler which exploded and wrecked the plaintiff's premises.

CHAPTER V.

(a) Liabilities not dependent upon proof of negligence.

SECTION 1.

Ownership and Keeping of Animals.

(a) Trespasses upon real property.

ANON.

12 Henry VII. Keilway, 3b.

And they (the Court) say further, that where my beasts of their own wrong without my will and knowledge break another's close I shall be punished, for I am the trespasser with my beasts; which was also agreed to by law; for I am held by the law to keep my beasts without their doing wrong to any one.[1]

DELANEY *v.* ERRICKSON.

Supreme Court of Nebraska, 1880. 10 Nebraska, 492.

COBB, J.: It cannot be denied that at common law every one was obliged at his peril to keep his domestic animals off of the lands of another, and it made no difference whether such lands were inclosed or uninclosed, cultivated or uncultivated.

The first legislature convened in the territory of Nebraska passed an act which (in substance) now constitutes chapter ten of the general laws, and is in the following words: "So much of the common law of England as is applicable and not inconsistent with the constitution of the United States, with the organic law of this territory, or with any law passed or to be passed by the legislature of this territory, be and the same is adopted and declared to be law within said territory."

It will be necessary then to examine, first, whether that provision of the common law of England, above referred to, is appli-

[1] *Accord: Stackpole* v. *Healy*, 16 Mass. 33 (1819); *Wells* v. *Howell*, 19 Johns. (N. Y.) 385 (1822); and cases cited in Ingham on the Law of Animals, § 70, p. 258. In Pennsylvania the common law rule is in force; *Albert* v. *Knight*, 6 Pa. 472 (1847), except as to uninclosed woodland, though even here, says Gibson, C. J., "the entry is in strictness a trespass, which, for its insignificance, is not noticed by the law, probably on the foot of the maxim, *de minimis*, or perhaps it is better that all waste lands should be treated as a common without stint;" *Erdman* v. *Gottshall*, 9 Pa. S. C. 295 (1899). It is no defense that the defendant used ordinary care and prudence in taking care of his cattle, he is bound to keep them out of the plaintiff's close. *Tonawanda R. R.* v. *Munger*, 5 Denio (N. Y.), 255 (1848), per Beardsley, C. J., p. 267; nor is the sufficiency of the defendant's fence material, since "the fact that the cattle escaped through this fence by no act of negligence on the part of the defendant is not a defense." *Erdman* v. *Gottshall*, 9 Pa. S. C. 295 (1899).

An owner of land is, however, not liable for the escape of cattle not owned by him nor "under his control, entering his land and passing thence to land adjoining it, whether there be a partition fence or not", *Cook* v. *Morea*, 33 Ind. 497 (1870), *per* Worden, J., p. 300.

cable to the people of Nebraska in their condition at the time of the passage of said act and down to the present time; and, secondly, whether such provision and principle of the common law are consistent with the several acts of the legislature of the state and late territory bearing upon the question involved in this inquiry.

For a number of years following the establishing of the territorial government, the settlements were almost exclusively confined to the near vicinity of the Missouri river and the small streams emptying into it, where timber for fencing was comparatively plentiful, sufficiently so as to enable the settlers to fence such land as they desired to cultivate, and by so doing they were enabled to allow their numerous herds of cattle the free range of the almost boundless prairie at their doors. But soon the lands were commenced to be surveyed and brought into market, and, as the homestead law was not yet enacted, nor the wise policy of reserving the public lands for the use of actual settlers yet adopted, a large number of tracts of land soon became the private property of individuals, many of whom had never been, nor ever expected to be, inhabitants of the territory. Such purchasers of land took an absolute allodial estate in them. Nevertheless they took such estate subject to any and all the conditions which nature, the policy of the government, the undeveloped state of the country, and the state of society had thrown around it. Among these was the fact that it was the settled policy of the general government, which owned the surrounding lands, to throw them open to free and unrestricted pasturage. This was to the early settler and emigrant a valuable privilege, but one which they could not enjoy if each owner of stock was compelled to stand watch over his cattle to keep them off of each tract of land which, by reason of entry at the distant land office, should become the private property of individuals. The cattle could not be taught to regard the mounds of the government surveyors, nor that invisible line which, according to Blackstone, the common law of England draws around the possessions of every landholder.

But as emigration continued and population increased, the settlements extended out upon the open prairies where timber for fencing was not to be had, and we then having no railroad communication with the pineries or the Mississippi river, had each settler been obliged to provide a fenced pasture for his stock to keep them off of the lands of others, the settlement of the territory would have been impracticable. But it being equally impossible to procure fencing to enclose the cultivated fields, there arose a necessity for a law to compel the owners of stock to employ herders for its control, to keep it off of the growing crops. The proposition to enact such a law was regarded with disfavor by the inhabitants of the timbered portion of the state, and for a time strenuously opposed. Hence the peculiar character of the earlier herd laws, and even now five of the northern counties are specifically exempted from its provisions, and a method is prescribed by which any county may at any time take itself out of such operation by a majority vote of the inhabitants. But during the entire history of the territory, as well

as that of the state, down to a recent period, it had never been even suggested that neat cattle were, by virtue of any law or custom, required to be either fenced or herded off of wild, uncultivated lands. But the universal understanding, belief, and usage of the people has been to the contrary.

It is claimed, and possibly with justice, that the time has now arrived, when, by reason of the great increase in the density of the population of the state, and the enhanced value of grazing land, the owners of such lands should be protected in its exclusive enjoyment, the same as land sown to crops. If the time has arrived for such change, the legislature and not the courts is the place where it should be inaugurated.

It therefore appears to me that the common law of England, in the respect under consideration, was not "applicable" to our state and condition at the time of the framing of our laws and institutions, even if it can be said to be so now.[1]

ON REHEARING, *11 Nebraska, 533 (1881)*, LAKE, J.: At the first hearing the principal point respecting the alleged trespass brought to our notice was whether in this state the owner of domestic ani-

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[1] *Accord: Little Rock, etc., R. R.* v. *Finley*, 37 Ark. 562 (1881); *Morris* v. *Foraker*, 5 Colo. 425 (1880); *Studwell* v. *Ritch*, 14 Conn. 292 (1841); *Sprague* v. *R. R.*, 6 Dak. 86 (1888); *R. R.* v. *Geiger*, 21 Fla. 669 (1886); *Wagner* v. *Bissell*, 3 Iowa, 396 (1856); *Seeley* v. *Peters*, 5 Gilon (Ill.), 130 (1848); but this does not apply when the defendant removes part of the plaintiff's inner fence, *Buckmaster* v. *Cole*, 12 Ill. 345 (1850), nor where the cattle escape through a defective fence which by agreement or by statute the defendant is bound to maintain; *Anderson* v. *Locke*, 64 Miss. 283 (1886); *Gorman* v. *R. R.*, 26 Mo. 445 (1858); *Beinhorn* v. *Griswold*, 27 Mont. 79 (1902), *semble; Kerwhacker* v. *R. R.*, 3 Ohio St. 172 (1854); *Chase* v. *Chase*, 15 Nev. 259 (1880); *Laws* v. *R. R.*, 7 Jones L. (N. C.), 468 (1860); *Timm* v. *R. R.*, 3 Wash. Ty. 299 (1887); *Blaine* v. *R. R.*, 9 W. Va. 252 (1876); *Pace* v. *Potter*, 85 Tex. 473 (1893); *Buford* v. *Houts*, 133 U. S. 320 (1890), *semble* as to lands in Utah, the point actually determined was that unenclosed Government lands shall be free to those who seek to use them for pasture. In Alabama it is held that the common law rule is "not in force, being inconsistent with the statutes in respect to estrays, inclosures, and trespasses by cattle."

In Illinois and Ohio the common law rule has been restored by statute, *Bulpit* v. *Mathews*, 145 Ill. 345 (1893); *Sloan* v. *Hubbard*, 34 Ohio St. 583 (1878).

But "it follows not that because such browsing is excusable as a trespass, it is matter of right. It is an immunity, not a privilege. * * * It is enough in all reason, that the neighbor's cattle should have the range of his forest, without imposing upon him" (the owner of the forest) "the duty of looking to their safety." Gibson, C. J., *Knight* v. *Albert*, 6 Pa. 472 (1847), plaintiff's cattle, while "browsing" upon defendant's unenclosed woodland, fell into an ore pit dug therein; *Caulkins* v. *Mathews*, 5 Kans. 191 (1869), similar facts; *Beinhorn* v. *Griswold, supra*, plaintiff's cattle, ranging upon the public domain, wandered upon defendant's open mine and mill site and drank a poison from an open vat thereon; *Christy* v. *Hughes*, 24 Mo. App. 275 (1887), plaintiff's hogs, sleeping under defendant's building, killed by fall of overloaded floor; *Herold* v. *Meyers*, 20 Iowa, 378 (1866), plaintiff's cattle strayed into defendant's field and overate the corn growing thereon. As to the liability of a railway company for running over stock trespassing upon its unfenced right of way, compare *Kerwhacker* v. *R. R., supra*, with *Tonawanda R. R.* v. *Munger*, 5 Denio, N. Y. 255 (1848), and see *Railroad Co.* v. *Skinner*, 19 Pa. 298 (1852).

mals might lawfully permit them to wander upon and depasture the uninclosed, uncultivated lands of others. And our opinion on that branch of the case did not go beyond this, holding that he could. But, in reality, the record presented the further question, whether the plaintiff in error had the right to *drive* his animals upon such lands for the purpose of pasturage without the owner's permission? This is a very different question from the one previously decided, and we must answer it in the negative.

While it is true that Delaney would not have been answerable for indirect intrusions of his animals upon the land in question, he was not at liberty to drive, or have them driven, and kept there, against the wish of Errickson, as the evidence shows very conclusively that he did. We know of no law requiring as a condition to one's right to the exclusive enjoyment of his own estate against the willful, injurious acts of others, that he shall keep it inclosed by a fence. No statute, that we are aware of, so declares; and such is not the rule of the common law, which has so great regard "for private property that it will not authorize the least violation of it." 1 Broom & Hadley's Com., Am. Ed., 116.[2]

The theory of the defense to the alleged trespass is shown by an instruction to the jury, requested on behalf of Delaney, and which the court very properly refused to give. It was in these words: "If you find that the land in question was uncultivated, wild prairie land, and uninclosed, and land upon which the inhabitants of that neighborhood had uninterruptedly herded their cattle and stock from the first settlement of the country, then the plaintiff is not liable in this action." Several other instructions of the same import were also requested and refused; but the court did instruct that if the jury found "that Errickson notified Delaney that he, Errickson, had leased the land in controversy, that he, Delaney, must keep his stock off the same," and that regardless of this notice "Delaney drove, kept, and herded sheep thereon," then they should "find for Errickson whatever damages the stock of Delaney did while so on the land to the grass thereon." Under the evidence this instruction was right, and taken together with the rest of the charge, very properly restricted the jury in the assessment of damages to such as were shown to have been done by the stock, not when simply straying upon the land, but when purposely driven there and kept there through Delaney's agency. Had the evidence merely shown that the cattle wandered upon the land, there would have been no cause of action, and the first instruction requested on behalf of Delaney, which the court refused, would have been proper.

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[2] *Accord: Lazarus* v. *Phelps,* 152 U. S. 81 (1894), where defendant overstocked the land leased by him with his own cattle and that of others taken by him for pasture, and permitted them to occupy plaintiff's adjacent unfenced land; so when the defendant encloses the plaintiff's land as a range or pasture, *St. Louis Cattle Co.* v. *Vaught,* 1 Tex. Civ. App. 388 (1892), or where the defendant herds his cattle on the plaintiff's open land, *Harrison* v. *Adamson,* 76 Iowa, 337 (1888); as to the distinction between the right to close-herd sheep and to allow cattle to range at large, see *Willard* v. *Mathesus,* 7 Colo. 76 (1883).

THE TONAWANDA RAILROAD *v.* MUNGER.

Supreme Court of New York, 1848. 5 *Denio*, 255.

BEARDSLEY, C. J., p. 259: By the statute (1 R. S. 353, art. 4), it may be made the duty of owners of adjoining lands to build and maintain certain parts of division fences. The like obligation may also be imposed by contract, or prescription which presupposes an original contract; and where the duty exists and has been violated, the law will give no redress to the party in fault for damages sustained by him in consequence of a defect in that part of the fence he was bound to make or repair. (1 Ch. Pl. 544; 2 Saund. 285, n. 4; 1 Cowen, 79, note; *Shepherd* v. *Hees*, 12 John. 433.) An act passed in 1838 (Laws of 1838, p. 253), declares that "if any person liable to contribute to the erection or reparation of a division fence, shall neglect or refuse to make and maintain his proportion of such fence, or shall permit the same to be out of repair, *he shall not be allowed to have and maintain any action for damages incurred.*" This created no new rule, but merely affirmed a well settled principle of the common law, forbidding a recovery in any case for damages which the negligence or positive misfeasance of the party complaining contributed to bring upon himself.[1]

Where a prescriptive obligation rests on the owner of land adjoining a highway, to fence against cattle lawfully therein, he cannot maintain trespass for an entry by such cattle through a defect in his fence. This is well settled.

SANDERS *v.* TEAPE AND SWAN.

In the Queen's Bench, 1884. 51 *Law Times, N. S.*, 263.

The plaintiff, a labourer, was digging a hole in a garden of a house adjoining that of the defendant Teape. There was a wall which belonged to the defendant Teape only three feet high between these two gardens. The hole was about ten feet deep, and the plaintiff was, at the time in question, engaged in doing some work at the

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[1] Similar statutes are in force in the great majority of those jurisdictions which follow the common law rule; while varying greatly in their provisions, they in the main fall into two principal classes; first, those imposing a general duty to fence all cultivated lands, *Gregg* v. *Gregg*, 55 Pa. 227 (1868); *U. P. R. R.* v. *Rollins*, 5 Kans. 167 (1868); *Bonner* v. *De Loach*, 78 Ga. 50 (1886); but see *Joiner* v. *Winston*, 68 Ala. 129 (1880). Second, those which deal with the duty to erect partition fences, *Rust* v. *Low*, 6 Mass. 90 (1809). In the latter case it was held that such acts were passed to supply the lack of those "prescriptions to fence" impossible in a newly settled country, and like such prescriptions imposed the duty only against cattle lawfully upon the adjoining premises; *accord*, *McDonnell* v. *R. R.*, 115 Mass. 564 (1874); *Low* v. *Wormwood*, 29 Me. 282 (1849); *Avery* v. *Maxwell*, 4 N. H. 36 (1827); *Wood* v. *Snider*, 187 N. Y. 28 (1907), the plaintiff's failure to maintain a partition fence was no defense to one whose cattle having escaped from the highway into the adjoining field of a stranger had thence strayed upon the plaintiff's land.

bottom of the hole. Three dogs belonging to the defendant Teape had been taken out by the other defendant Swan, and as the defendant Swan was returning with the dogs, the dogs ran through a gate into a garden adjoining the one where the plaintiff was at work. The dogs began to run about in playfulness, and one of them, a large Newfoundland dog, jumped over the wall, and jumped or fell into the hole where the plaintiff was working at the time in a stooping posture. The dog fell on the nape of the plaintiff's neck, causing injuries for which he was confined to bed for three weeks, and he was unable to work for some time after.

For these injuries the plaintiff, who had refused two sovereigns offered to him as compensation, brought an action in the Bloomsbury County Court against the defendant Teape as the owner of the dogs, and the defendant Swan as being in charge of the dogs when the injuries in question were received.

The learned County Court judge ruled that there was no evidence to go to the jury in support of the plaintiff's case, and that, even assuming all the facts as alleged by the plaintiff, he had no cause of action against either of the defendants; and he gave judgment for the defendants.

The plaintiff now appealed.

LORD COLERIDGE, C. J.: It seems to me to be clear that the learned County Court judge was quite right, and it must be manifest upon ordinary principles of common sense that he was so. An action under the circumstances of this case is quite preposterous. It was an action against a person who kept a dog, because the dog, jumping about playfully, jumped over a low wall and into a hole where the plaintiff happened to be at work. On referring to the authorities, it is manifest that such an action could not be maintained. In *Mason* v. *Keeling* (1 Ld. Raym. 606, the well known case in the time of Lord Raymond and Lord Holt), it was held that an action would not lie against a man for mischief done by his dog, unless he knew that he had done mischief before, or was of a mischievous nature; and the same principle has also been laid down by Parke, B., in our own time. In *Brown* v. *Giles* (1 C. & P. 118), it was held that a dog, jumping into a field without the consent of its master, is not a trespass for which an action will lie. In *Beckwith* v. *Shordike* (4 Bur. 2093), it was held that an involuntary trespass may be justified, but not a voluntary one, and though the verdict there was for the plaintiff, this arose from the jury finding that the trespass was an intentional trespass, and not a mere involuntary accident.[1] The result of all these cases is, that if a dog, going about, commits an injury or does any mischief, the owner of the dog will be liable only if the dog was of a mischievous nature and he was aware of that fact; but if there be no evidence of that, then no action will lie. Here there is no suggestion of any proof of the mischievous nature of the dog. The only thing suggested as a *scienter* is, that the owner of the dog

[1] In that case the defendant was himself a trespasser upon the plaintiff's close, and his dog which accompanied him pulled down and killed a deer kept by the plaintiff in a paddock thereon.

offered the plaintiff a couple of sovereigns as a compensation, but this was entirely from his good nature, and not because he was liable in point of law. I am of opinion, therefore, that the plaintiff has shown no cause of action, and that this appeal should be dismissed.

WILLIAMS, J.: I am of the same opinion. If a man keeps horses and other animals, he is bound to keep them on his own ground; if he does not he may be liable to an action of trespass. There is an exception to this when they are on a public highway, as they have a right to be there, and then the owner is bound to use ordinary care. But in the case of dogs, pigeons, and the like, the case is different: if a dog, not being exceptionally mischievous, acting in playfulness goes over another man's land, there is no trespass, and the owner of the dog would not be liable. Here, so far as the defendants are concerned, the occurrence was purely accidental and involuntary, and no action lies against them in respect thereof, either as for a trespass or for any breach of duty.[2]

Judgment for defendants. Appeal dismissed.

SHERIDAN *v.* BEAN.

Supreme Judicial Court of Massachusetts, 1844. 8 *Metcalfe,* 284.

HUBBARD, J.: This is an action of trespass *quare clausum fregit,* and the only question submitted to the court is, whether it will lie against the owner of horses at agistment, which have strayed from the agister's field into the plaintiff's, and have done the damage complained of. It is contended that this action cannot be maintained, either at common law or upon the statute, against the owner of the horses, under such circumstances, but only against the agister. And the argument urged is, that to constitute a trespass, there must be an invasion of the property or person of another, by one who is an actor without right, either wilfully or negligently; and that in the present case, the act of sending the horses to be agisted was lawful, and that during the time they were agisted they were under the control and in the custody of the agister, and not of the defendant.

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[2] *Accord: Van Etten* v. *Noyes,* 112 N. Y. Supp. 888 (1908); *Buchanan* v. *Stout,* 123 App. Div. (N. Y.) 648 (1908); *Woolf* v. *Chalker,* 31 Conn. 121 (1862), *semble,* p. 128. *Contra: Chunot* v. *Larson,* 43 Wis. 536 (1878); *Doyle* v. *Vance,* 6 Vict. L. R. 87 (1880).

In *Read* v. *Edwards,* 17 C. B. N. S. 244 (1864), Willes, J., says, p. 260: "The question was much argued, whether the owner of an animal was answerable in trespass for every unauthorized entry of the animal into the land of another, as in the case of an ox. And the reasons were offered, which we need not now estimate, for a distinction between oxen and dogs or cats, on account,—first, of the difficulty or impossibility of keeping the latter under restraint,—secondly, the slightness of the damage which their wandering ordinarily causes,—thirdly, the common usage of mankind to allow them a wider liberty,—and lastly, their not being considered in law so absolutely the chattels of the owner, as to be the subject of larceny." A dog may, however, be distrained damage feasant, *Bunch* v. *Kennington,* 1 Q. B. (A. & E., N. S.) 674 (1841); *Boden* v. *Roscoe,* L. R. 1894, 1 Q. B. 608, per Cave, J., p. 611.

But though it is true that the owner of land or of chattels cannot maintain trespass against a wrongdoer, unless he is in possession of the land or the chattels at the time of the wrong done, yet it does not follow, as the converse of the rule, that the general owner may not be liable in an action for the injury done to another by a bailee or servant of the owner, though he is out of possession at the time of the injury. There are cases in which the party has an election whether to sue the owner of the chattel, or the agent or servant. And in regard to cattle, which, from the nature and the manner in which they are kept and employed, are peculiarly liable to trespass upon others, especial care has been taken for the protection of the rights of parties upon whom such trespasses may be committed, by giving them a remedy, not only against owners, but a process *in rem*, against the cattle themselves, when taken damage feasant,

In the case of trespass committed by cattle agisted, which is the case at bar, it is laid down, by approved writers of former times, cited by the plaintiff's counsel, that the party injured has his election to sue either the owner or agister, though he can have but one satisfaction. *Si mes avers sont en le gard de I. S., et durant cest temps font trespas al auter, il avera trespas vers moie ou I. S. a son election, mes il n'avera satisfaction d'ambideaux.* 2 Rol. Ab. 546, cites 7 Hen. IV. 31 *b*. And this is confirmed by Comyns in his Digest, Trespass, C. 1. See also 20 Vin. Ab. Trespass, B.

The defendant's counsel has cited a case from Clayton's Reports, called *Bateman's case*, as maintaining a contrary doctrine. But upon examining that case, it is found merely to affirm the position, that in case of agist cattle, the agister is liable for trespass committed by them, without touching the question of the liability of the owner also to an action. The principal case in Clayton is that of *Dawtry* v. *Huggins*, pp. 32, 33, in which it was ruled, that "if A have the custody of the goods of B; as here it was hogs put into the defendant's yard; if these do a trespass to the land of C adjoining, A shall be punished in trespass, and this though the owner's servant did wait upon them; and here it was proved the servant of A did also wait on them, and did serve them, therefore they were in his special possession; and the like matter was ruled in the case of *Stephen Bateman* of Wakefield, for agist cattle, if they do commit a trespass, the owner of the soil, where, &c. shall answer for that trespass."[1]

We consider, then, that the common law gave the plaintiff his election to pursue either the owner or agister, at his pleasure, or to seize the cattle damage feasant, intending to afford a threefold remedy for an injury so easily committed.

While there is an apparent hardship in subjecting a person to the action of trespass, where the cause arises from the neglect of

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[1] *Accord: Moulton* v. *Moore*, 56 Vt. 700 (1884); *Tewkesbury* v. *Bucklin*, 7 N. H. 518 (1835). So where by the terms of a fencing act, "an owner" of cattle is made liable for the damage done when the plaintiff's fence is sufficient, "it seems reasonable that anyone to whom the use and care and control of cattle are confided, should be responsible for damage by them done; and that such is the spirit of the law; and that he ought, therefore, to be deemed the owner." Daggett, J., *Smith* v. *Jaques*, 6 Conn. 530 (1828).

another, yet we cannot overlook the necessity of the checks which are required to guard against this species of trespass, which is not only so easily committed, but is so difficult to prevent. And we think our ancestors intended to give an ample remedy, by subjecting the owner, the agent or bailee, and the offending animals themselves, to making good the damages thus committed. Nor does the hardship appear so great, when we consider that the owner has his remedy against the person whom he employs, and if he does not obtain satisfaction for his loss, it is rather he who employed a negligent person that should suffer, than the man who is injured by such neglect.[2]

HARTFORD *v.* BRADY.

Supreme Judicial Court of Massachusetts, 1874. 114 *Mass.* 466.

DEVENS, J.: Inasmuch as the highways have been set apart, among other things, that cattle may be driven thereon, and as, from the nature of such animals, it is impossible, even with care, to keep them upon the highways unless the adjoining land is properly fenced, it has been settled that the owner of unfenced lands upon such ways cannot seize as damage feasant, or sustain an action for the injury caused by, cattle that wander thereupon, if reasonable care has been used in driving them along the highway, or if they have so escaped, having been properly managed, if reasonable effort has been made to remove them. *Stackpole* v. *Healy,* 16 Mass. 33, and cases cited. *Lyman* v. *Gipson,* 18 Pick. 422. *Little* v. *Lathrop,* 5 Greenl. 356. *Lord* v. *Wormwood,* 29 Maine, 282. *Avery* v. *Maxwell,* 4 N. H. 36. *Mills* v. *Stark,* 4 N. H. 512. *Dovaston* v. *Payne,* 2 H. Bl. 527. *Goodwyn* v. *Cheveley,* 4 H. & N. 631.

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[2] This is so where the place of agistment is owned by the agister as in the principal case, *Stafford* v. *Ingersol,* 3 Hill, N. Y. 38, 1842, *accord;* or is the property of the owner of the cattle and farmed by the agister on shares, *Marsh* v. *Hand,* 120 N. Y. 315 (1890), or leased by the owner to the agister or bailee, *Blaisdell* v. *Stone,* 60 N. H. 507 (1881), in which Doe, C. J., says, p. 509: "It may be reasonably necessary that the risk of entrusting cattle to an irresponsible bailee, should so rest in their owner as not to deprive injured third persons of the benefit of a common law action."

In *Atwater* v. *Lowe,* 39 Hun (N. Y.), 150 (1856), a distinction is drawn between the owner's liability for the trespasses of his cattle while in the custody of an agister, or bailee, when the owner remains constructively in possession and his liability for the trespass of those in the possession of a lessee when the owner's interest in the cattle is parted with for the term of the lease. See also *Marsh* v. *Hand, et al., supra,* and compare with this 2 Rolle (1868), 553, pl. 20-25, where it is said that, "If any servant without my knowledge drive my cattle upon the land of another, my servant is the trespasser and not I, because by driving the cattle there of his own will without my consent he gains a special property for the time, and so for that purpose they are his cattle. But it seems that if my wife drives them on another's land, I myself become a trespasser, for the wife cannot gain a property of me, 12 Hy. T., Keil. 36.

Contra: *Rossell* v. *Cottom,* 31 Pa. 525 (1858), where it was held that the agister is alone liable, Thompson, J., saying: "It is not the ownership of the trespassing creature, but the possession and use, that raises the liability"; *Reddick* v. *Newburn,* 76 Mo. 423 (1882); *Eck* v. *Hocker,* 75 Ill. App. 641 (1897).

In the present case, the count of the declaration on which the plaintiff relied was one charging the defendant with so negligently driving the cattle along the public highway near the plaintiff's close, that by reason thereof they broke and entered such close and did the damage complained of. But the question whether there was any negligence in the manner in which the cattle were driven along the highway was not put to the jury by the learned judge. He ruled that if, while the cattle were being driven by Hoyt and his assistants, they escaped from his control and broke and entered the plaintiff's close, and trampled and destroyed his crops there growing, the defendant was liable therefor. This instruction apparently assumes that the cattle entered into the land of the plaintiff directly from the highway. As the case finds that they did not pass through any fence, it is erroneous, because it makes the defendant responsible even if the cattle were in all respects properly managed and attended while travelling on the highway, and if having escaped while so managed and attended into the plaintiff's land, every reasonable effort was made to remove them and prevent damage.[1]

(b) Damage other than trespass upon real property.

BURTON *v.* MOORHEAD.

Scottish Court of Session, 1881. 8 *Rettie*, 892.

In December, 1880, Thomas Campbell Burton, professor of dancing, Glasgow, presented a petition in the Sheriff Court there against Robert Moorhead, commission agent, Glasgow, concluding for damages to the extent of £150 in respect of injuries alleged to have been inflicted on him by a dog belonging to the defender.

On January 27, 1881, the Sheriff-substitute (Lees), pronounced the following interlocutor:—"Finds that on 29th May, 1880, the pursuer was passing along a private road leading past the defender's house to the water-works, in course of construction for the burgh of Paisley, and that said road led near a kennel, at which

[1] *Accord: Erdman* v. *Gottshall*, 9 Pa. Sup. Ct. 295 (1899); *Rightmire* v. *Shepard*, 12 N. Y. Supp. 800 (1891); *Wood* v. *Snider*, 187 N. Y. 28 (1907), *semble; Bourchier* v. *Mitchell*, 17 Vict. L. R. 27 (1891); but see 20 Ed. IV, 10 b., cited in note to *Read* v. *Edwards*, 17 C. B. N. S. 244, p. 251, "Littleton. If a common road lies over the land of divers men, and if a drover comes with his beasts and some of them go out of the way, he shall be punished in an action of trespass." Nor is one driving cattle through the streets of a town liable in the absence of negligence for their escape into abutting premises. *Tillett* v. *Ward*, L. R. 10 Q. B. D. 17 (1882).

But this immunity is only enjoyed as an incident to the use of the highway for purposes of travel thereon, *Dovaston* v. *Payne*, see above; so one grazing his cattle upon the public highway is answerable to the owner of a close adjoining it into which it escapes, though it be by reason of the insufficiency of fences which such owner was bound to maintain, *Avery* v. *Maxwell*, and *Stackpole* v. *Healy*, see above; but see *Lord* v. *Wormwood*, 29 Me. 282 (1849).

In those States which hold that under a fencing act an owner is bound to fence against cattle "lawfully" upon the adjoining premises, cattle, which escape into such adjacent premises while being carefully driven along a highway on which it abuts, are not "lawfully" thereon, *Wood* v. *Snider*, 187 N. Y. 28 (1907); *McDonnell* v. *R. R.*, 115 Mass. 594 (1874).

there was chained a retriever dog belonging to the defender, and kept by him there as a watch-dog: Finds that the said dog was of a most savage character, and that it had bitten several people, and that the defender had been put on his guard as to its propensity to attack people: Finds that in these circumstances it was incumbent on him to take all proper precautions for the safety of people having occasion to pass along said road: Finds that the precautions adopted by the defender were, that the dog was secured by a chain attached at one end to its collar, and at the other to a ring passing through a staple driven into the ground: Finds that on the occasion in question the dog sprang so violently towards the pursuer that one of the links of its chain snapped, whereon it rushed on the pursuer and bit him severely: Finds that the said chain had been in use for two years, had been bought as a new chain, and as being of sufficient strength to restrain the dog, that apparently to the eye it was sufficient for this purpose, and that it has never before nor since 29th May given way: Finds, therefore, that the precautions taken by the defender were reasonably sufficient: Finds, in these circumstances, as matter of law, that the defender is not responsible to the pursuer for the injuries he has sustained through the unexpected fracture of the dog's chain: Therefore assoilzies the defender from the conclusions of the action, and decerns."

The pursuer appealed to the Sheriff (Clark), who, on 5th April, 1881, pronounced an interlocutor recalling the judgment of the Sheriff-substitute, on the ground that the occurrence took place through the failure of the defender to provide a chain sufficiently strong for the purpose intended, and assessing the damages at £50.

The defender appealed to the Court of Session.

LORD JUSTICE-CLERK.—There are two grounds on which the Sheriff's judgment is assailed, first, that the pursuer had no right to be where he was, and that, therefore, the obligation of the owner of the dog was not so strong as it would otherwise have been, and second, that the owner took all reasonable precautions to restrain this dog, and that the chain having broken from unsuspected causes, he was discharged from all responsibility. In regard to the first ground, I do not think that the evidence bears out the contention.

The second question is more important, and if the liability of the defender depended on his having taken reasonable precautions to restrain the dog I should think that he had very good grounds to prevail.

But that view depends, I think, on a misapprehension of the true principle of his duty. It seems agreed that where an owner of a dog has no reason to suppose that it is ferocious the mere fact that it has turned out to be so would not make him liable for anything it has done; the dog has in fact the privilege of one worry. But when the ferocity of the dog is quite well known to the owner his obligation is not one of reasonable care, but not to keep the dog at all, unless he does it in such a way as to make it perfectly secure. The distinction is most clear, and therefore the owner of the dog keeps it entirely at his own risk. He does not undertake that he will restrain the animal, but he must restrain, and, if he does not,

he will be responsible for its acts. The following passage in Lord Hale's Pleas of the Crown shews the distinction clearly, for under the old English law what will save a man from a criminal prosecution will not save him from a civil action of damages. He says,—"If a man have a beast, as a bull, cow, horse, or dog, used to hurt people, if the owner know not his quality he is not punishable, but if the owner be acquainted with his quality, and keeps him not up from doing harm, and the beast kills a man, by the ancient Jewish law the owner was to die for it. . . . If the owner have notice of the quality of his beast, and it doth anybody hurt, he is chargeable with an action for it. Though he have no particular notice that he did any such thing before, yet if it be a beast that is *feræ naturæ*, as a lion, a bear, a wolf, yea even an ape or monkey, if he get loose and do harm to any person, the owner is liable to an action for the damage, and so I knew it adjudged in *Andrew Baker's* case, whose child was bit by a monkey that broke his chain and got loose. And therefore in case of such a wild beast, or in case of a bull or cow that doth damage where the owner knows of it, he must at his peril keep him up safe from doing hurt, for though he use his diligence to keep him up, if he escapes and do harm the owner is liable to answer damages.[1] But as to the point of felony, if the owner have notice of the quality of the ox, &c., and use all due diligence to keep him up, yet the ox breaks loose and kills a man, this is no felony in the owner, but the ox is a deodand. But if he did not use that due diligence, but through negligence the beast goes abroad, after warning or notice of his condition, and kills a man, I think it is manslaughter in the owner."

That precisely covers the case here, and brings out the distinction clearly between a man doing what is lawful in a neglectful manner, and a man doing what is unlawful, except on the condition of taking all the risk on himself.

LORD YOUNG.—I entirely concur; and I think the case is very important. The Sheriff-substitute finds as a matter of fact "that the said dog was of a most savage character, and that it had bitten several people;" and the Sheriff finds that the dog was "a powerful and ferocious dog." Now, there is no necessity for a man to keep an animal of this kind—dangerous to human beings; there is no more necessity for him to keep it than there is to keep a wild animal. He may lawfully keep it, but he keeps it at his own risk; he is not only bound and obliged to use diligence, or, as the Sheriff-substitute says, "to take precautions which are reasonably sufficient" to restrain the dog; but the risk shall be entirely his, and the precautions he

[1] *Accord: May* v. *Burdett*, 9 Ad. and E. N. S. (Q. B.) 101 (1846), in which it was held that a declaration need not allege, in addition to the defendant's knowledge of the vicious character of the animal (in this case, a monkey), any negligence in failing to properly secure it; Lord Denman saying, p. 111, "The gist of the action is keeping the animal after knowledge of its mischievous propensities"; *Card* v. *Case*, 5 C. B. (M. G. and S.) 622 (1848); *Jackson* v. *Smithson*, 15 M. and W. 562 (1846); *Mann* v. *Weiand*, 81* Pa. 243 (1875); *Muller* v. *McKesson, et al.*, 73 N. Y. 195 (1878), and cases therein.

In *Muller* v. *McKesson*, 73 N. Y. 195 (1878), Church, C. J., says, p. 200: "In some of the cases it is said that from the vicious propensity and knowl-

edge of the owner negligence *will be presumed,* and in others that the owner is *prima facie* liable. This language does not mean that the presumption or *prima facie* case may be rebutted by proof of any amount of care on the part of the owner in keeping or restraining the animal. This presumption of negligence, if it can be said to arise at all, so as to be in any way material in a case where the owner is absolutely bound at his own peril to prevent mischief is a *presumptio juris et de jure,* against which no averment or proof is receivable. It is not a presumption in the ordinary sense of the word, raising a *prima facie* case which may be rebutted." *Card* v. *Case,* 5 C. B. (M. G. and S.) 622, p. 623 (1848), note b. "Since the owner's liability is based on his keeping an animal known to be vicious, if his servant be injured it is no defense that through the negligence of a fellow servant it was allowed to get loose." *Muller* v. *McKesson,* 73 N. Y. 195 (1878).

If the animal be domesticated (*mansuetae naturae*), knowledge of its vicious disposition must be alleged in the declaration and proved by evidence, *Buxenden* v. *Sharp,* 2 Salk. 662 (1709); *Mason* v. *Keeling,* 12 Mod., 332 (1799); *Papplewell* v. *Pierce,* 10 Cush. (Mass.) 509 (1852); and *Reynolds* v. *Hussey,* 64 N. H. 64 (1886); *Mann* v. *Weiand,* 81* Pa. 243 (1875).

If the animal be *foerœ naturœ* such allegation is unnecessary, *Spring Co.* v. *Edgar,* 99 U. S. 645 (1878), *Hayes* v. *Miller,* 150 Ala. 621 (1907), and though such knowledge is often alleged in the declaration, *May* v. *Burdett,* such statement in the declaration "must be taken to be proved, as every one knows that such animals as lions and bears are of a savage nature," *Besozzi* v. *Harris,* 1 F. and F. 92 (1858), p. 93.

As to whether the defendant's *scienter* can be shown by proof that a servant or agent knew of the animal's ferocious nature, see *Twigg* v. *Ryland,* 62 Md. 380 (1884), and *Gooding* v. *Chutes Co.,* 155 Cal. 620 (1909).

One voluntarily and knowingly keeping and harboring an animal known by him to be ferocious, is liable for harm done by it, though not its owner, *Quilty* v. *Battie,* 135 N. Y. 201 (1892), married woman held liable for injuries done by vicious dog, kept by her husband, with her knowledge and consent, upon premises which were her separate property; *Frammell* v. *Little,* 16 Ind. 251 (1861), bailee of vicious heifer, held liable for injuries done by her; *Snyder* v. *Patterson,* 161 Pa. St. 98 (1894), owner of premises held liable for injuries done by a dog which he had allowed his nephew, who lived with him, to keep therein; *Hayes* v. *Smith,* 62 Ohio St. 161 (1900); and see *Twigg* v. *Ryland,* 62 Md. 380 (1884).

Where, however, the defendant is required by law to keep wild or vicious animals he is not liable unless he is guilty of negligent custody, *Jackson* v. *Baker,* 24 D. C., App. Cases 100 (1904), keeper of Government Zoological Garden held not liable for injuries done by the beasts kept therein. As to whether a common carrier is in the absence of negligence liable for the injuries done by wild animals in its charge for transportation, see *Malloy* v. *Starin,* 191 N. Y. 21 (1907).

An owner who has hired or lent a useful animal to another is not liable for its misconduct while out of his possession, even though he knew it was vicious when he parted with it, *Bell* v. *Leslie,* 24 Mo. 661 (1887); but *quaere,* as to owner of fierce wild beasts so out of possession.

In many states statutes have been passed greatly enlarging the liability of the owners or keepers of dogs for injuries done outside the premises of such owner or keeper, for which see Cooley on Torts, 3rd Ed., 408, n. 65. These statutes, which differ greatly, unite in dispensing with the necessity of proving that the defendant knew of the dog's mischievous propensities, *Kerr* v. *O'Connor,* 63 Pa. St. 341 (1869); *Le Forest* v. *Tolman,* 117 Mass. 109 (1875). Under many, as Massachusetts, Michigan, New Hampshire, Ohio and Rhode Island, double damages may be recovered. Some make the owner or keeper liable only for injury to sheep, *Kerr* v. *O'Connor,* 63 Pa. St. 341 (1869); *Osincup* v. *Nichols,* 49 Barb. (N. Y.) 145 (1868), or others' cattle, as in the English Dogs Act of 1865, 284, 29 Vict. c. 60. An owner is liable for all the injuries done by his dog jointly with the dog of another owner, *Kerr* v. *O'Connor,* 63 Pa. St. 341 (1869); *Remele* v. *Donahue,* 54 Vt. 555 (1882); *McAdams* v. *Sutton,* 24 Ohio St. 333 (1873), as to whether joint action against both owners will lie, compare *Kerr* v. *O'Connor,* 63 Pa. St. 341 (1869), with *Adams* v. *Hall,* 2 Vt. 9 (1829).

takes must be effectual. If they are not, the owner is responsible. That is the law, and it is well set forth in the passage from Hales Pleas of the Crown your Lordship has quoted. If it be a wild animal, or an ordinary domestic animal which is dangerous to human beings, the keeper shall not discharge himself of his obligation by using diligence, which in fact turned out to be ineffectual. It is different when there is a criminal question in the matter, and not merely one of damages, for when a man is sought to be made criminally responsible, then the question of reasonable diligence will be entertained. I concur in all the findings of the Sheriff-substitute as summarised by the Sheriff, with the exception of the finding as to the reasonably sufficient precautions. I think the precautions must be effectual, and not only reasonably sufficient, in the sense that though they were not effectual the owner was morally excusable. The reason of our judgment is that ineffectual precautions are no defence to an action for injuries done to a person, where he lawfully was, by a ferocious animal.

LORD CRAIGHILL concurred.

THE COURT pronounced the following interlocutor:—"Find that the dog in question was ferocious and dangerous, and known to be so by the appellant (defender): Find that the dog was kept on the chain, but that this chain was insufficient to render the dog secure, and that the chain broke, and the dog getting loose, bit the respondent (pursuer) severely: Find that the respondent was where he was entitled to be at the time of this occurrence: Therefore dismiss the appeal, approve the judgment of the Sheriff appealed against, and decern."

PLATT, B., in *Jackson* v. *Smithson*, 15 Meeson and Welsby, 562 (1846), at p. 565: "No doubt a man has a right to keep an animal which is *feræ naturæ*, and nobody has a right to interfere with him in so doing, until some mischief happens; but as soon as the animal has done an injury to any person, then the act of keeping it becomes, as regards that person, an act for which the owner is responsible."[1]

FILBURN *v.* THE PEOPLE'S PALACE AND AQUARIUM COMPANY, LIMITED.

Court of Appeals, 1890. L. R. 25 Q. B. D., 258.

APPEAL from a judgment of Day, J.

The action was brought to recover damages for injuries sustained by the plaintiff by his being attacked by an elephant, which was the property of the defendants, and was being exhibited by them. The learned judge left three questions to the jury: whether the elephant was an animal dangerous to man; whether the defendant knew the elephant to be dangerous; and whether the plaintiff brought the attack on himself. The jury answered all three questions in the negative. The learned judge entered judgment for the plaintiff for a sum agreed upon in case the plaintiff should be entitled to recover.

The defendants appealed.

[1] Compare with this the language of the court in *Woolf* v. *Chalker*, 31 Conn., 121 (1862).

Lockwood, Q. C., and *Cyril Dodd, Q. C.*, in support of the appeal. There are certain animals recognised as being of an untameable nature, and these a person keeps at his peril. In Hale's Pleas of the Crown (vol. i. p. 430), it is said: "Tho' he have no particular notice, that he did any such thing before, yet if it be a beast, that is *feræ naturæ*, as a lion, a bear, a wolf, yea an ape, if he get loose and do harm to any person, the owner is liable to an action for damage." There is, however, no hard and fast line which prevents an animal *feræ naturæ* ceasing to belong to that class and becoming domesticated. The distinction is drawn in *Rex* v. *Huggins* (2 Ld. Raym. 1574), where it is said: "There is a difference between beasts that are *feræ naturæ*, as lions and tygers, which a man must always keep at his peril; and beasts that are *mansuetæ naturæ*, and break through the tameness of their nature, such as oxen and horses. In the latter case an action lies if the owner has had notice of the quality of the beast; in the former case an action lies without such notice." All animals are wild by nature, and the reason for the distinction is, that some of them are treated as domesticated, because they have been tamed and are used in the service of man. Though there are wild elephants, just as there are wild oxen and horses, a great number have been tamed, and are used in the service of man; and the same ruling should apply to individuals of this class as to domesticated animals generally. The jury have negatived any knowledge on the part of the defendants of any dangerous character in this elephant, and they are, under these circumstances, entitled to the verdict.

Montague Lush, contra, was not called on.

LORD ESHER, M. R. The only difficulty I feel in the decision of this case is whether it is possible to enunciate any formula under which this and similar cases may be classified. The law of England recognises two distinct classes of animals; and as to one of those classes, it cannot be doubted that a person who keeps an animal belonging to that class must prevent it from doing injury, and it is immaterial whether he knows it to be dangerous or not. As to another class, the law assumes that animals belonging to it are not of a dangerous nature, and anyone who keeps an animal of this kind is not liable for the damage it may do, unless he knew that it was dangerous. What, then, is the best way of dealing generally with these different cases? I suppose there can be no dispute that there are some animals that every one must recognise as not being dangerous on account of their nature. Whether they are *feræ naturæ* so far as rights of property are concerned is not the question; they certainly are not so in the sense that they are dangerous. There is another set of animals that the law has recognised in England as not being of a dangerous nature, such as sheep, horses, oxen, dogs, and others that I will not attempt to enumerate. I take it this recognition has come about from the fact that years ago, and continuously to the present time, the progeny of these classes has been found by experience to be harmless, and so the law as-

sumes the result of this experience to be correct without further proof. Unless an animal is brought within one of these two descriptions—that is, unless it is shewn to be either harmless by its very nature, or to belong to a class that has become so by what may be called cultivation—it falls within the class of animals as to which the rule is, that a man who keeps one must take the responsibility of keeping it safe. It cannot possibly be said that an elephant comes within the class of animals known to be harmless by nature, or within that shewn by experience to be harmless in this country, and consequently it falls within the class of animals that a man keeps at his peril, and which he must prevent from doing injury under any circumstances, unless the person to whom the injury is done brings it on himself. It was, therefore, immaterial in this case whether the particular animal was a dangerous one, or whether the defendants had any knowledge that it was so. The judgment entered was in these circumstances right, and the appeal must be dismissed.

LINDLEY, L. J. I am of the same opinion. The last case of this kind discussed was *May* v. *Burdett* (9 Q. B. 101), but there the monkey which did the mischief was said to be accustomed to attack mankind, to the knowledge of the person who kept it. That does not decide this case. We have had no case cited to us, nor any evidence, to shew that elephants in this country are not as a class dangerous; nor are they commonly known here to belong to the class of domesticated animals. Therefore a person who keeps one is liable, though he does not know that the particular one that he keeps is mischievous. Applying that principle to this case, it appears that the judgment for the plaintiff was right, and this appeal must be dismissed.

BOWEN, L. J. I am of the same opinion. The broad principle that governs this case is that laid down in *Fletcher* v. *Rylands* (Law Rep. 1 Ex. 265; Law Rep. 3 H. L. 330), that a person who brings upon his land anything that would not naturally come upon it, and which is in itself dangerous, must take care that it is kept under proper control. The question of liability for damage done by mischievous animals is a branch of that law which has been applied in the same way from the times of Lord Holt (See *Mason* v. *Keeling*, 12 Mod. 332) and of Hale until now. People must not be wiser than the experience of mankind. If from the experience of mankind a particular class of animals is dangerous, though individuals may be tamed, a person who keeps one of the class takes the risk of any damage it may do.[1] If, on the other hand, the animal kept belongs to a class which, according to the experience of mankind, is not

[1] *Accord*: Crowden, J., in *Besozzi* v. *Harris*, 1 F. and F., 92 (1858), p. 93, "Every one must know that bears are of a savage nature. For though such nature may sleep for a time, this case shows it may wake up at any time"; and Todd, J., in *Vredenburg* v. *Behan*, *post* p. 521.

In *Hays* v. *Miller*, *infra*, it was held that a plea that the wolf had been to the defendant's knowledge "domesticated to such an extent as to lead those acquainted with its habits to believe that no harm would come from contact with it" was *held* to have been properly stricken out since the facts set out were no defense to the action though provable in mitigation of damages.

dangerous, and not likely to do mischief, and if the class is dealt with by mankind on that footing, a person may safely keep such an animal, unless he knows that the particular animal that he keeps is likely to do mischief. It cannot be doubted that elephants as a class have not been reduced to a state of subjection; they still remain wild and untamed, though individuals are brought to a degree of tameness which amounts to domestication. A person, therefore, who keeps an elephant, does so at his own risk, and an action can be maintained for any injury done by it, although the owner had no knowledge of its mischievous propensities. I agree, therefore, that the appeal must be dismissed.

Appeal dismissed.[2]

EARL *v.* VAN ALSTINE.

Supreme Court of New York, 1850. 8 Barbour, 630.

THIS action was commenced in a justice's court. The complaint alledged that the defendant was the owner of 15 hives of bees, which he wrongfully kept in his yard adjoining the public highway, and that the plaintiff's horses, while travelling along the highway and passing the place where the bees were kept, were attacked and stung so severely that one of them died and the other was greatly injured, &c. The answer denied the charge contained in the complaint. Upon the trial, the keeping of the bees as alleged, and the injury to the horses, were proved, and the plaintiff recovered judgment for $70.25 and costs. Upon appeal to the county court of Wayne county, this judgment was reversed, and the cause was brought to this court by appeal from the judgment of the county court.

By the Court, SELDEN, J. This case presents two questions; 1. Is any one who keeps bees liable, at all events, for the injuries they may do? and 2. Did the defendant keep these bees in an improper

In *Spring Co.* v. *Edgar*, 99 U. S., 645 (1878), Clifford, J., p. 653, seems to recognize an intermediate class between domestic and untamable animals, animals which may be tamed but which are liable to revert to their wild habits.

[2] So in *Vredenburg* v. *Behan*, *post*, p. 521; *Besozzi* v. *Harris*, 1 F. and F., 92 (1858), and *Marquet* v. *La Duke*, 96 Mich., 596 (1896), bears, in *Marlor* v. *Ball*, 16 Times L. R., 239 (1900), zebras, and in *Hayes* v. *Miller*, 150 Ala., 621 (1907), and *Manger Bros.* v. *Shipman*, 30 Neb., 352 (1890), wolves were held to be animals *ferae naturae* so far as the liability of their custodians was concerned. In *Spring Co.* v. *Edgar*, 99 U. S., 645 (1878), it was alleged that the defendants knew of the vicious nature of a stag allowed to range over its premises, and the evidence of defendant's knowledge was held to have been properly left to the jury.

In *Maung Kyau Dun* v. *Ma Kyi and Narasanan Chetty*, 2 Upper Burma Rulings, Civ. 570 (1900), it was held that, "In view of the manner in, and the extent to, which elephants are employed in this country, such a proposition" (that their owners should be liable for harm done by them without proof of negligence or knowledge of their vicious disposition) "would be manifestly unjust."

manner or place, so as to render him liable on that account?

It is insisted by the plaintiff that while the proprietor of animals of a tame or domestic nature *domitæ naturæ*, is liable for injuries done by them, (aside from trespasses upon the soil,) only after notice of some vicious habit or propensity of such animal; that one who keeps animals *feræ naturæ* is responsible at all events for any injuries they may do, and that as bees belong to the latter class it follows of course that the defendant is liable.

In order to determine this question, upon which no direct or controlling authority exists, that I have been able to find, it becomes necessary to look into the principles upon which one who owns or keeps animals is held liable for their vicious acts. It will be found, on examination of the authorities upon the subject, that this classification of animals by the common law into animals *feræ naturæ* and *domitæ naturæ* has reference mainly if not exclusively, to the rights of property which may be acquired in them; those of the latter class being the subjects of absolute and permanent ownership, while in regard to the former only a qualified property can exist, and the distinction is based upon the extent to which they can be domesticated or brought under the control and dominion of man, and not at all upon the ferocity of their disposition, or their proneness to mischief. For instance, the dog, some species of which are extremely savage and ferocious, is uniformly classed among animals *domitæ naturæ*, while the hare, the rabbit and the dove are termed *feræ naturæ*, although comparatively harmless. It would not be rational to suppose that a classification adopted with exclusive reference to one quality of animals, could be safely used to define and regulate responsibilities growing out of other and different qualities; nor would it accord with that just analysis and logical accuracy which distinguish the common law, that it should be resorted to for that purpose. And although some *dicta* may be found in the books which might seem to countenance the idea, the decided cases do not lead to any such conclusion.

Peake, in his work on evidence, under the head of "Actions founded in negligence," has the following: "If one man keep a lion, bear, or any other wild and *ferocious* animal, and such animal escape from his confinement and do mischief to another, the owner is liable to make satisfaction for the mischief so done without further evidence of negligence in him; for every person who keeps such noxious and *useless* animals must keep them at his peril. On the contrary, if a man has a dog, a bull, or any other domestic animal such as are usually kept and are indeed *necessary to the existence of man*, no action is maintainable without proof of knowledge, &c.; for without such knowledge no negligence or fault is imputable to the defendant." (*Norris' Peake*, 486.) Three things are worthy of notice in this extract. In the first place the author mentions animals that are not only wild but *ferocious*, and speaks of them as not only noxious but *useless*. In speaking of domestic animals he

dwells upon their utility and value; and lastly, he makes negligence the foundation of the liability of the owner.

These authorities seem to me to point to the following conclusions. 1. That one who owns or keeps an animal of any kind becomes liable for any injury the animal may do, only on the ground of some actual or presumed negligence on his part. 2. That it is essential to the proof of negligence, and sufficient evidence thereof, that the owner be shown to have had notice of the propensity of the animal to do mischief. 3. That proof that the animal is of a savage and ferocious nature is equivalent to proof of express notice. In such cases notice is presumed.

Having shown, then, as I think, clearly, that the liability does not depend upon the classification of the animal doing the injury, but upon its propensity to do mischief, it remains to be considered whether bees are animals of so ferocious a disposition, that every one who keeps them, under any circumstances, does so at his peril. If it is necessary for the plaintiff to aver and prove the mischievous nature of the animal, nothing of the kind was done in this case; but if courts are to take judicial notice of the nature of things so familiar to man as bees, which I suppose they would be justified in doing, then I would observe that however it may have been anciently, in modern days the bee has become almost as completely domesticated as the ox or the cow. Its habits and its instincts have been studied, and through the knowledge thus acquired it can be controlled and managed with nearly as much certainty as any of the domestic animals; and although it may be proper still to class it among those *ferœ naturæ*, it must nevertheless be regarded as coming very near the dividing line, and in regard to its propensity to mischief, I apprehend that such a thing as a *serious* injury to persons or property from its attacks is very rare, not occurring in a ratio more frequent certainly than injuries arising from the kick of a horse, or the bite of a dog.

There is one rule to be extracted from the authorities to which I have referred, not yet noticed, and that is that the law looks with more favor upon the keeping of animals that are useful to man, than such as are purely noxious and useless. And the keeping of the one, although in some rare instances they may do injury, will be tolerated and encouraged, while there is nothing to excuse the keeping of the other. In the case of *Vrooman* v. *Lawyer*, (13 John. Rep. 339,) the court say: "If damage be done by any domestic animal kept *for use or convenience*, the owner is not liable to an action, without notice." The utility of bees no one will question, and hence there is nothing to call for the application of a very stringent rule to the case. Upon the whole, therefore, I am clearly of the opinion that the owner of bees is not liable *at all events* for any accidental injury they may do. The question is still left whether the keeping of these bees so near the highway subjects the defendant to a responsibility which would not otherwise rest upon him. I consider this question as substantially disposed of by the evidence in the case. It appears that bees had been kept in the same situation for

some eight or nine years, and no proof was offered of the slightest injury ever having been done by them. On the contrary, some of the witnesses testify that they had lived in the neighborhood and had been in the habit of passing and repassing frequently, with teams and otherwise, without ever having been molested. This rebuts the idea of any notice to the defendant, either from the nature of bees or otherwise, that it would be dangerous to keep them in that situation; and of course, upon the principles already settled, he could not be held liable.

The judgment of the county court must be affirmed.[1]

SCRIBNER *v.* KELLEY.

Supreme Court of New York, 1862. 38 Barbour 14.

Action brought to recover damages for an injury caused by the fright of the plaintiff's horse at the sight of an elephant of the defendants, about November 22, 1857, at or near Tarrytown, in the county of Westchester. The elephant was in charge of a person alleged to be the servant of the defendants. The person so in charge at the time of the accident was traveling with the elephant on the highway called the Highland turnpike, and was riding on horseback, on the westerly side of said elephant. The plaintiff, with his horse and wagon, was traveling through Beekman street, going east, and was about one hundred feet from said turnpike road, when his horse, seeing the elephant coming down the turnpike, at some distance above the point of intersection of Beekman street with the turnpike, became frightened and ran away, causing the damage complained of. The complaint alleged that the defendants

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[1] *Accord: Petey Mfg. Co.* v. *Dryden,* 5 Penniwell (Del.) 166 (1904); *Parsons* v. *Mauser,* 119 Ia. 88 (1903), Ladd, J., saying, p. 90: "Every one harboring creatures *ferae naturae* is charged with knowledge of their habits and evil propensities. There is no reason for an exception in favor of the bee. Indeed, their disposition to make themselves felt is a matter of common observation or experience from early childhood. But they are very useful, the (apiary), often furnishing a livelihood and generally proving a source of profit; and the books seem to look with more favor upon the keeping of animals useful to man than those which are worthless save as curosities. For this reason the rule of absolute liability for the consequences of injuries received from wild beasts kept in confinement, declared in the earlier decisions, even if regarded as sound, ought not to be extended to creatures so nearly domesticated." See also *Lucas* v. *Pettit,* 12 Ont. L. R. 448 (1906), and *O'Gorman* v. *O'Gorman,* I. R. (1903) 2 K. B. 573, especially argument of Bourke, K. C., and *compare Maug, Kyan Dun* v. *Ma Kyin, et al.,* note to *Filburn* v. *Peoples Palace, etc., ante.*

But one keeping bees may be liable if he be guilty of negligence, as where he keeps them at an improper place, *Parsons* v. *Mauser, supra,* hives maintained near hitching post for horses; *Lucas* v. *Pettit, supra,* more than a hundred hives placed close to plaintiff's premises, or where he otherwise deals with them in a way tending to the injury of others, *O'Gorman* v. *O'Gorman, supra,* defendant smoked out his bees while plaintiff was "tackling" his horses on his adjacent premises.

were the owners of said elephant, and the person in charge of him their servant, and that said servant well knew that said elephant was calculated to and would frighten horses, and that by want of care on his part, without any negligence of the plaintiff, the damage occurred. The answer of the defendant Kelley admitted the ownership of the elephant, and denied every other allegation in the complaint. After the plaintiff rested his case, the counsel for the defendants moved for a nonsuit and dismissal of the complaint, on the grounds, 1st. That there was no proof that the defendants knew the elephant would cause and produce such injury; and 2d. There was no proof of carelessness or negligence on the part of the defendants or their agents or servants. Which motion was granted by the courts and the complaint dismissed, on the ground that no negligence was shown on the part of the defendants, and the plaintiff excepted to such decision. The plaintiff moved for a new trial, on a case and exceptions ordered to be heard in the first instance at a general term.

By the Court, SCRUGHAM, J. The liability of the owner or keeper of an animal of any description, for an injury committed by such animal, is founded upon negligence, actual or presumed. It is not in itself unlawful for a person to keep wild beasts, though they may be such as are of a nature fierce, dangerous and irreclaimable; but as the propensity of such animals to do dangerous mischief is well known, and is inherent and not to be eradicated by any effort at domestication, nor restrained except by perfect confinement or extraordinary skill and watchfulness, the owner or keeper of such dangerous creatures is required to exercise such a degree of care in regard to them as will absolutely prevent the occurrence of an injury to others through such vicious acts of the animal as he is naturally inclined to commit. Under such circumstances the occurrence of the act producing the injury affords sufficient evidence that the owner or keeper has not exercised the degree of care required of him, and his failure to do so is negligence. Therefore, to maintain an action for an injury caused by the vicious act of such an animal, it is not necessary to prove that it occurred through the actual negligence of the owner or keeper, but the negligence upon which his responsibility rests will be presumed.

This is so because the injury results from a vicious propensity which is the natural effect and sure accompaniment of the savage and ferocious nature of the animal, and the existence of such qualities in him is equivalent to proof of express notice of the propensity. But it is apparent that the rule will not apply where the injury does not proceed from any such propensity; for it is only of its existence that the savage and ferocious nature of the animal can be regarded as notice.

In this case the injury resulted not from the act of the elephant, but from the fact that his appearance, as he was passing along the highway, caused the horse of the plaintiff to become frightened and unruly. To render the defendants liable for the damage that accrued, it would be necessary to show, not only that such is the effect

of the appearance of an elephant upon horses in general, but also that the defendants knew or had notice of it; for if it is conceded that the elephant is of a savage and ferocious nature, it does not necessarily follow that his appearance inspires horses with terror. It does not appear that the elephant was at large, but on the contrary that he was in the care, and apparently under the control, of a man who was riding beside him on a horse; and the occurrence happened before the passage of the act of April 2d, 1862, regulating the use of public highways. There is nothing in the evidence to show that the plaintiff's horse was terrified because the object he saw was an elephant, but only that he was frghtened because he suddenly saw, moving upon a highway crossing that upon which he was traveling, and fully 100 feet from him, a large animate object to which he was unaccustomed—*non constat* that any other moving object of equal size and differing in appearance from such as he was accustomed to see might not have inspired him with similar terror. The injury which resulted from his fright is more fairly attributable to a lack of ordinary courage and discipline in himself, than to the fact that the object which he saw was an elephant.

The complaint was properly dismissed, at the circuit.[1]

Judgment for the defendants, with costs.

TWISDEN, J., in *Mitchil* v. *Alestree*, 1 Ventris, 295 (1676): "If one hath kept a tame Fox, which gets loose and grows Wild, he that hath kept him before shall not answer for the Damage the Fox doth after he has lost him, and he hath resumed his wild Nature."[2]

VREDENBURG *et al. v.* BEHAN *et al.*

Supreme Court of Louisiana, 1881. 33 *La. Ann.* 627.

The opinion of the Court was delivered by

TODD, J. Mrs. V. Vredenburg, in her own behalf as the widow of William Hazard Vredenburg, deceased, and as tutrix of his minor children, brings this suit against the defendants, and claim from them *in solido* fifty-five thousand dollars damages.

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[1] *Accord: Bostock Ferrari Amusement Co.* v. *Brocksmith*, 34 Ind. App. 566 (1905), plaintiff's horse frightened by a docile, gentle bear which was being led by the defendant's servants, properly secured and under perfect control, through the public streets, compare *Marsh* v. *Koons* and other cases cited in note 2 to *Healy* v. *Ballentine and Sons, ante.*

If on the contrary the animal escapes from control and does injury while being driven or led through the streets, the person driving or leading it, will be liable if he fails to take that care in so doing which, in view of the known character of the class to which it belongs, as a wild bull, *Barnum* v. *Terpenning*, 75 Mich. 557 (1889), or of its known individual propensities, *Limehan* v. *Sampson*, 126 Mass. 506 (1879); *Hudson* v. *Roberts*, 6 Exch. 697 (1851), is necessary to secure the safety of the travelling public.

While even gentle bulls are notoriously apt to become irritated and therefore unfit to be led or driven upon the highway without stringent care to

1. The facts out of which this controversy grew are, substantially, as follows:

The defendants were members of an association or society known as the Crescent City Rifle Club.

In July, 1877, the club, wishing to send some of its members North to participate in an inter-State rifle shooting match, about to take place in New York, for the purpose of providing means therefor, concluded to give an entertainment at Milneburg, on Lake Pontchartrain. The Continental Guards, a military company of the city of New Orleans, to further the object in view, and as a contribution to the proposed entertainment, offered to the club a bear, owned by the officers of the company, "as a prize to be shot for" on the occasion. The offer was accepted, and a member of the club was instructed to make the necessary arrangements for shooting for the bear.

The entertainment came off on the 3d of August, 1877; the bear was brought on the ground and was offered as a prize, as previously arranged. He was won by William Arms, a member of the club, and one of the defendants. Arms put him up again to be shot for, and this time he was won by another person, who, however, declined to claim the prize. Arms had the bear taken to the grounds of the club, and caused him to be chained to the corner of the clubhouse; and there the bear remained until the 30th of October, 1877. These grounds had been leased by the club, and the house erected by it belonged, by the terms of their charter, to the members of the club.

The pasture of Mr. Vredenburg, who was engaged in a dairy business, adjoined the grounds of the rifle club, and he and his employees in going to and from the pasture passed through these club grounds. On the evening of the 30th of October, Mr. Vredenburg went to the pasture after his cows. A short time thereafter, as he was returning from the pasture, he was attacked by the bear, which in the meantime had gotten loose, and received the injuries of which he subsequently died. Tetanus or lock-jaw supervened, attended with great suffering, and his death occurred on the 27th November, twenty-one days after the wounds were inflicted. It is shown that just after Mr. Vredenburg passed through the club grounds on his way to the pasture, a boy, who was employed by him to assist in driving his cattle, and in his dairy business generally, came into the club grounds accompanied by a small dog, and teased the bear by setting the dog on him; and it was whilst the animal was thus worried, that he twisted his collar off, and ran after the dog and finally encountered Mr. Vredenburg; and just as he attacked him he was whipped by his keeper in an effort to prevent the attack, which only served to enrage him the more.

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prevent their escape, it is not negligence to lead a horse, not known to be vicious, through a public street, whether the person so leading him is walking or riding or driving another horse and such person is not liable if such horse, by kicking, injures the person or property of a traveller. *Eddy* v. *Union Railroad Co.*, 25 R. I. 451 (1903.)

[8] See *Beven, Negligence in Law*, 3rd Ed., pp. 505, 520, 521; and *Brady v. Warren*, 1900, 2 Irish R. 632.

This last mentioned fact, touching the acts of the hired boy in causing the bear to break loose, is charged to have remotely caused or contributed to the death of the deceased, and is relied on by the defendants as a ground to relieve them of responsibility for the result; and though not strictly in the order of pleading adopted by their counsel, it is well to consider it at once, and eliminate it from the case.

2. The doctrine of contributory negligence has never been carried to the extent contended for in this instance. Had the acts referred to been committed by Vredenburg himself, there would be great force in the plea urged; and the principle invoked would be strictly applicable.[1] It is for his own acts, however, in this respect, that a man is bound and for which he must suffer; but he cannot be held equally answerable for the acts, faults and negligence of his employee.

The master or employer is only answerable for the faults of his employee when committed "in the exercise of the functions of his employment, and when he might have prevented the act and not done it." C. C. 2320.

In this instance, the boy's act was not in the remotest degree connected with his employment; his employer was not present, was not knowing or consenting to it; and it was not in his power to prevent it.

Besides, the responsibility attaching to those who own, control or keep animals *feræ naturæ*, to which class a bear belongs, is of that strict and grave character, as not to be relieved or modified by considerations of the kind presented, nor to be measured by rules that apply to owners or keepers of domestic animals.

Animals of this kind, such as lions, tigers, bears, are universally recognized as dangerous. It is the duty of those who own or keep them, to keep them in such a manner as to prevent them from doing harm, under any circumstances whether provoked, as they are liable to be, or not provoked. There must be security against them under all contingencies. *Domat*, p. 475; *Merlin, Repertoire*, tome 26, p. 242, *verbo Quasi-Delit; Marcade*, tome 5, pp. 272, 273; 1 *Law Repts.*, p. 263; 3 *Law Repts.*, p. 330.

Nor does it matter that an animal of this kind may be to some extent tame and domesticated; the natural wildness and ferocity of his nature but sleeps, and is liable to be awakened at any moment, suddenly and unexpectedly, under some provocation, as was the case in this instance.

[1] "And as negligence, in the ordinary sense, is not the ground of liability, so contributory negligence, in its ordinary sense, is not a defense." It must be shown that the plaintiff with full knowledge of the presence of the animal and of its vicious propensities "wantonly excites it or voluntarily and unnecessarily puts himself in the way of it," *Muller* v. *McKesson*, 73 N. Y. 195 (1878); *Lynch* v. *McNally*, 73 N. Y. 347 (1878); *Woolf* v. *Chalker*, 31 Conn. 121 (1862); *Marlor* v. *Ball*, 16 Times, L. R., 239 (1900); *Malloy* v. *Starin*, 113 App. Div. (N. Y.) 852 (1906); *Fake* v. *Addicks*, 45 Minn. 37 (1890); and see *Earhart* v. *Youngblood*, 27 Pa. St. 331 (1856); compare with this the decision of Paulus, Sent. Rec. 1, 15 Sec. 3. *"Ei, qui irritatu suo feriam bestiam vel quamcumque aliam quadrepedem in se proritaverit, eaque damnum dederit, neque in ejus dominum necque in custodem, actio datur."*

If the defendants are otherwise liable for the acts of the bear, the acts of the boy in provoking him cannot for these reasons, affect in the least that liability.[2]

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[2] It is held in some cases that "in truth there is no distinction between the case of an animal which breaks through the tameness of its nature, and is fierce, and known by its owner to be so, and one which is *ferae naturae*," Alderson, B., *Jackson* v. *Smithson*, 15 M. & W. 563 (1846), p. 565, but see 22 Harvard L. Rev. pp. 484, et seq. In *Baker* v. *Snell*, L. R. 1908, 2 K. B. 352, 825, it was held that an innkeeper, who kept upon his premises a dog known by him "to be ferocious and given to bite" was liable to a housemaid employed by him who was bitten by the dog, though the dog had been entrusted to the "potman," a fellow servant, whose duty it was to unchain the dog in the morning, exercise him and then chain him up again, and though the attack was caused by the act of the potman who, saying, "I bet the dog will not bite any one in this room," released him, saying as he did so, "Go it, Bob." See, however, the very learned article by T. Beven, Esq., in 22 Harvard L. R. 465, in which he severely criticises this decision. *Accord: Laverone* v. *Mangianti*, 41 Cal. 138 (1871); *Muller* v. *McKesson*, 73 N. Y. 195 (1878), where a savage dog, kept to guard the defendant's premises at night, was allowed to run at large during the day through the negligence of a fellow servant of the plaintiff, whose duty it was to chain him up in the morning. On the other hand it has been held that one keeping a ferocious dog for the protection of his home is liable only for negligent custody, *De Gray* v. *Murray*, 69 N. J. L. 458 (1903); *Worthen* v. *Love*, 60 Vt. 285 (1888); and see *Hayes* v. *Smith*, 62 Ohio St. 161 (1900).

In *Sarck* v. *Blackburn*, 4 C. & P. 297 (1830), Tindal, C. J., says, p. 300, "Undoubtedly a man has a right to keep a fierce dog for the protection of his premises but he has no right to put the dog in such a situation, in the way of access to his house, that a person innocently coming for a lawful purpose may be injured by it unless he gives sufficient notice of the animal's presence and it does not appear to me that a painted notice is sufficient, unless the party is in such a position in life as to be able to avail himself of it," which the plaintiff in the particular case was not, being a night-watchman and unable to read. Such animals, though kept as watch dogs, must be confined to the owner's premises and not permitted to run at large, *Smith* v. *Pelah*, 2 Strange 1265 (1746); *Roehers* v. *Remhoff*, 55 N. J. L. 475 (1893), and while he may let them loose upon his premises at night, *Brock* v. *Copeland*, 1 Esp. 203 (1794), he may not allow them to roam about the premises during the day, *Woolf* v. *Chalker*, 31 Conn. 121 (1862), p. 132, at least within city limits, *Sylvester* v. *Maag*, 155 Pa. St. 225 (1893), though it appears that anciently at least, farmers, even those dwelling in the forests, were allowed by the common law to keep mastiffs about their homes, if so expedidated as to be incapable of destroying the deer, Mamvord, Forest Law, p. 107, quoted by T. Beven, Esq., 22 Harvard L. R. 487.

As to the liability of an owner of land to persons coming upon his land as trespassers for injuries done by ferocious domestic animals kept thereon, see notes to *Bird* v. *Holbrook*, *ante*.

See, *accord:* Alderson, B., *Jackson* v. *Smithson*, 15 M. & W. 563 (1846), p. 565:—"In truth, there is no distinction between the case of an animal which breaks through the tameness of its nature, and is fierce, and known by its owner to be so, and one which is *ferae naturae*," but see 22 Harvard, L. R., pp. 484, *et seq.*

McCASKILL *v.* ELLIOT.

Court of Appeals of South Carolina, 1850. 5 *Strobhart* 196.

Before WARDLAW, J., at Kershaw, March, 1850.

Case for wrongfully keeping a dog that bit the plaintiff.

The first count alleged that the dog was accustomed to bite mankind; the second, that he was of a ferocious and mischievous disposition—both counts alleged the *scienter* of defendant.

It appeared that the dog was large, and, in appearance, fierce; that he would run out of the yard of defendant (who lived near to a road) and bark furiously at persons passing by, and that once he bit the heels or tail of a horse that a witness was riding; that once at a mill, he attacked a negro who passed near to a horse he was lying by, but was kept off with a stick; that defendant had said, "the dog will follow me wherever I ride and lie by my horse, and then nobody must come near."

On occasion of a *big meeting,* defendant's son went fifteen minutes or so earlier than his father, the dog following; the son pulled off his saddle and scolded the dog, who slunk back and lay down by the saddle. The plaintiff coming afterwards, during service in the church, hitched his horse, and walking towards the church passed near the dog. The dog flew at and bit him.

Testimony was offered as to the subsequent conduct of the parties, which it is useless to report.

There was no testimony to show that the dog had previously bit any person. The defendant's counsel contended that this was indispensable, citing 7 *Car. & Payne,* 756. The Circuit Judge thought that a previous biting, known to defendant, might have an effect upon the degree of care which would afterwards be required of him, but was not indispensable under the second count.

He directed the jury to inquire whether the evidence had satisfied them—first, that the dog was of a ferocious and mischievous nature—second, that this was known to defendant; and third, that the defendant had been blameably negligent in his keeping of such a dog.

If these propositions were established, he thought the verdict should be for the plaintiff. The jury found for the plaintiff, a sum sufficient to carry costs.

The defendant appealed, and moved for a new trial, on the following grounds:

1. Because the first count sets out that the defendant knew that the dog was "used and accustomed to attack and bite mankind;" and the other count sets out that the defendant knew the dog "was of a ferocious and mischievous nature;" and it is most respectfully submitted, that in such case, to entitle the plaintiff to a verdict, he must prove, that before biting him, the dog had bit some person, and that the defendant had had notice of that fact.

2. Because, in such case, knowledge of the defendant that the dog "was of a ferocious and mischievous nature," cannot be *inferred* from any conduct, habit or act of the dog, short of an actual biting

of some person anterior to the biting of the plaintiff, and no other or less proof is sufficient to show that the defendant had notice that the dog "was of a ferocious and mischievous nature."

3. Because the verdict is against the law and evidence of the case.

Smart, for the motion.

Kershaw, contra.

Curia, per WARDLAW, J.—In every case for mischief done by an animal, where no evil design is imputed to the defendant, the cause of action is the defendant's breach of social duty, in not effectually preventing a thing within his control from doing the harm complained of, when his previous information ought to have shown that the thing was likely to do such harm if not prevented. If the plaintiff's only statement of the evil qualities of the dog known to the defendant, had been that in the first count,—that it was accustomed to bite mankind,—then the particularity of the averment would have required evidence of at least one biting of a human creature. But under the second count alleging a ferocious and mischievous disposition, whatever was calculated to establish the dangerous propensity of the animal, in sufficient degree tended to support the allegation, and was properly left to the jury. That a dog has once bitten a man, is a circumstance from which the probability of its biting another, may be inferred; but the same inference may be drawn with equal confidence from other indications of the dog's disposition. Indeed, attempts before made by a dog that had never succeeded in actually biting, may give more full assurance of danger to be apprehended from it, than could exist as to another dog, that under some peculiar circumstances had used its teeth upon man. To require that a plaintiff, before he can have redress for being bitten, should show that some other sufferer had previously endured harm from the same dog, would be always to leave the first wrong unredressed, and to lose sight of the thing to be proved, in attention to one of the means of proof. If nothing short of a dog's once having bitten, can show its dangerous nature, even the owner of a dog known to have been bit by a rabid animal may not be answerable, unless on some previous occasion the dog has inflicted the dreadful injury, which he was bound to have apprehended and prevented.[1]

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[1] *Accord: Barnes* v. *Lucille, Ltd.,* 96 Times L. R. 680 (1907); *Rider* v. *White,* 65 N. Y. 54 (1875); *Godean* v. *Blood,* 52 Vt. 251 (1880); *Worth* v. *Gillig,* L. R. 2 C. P. 1. (1866).

A single attempt, successful or not, to do a similar harm is enough. *Killredge* v. *Elliott,* 16 N. H. 77 (1844); *Arnold* v. *Norton,* 25 Conn. 92 (1856); *Cockerham* v. *Nixon,* 11 Iredell (N. C.) 269; *Mann* v. *Weiand,* 81 Pa. 243 (1875).

If the animal has manifested the propensity to do the mischief it does not matter that he has on the previous or present occasion so acted in play and not out of a fierce and savage nature, *Evans* v. *McDermott,* 49 N. J. L. 163 (1886); *Crowley* v. *Groonell,* 73 Vt. 45 (1901) both dog cases; *Oakes* v. *Spaulding,* 40 Vt. 349 (1867) ram butting in play—nor will evidence of a dog's good character for mildness be admitted when it is shown to have previously bitten other persons, *Buckley* v. *Leonard,* 4 Denio, N. Y. 500 (1847), but see *Line* v. *Taylor,* 3 F. & F. 731 (1863).

If the owner of a dog knew from sufficient indications, that it was likely, at all times and in all places, to bite strangers that approached it, no care in closing gates, nor chain broken, is an answer to a plaintiff, who has been bitten when it escaped. If it was only so ferocious as to bite those who hurt it, a plaintiff (whose own misconduct has not brought just punishment upon himself) may well complain that it was not prevented from lying where he incautiously trod upon its toes. But still a watch dog may be kept, and if it is safely confined, so that only wrongdoers may suffer from it, it is the more valuable if it is sure to punish their unlawful ingress, and a person whose trespass has encountered it, must endure the consequences.

If a dog is likely, as his owner knows, to bite either man or sheep only at particular seasons, or under particular circumstances, then, against those seasons or circumstances, and that kind of mischief to be apprehended in them, the owner insures at his peril.[2] A plaintiff who has suffered such mischief, is, in cases that have been decided, advised to allege a general mischievous disposition, rather than a particular habit. Under such general allegation, his count is in effect, that the defendant wrongfully kept a dog which he knew to be likely to do a certain harm, and that the dog had done that harm to the plaintiff. From such harm done by such dog, the inference of blameable negligence contained in the fact of keeping necessarily arises, and therefore in this count negligence is substantially averred. A count of this kind puts in issue the existence of a disposition in the dog, ferocious and mischievous to such a degree as was likely to produce the injury complained of—such knowledge of that disposition, on the part of the defendant, as ought to have induced his reasonable apprehension and effectual prevention of such an injury —the subsequent keeping of the dog,—and the injury consequent thereon. Care taken by the defendant, which has failed to prevent what thus he ought to have apprehended and prevented, whilst he kept the animal, could not be a defence in any action of this kind;—however plainly sufficient, it would be for the defendant to deny, and by evidence contradict, all previous indication or habit known to him, that could have reasonably induced his expectation, that under the circumstances that occurred, the harm complained of would have been done.

The count now objected to, is conformable to various precedents, and is certainly sufficient after verdict.

In the case before us, the attention of the jury was directed to the question of negligence, perhaps unnecessarily:—but negligence has been in fact expressly found. The dog may have been harmless in the defendant's yard, but he knew that it had a habit of following and guarding a horse, and that when thus employed, it was dangerous. He was bound then to insure against this habit, and when he

[2] As a bitch, fierce only while nursing its pups, *Barnes* v. *Lucille*, 96 Times L. R. 680 (1907); *Clinton* v. *Lyons Co.*, L. R. 1912 3 K. B. 257, or a stag, savage during mating season, *Spring Co.* v. *Edgar*, 99 U. S. 645 (1878).

suffered the dog to mount guard at a meeting-house, where many persons unsuspicious of danger may have been expected to pass, he surely was blameably negligent.

The motion is dismissed.[*]

EVANS, FROST and WITHERS, JJ., concurred.

Motion refused.

HEALEY *v.* BALLANTINE & SONS.

Supreme Court of New Jersey, 1901. 66 N. J. L. 340.

DEPUE, CHIEF JUSTICE. This was a suit by husband and wife to recover damages for an injury done to the wife, Mary Healey, who, on October 14th, 1898, was walking along the sidewalk on Christie street, a public street in the city of Newark. While she was in the lawful use of the street a horse of the defendant was being led along the sidewalk by a halter by a servant of the defendant. The horse had no other harness. The plaintiff testified that she came from Ferry street into Christie street, and walked along the sidewalk on Christie street; that on the outer edge of the sidewalk and running parallel with Christie street is a wooden railing separating the sidewalk from the street; that while she was walking along the sidewalk she saw a man leading a horse by a halter coming towards her on the sidewalk; that as the man and horse approached her she attempted to get out of the way of the horse by going a little further out towards the railing, when the horse kicked her. For the personal injuries she sustained this suit was brought, and resulted in a verdict in favor of the plaintiffs for personal injuries to the wife and for the damages sustained by the husband. There is no controversy as to the manner in which the accident happened.

The plaintiffs neither allege in the declaration nor proved at the trial any mischievous propensity on the part of the defendant's horse. The contention on the part of the defence was that in order to allow the plaintiffs to recover damages for the personal injuries, a vicious or mischievous propensity on the part of the animal must be shown and the *scienter* established. This question was raised

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[*] In *Reynolds* v. *Hussey*, 64 N. H. 64 (1886) it is said that, "it is sufficient if the owner has seen or heard enough to convince a man of ordinary prudence of the animal's inclination to commit the class of injuries complained of," and in *Fake* v. *Addicks*, 45 Minn. 37 (1890) it is said that, "the notice of such propensity must be such as to put a prudent man on his guard." It is not necessary that the prior misconduct should be precisely similar to that for which the action is brought, it is enough if the two are so far alike that the commission of the one would tend to prove a disposition to commit the other, *Reynolds* v. *Hussey*, 64 N. H. 64 (1886), known tendency to kick sufficient to render owner liable for injuries due to rearing and striking; *Mann* v. *Weiand*, 81* Pa. 243 (1875). But it is so notorious that dogs may be fierce to their fellows or other animals and yet gentle to mankind that it is generally held that a known tendency to attack the former is not evidence of ferocity toward the latter, *Osborne* v. *Chocqueel*, L. R. (1896) 2 Q. B. 109; *Keightlinger* v. *Evans*, 65 Ill. 236 (1872), but see *Goething* v. *Morgan* (cited in Oliphant, Law of Horses, 5th Ed. p. 322), where it was held that the fact that a dog had bitten a child was insufficient to prove a tendency to worry

first on motion to nonsuit, which was denied and exception taken. The learned judge, in his charge to the jury, dealt with the subject as follows: "It is said by the defendant that the plaintiffs ought to prove to you that the defendant knew that the horse had this vicious propensity—in common language, that the defendant knew that the horse was a kicker. I charge you that that is not the law, and that it is not necessary, in order for the plaintiffs to recover, for them to show that the defendant corporation knew of this bad propensity, if it was a bad propensity, of the horse. You have the right to consider, as a matter of common observation, that horses will kick, and that even a kind and gentle horse will, on occasion, kick. Now, having that in view, and remembering the situation of Christie street, as far as you have it from the evidence, did the stableman act negligently and carelessly in leading the horse along the sidewalk so near to the plaintiff Mary Healey that the horse could reach her with his hoofs?" To this instruction exception was also taken, and errors have been assigned accordingly.

To sustain the contention of the defendant's counsel, reliance is placed on *Cox* v. *Burbridge*, 13 C. B. (N. S.) 430. In that case it appeared that the defendant's horse, being on a highway unattended, kicked the plaintiff, a child who was playing there; there was no evidence to show how the horse came on the spot, or what induced him to kick the child, or that he was accustomed to kick. It was held that there was no evidence from which a jury would be justified in inferring that the defendant had been guilty of actionable negligence. The familiar doctrine of the common law is that the owner of a domestic animal is not responsible for an injury done by it unless he has knowledge of the propensity or vice which induces the animal to do the injury, or has been guilty of some actionable negligence. The court, in disposing of the case, dwelt mainly on the fact that there was no evidence of an actionable wrong on the part of the owner of the animal. Chief Justice Earle said: "To entitle the plaintiff to maintain the action it is necessary to show a breach of some legal duty due from the defendant to the

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sheep and Gould, J., in *Mason* v. *Keeling*, 12 Mod. 332 (1699), p. 335; "If a dog be *assue* to bite cows, and the master knows it, this will not be sufficient to make him liable for biting cows."

Certain classes of domestic animals may by nature be so prone to do certain mischiefs that knowledge of their tendency will be presumed, so it was held that the inclination of the ordinary wild bull to become irritated by unusual surroundings was so notorious as to require a person driving the bull through the public streets to take precautions against it, *Barnum* v. *Terpenny*, 75 Mich. 557 (1889), and in *Fleming* v. *Orr*, 2 Macq. 14 (1856), Lord Cockburn held that "the tendency to worry sheep is a natural one in such dogs (foxhounds), and for neglecting to guard against it the owner is responsible." In *Hahnke* v. *Frederick*, 140 N. Y. 224 (1893), the fact that a dog was (1st) a watchdog and (2nd) was kept chained was held sufficent evidence to warrant the jury in finding that the owner knew it to be savage, but see as to the first fact, *Moss* v. *Partridge*, 9 Ill. App. 490 (1881), *contra*, and as to the second, Kenyon, C. J., in *Jones* v. *Perry*, 2 Esp. 482 (1796), *accord*, and Ellenborough, C. J., in *Beck* v. *Dyson*, 4 Camp. 198 (1815), *contra*.

plaintiff; and it is enough to say that there is no evidence to support the affirmative of the issue that there was negligence on the part of the defendant for which an action would lie by the plaintiff. The simple fact found is that the horse was on the highway. He may have been there without negligence of the owner; he might have been put there by a stranger, or might have escaped from some enclosed place without the owner's knowledge. To entitle the plaintiff to recover there must be some affirmative proof of negligence in the defendant in respect of a duty owing to the plaintiff."[1]

In a later case (*Lee* v. *Riley*, 18 C. B. [N. S.] 722), through a defect of fences, which it was the duty of the defendant to repair, his mare strayed in the night-time from his close into an adjoining field, and so into the field of the plaintiff's in which was a horse; from some unexplained cause the animals quarreled, and the result was that the plaintiff's horse received a kick from the defendant's mare which broke his leg, and he was necessarily killed. It was held that the defendant was responsible for his mare's trespass, and that the damage was not too remote. In that case there was no proof that the defendant's animal was vicious. The liability of the defendant was put upon the ground that the animal was trespassing on the plaintiff's close, and that the foundation of the cause was negligence on the part of the defendant in neglecting properly to keep up his fences, by means of which his mare strayed from his close and injured the horse.[2] Chief Justice Earle sat in both of these cases and took part in the decision of each. In *Ellis* v. *Loftus Iron Co.*, L. R., 10 C. P. 10, the defendant's horse injured the

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[1] *Cox* v. *Burbridge* was followed in the two recent cases of *Hadwell* v. *Righton*, L. R. 1907, 2 K. B. 345, where one of the defendant's fowls, straying on the highway, being frightened by a dog belonging to a third person, flew into the spokes of the plaintiff's bicycle and upset him, and *Higgins* v. *Searle*, 100 L. J. 280 (1909) where the defendant's sow, lying on the highway frightened a horse drawing a van causing it to shy in to the path of the plaintiff's motor car, thus bringing about a collison between the van and car. It is to be noted that while the jury found that the probable result of a sow lying by the highway was that horses would shy, "This point was not raised on the pleadings and no evidence seems to have been given at the trial in support of it," per *Cozens-Hardy*, M. R. p. 281, and *Clinton* v. *Lyons Co.*, L. R. 1912 3 K. B. 198.

See *Doyle* v. *Vance*, 6 Victorian L. R. Cases at Law 87 (1880) in which it is said that in *Cox* v. *Burbridge*, "the defendant was held not guilty of actionable negligence; but that was on the ground that the horse had a right to be on the highway, as well as the child."

[2] See, *accord:* Jewett, C. J., in *Van Lenven* v. *Lyke*, 1 N. Y. 515 (1848), p. 517. "In declaring for such trespasses," (by animals escaping from their owners' premises), "it is competent for the plaintiff to allege the breaking and entering his close by such animals of the defendant, and there committing particular mischief or injury to the person or property of the plaintiff, and upon proof of the allegation, to recover as well for the damage for the unlawful entry as for the other injuries so alleged, by way of aggravation of the trespass, without alleging or proving that the defendant had notice that his animals had been accustomed to do such or similar mischief. The breaking and entering the close in such action is the substantive cause of action and the rest is laid as matter of aggravation only."

plaintiff's mare by biting and kicking her through the fence separating the plaintiff's land from the defendant's. It was held that the defendant was liable in damages, apart from any question of negligence on its part. The ground of that decision is stated in the opinion of Mr. Justice Keating to be this: "The horse, it is found, kicked and bit the mare through the fence. I take it that the meaning of that must be that the horse's mouth and feet protruded through the fence over the plaintiff's land, and that would, in my opinion, amount in law to a trespass."

Mr. Beven, commenting on these cases, used this language: "Although when a horse is in a place where it has a right to be, any disposition to kick that it may suddenly manifest does not import a liability on its owner; when the horse is where it should not be, and kicks, the kicking is not so far remote from what is to be expected from the natural disposition of horses that the injury cannot be said to follow in the natural and obvious sequence from the original wrongful act which allowed the horse to get where an opportunity of doing injury is given." 1 *Beven Negl.* 97. The same principle is laid down in 2 *Am. & Eng. Encycl. L.* (2d ed.) 364 in these words: "If domestic animals are rightfully in the place where they do the injury complained of, the owner will not be liable unless he had knowledge of the vicious propensity of such animals; and in an action for such injuries, knowledge on the part of the owner must be alleged and proved."

It may safely be asserted that the decision of that (*Cox* v. *Burbridge*) case was contrary to the great weight of authority in this country,[8] and it seems to us not sustained on principle or by preceding authority in England. The case of *Cox* v. *Burbridge* is, however, so clearly distinguishable from this case that if recognized as authority, it would be inapplicable in this instance. In that case it was assumed by the court and made the groundwork of decision that there was no evidence of an actionable wrong on the part of the owner of the animal; that it may have been in the street without any negligence of the owner, or might have been put there by a stranger, or might have escaped from some enclosed place without the owner's knowledge. In the present case the defendant's horse was in charge of a servant, for whose acts and negligence the defendant is responsible. The trial court charged the jury that the defendant "would have a right to cross that sidewalk with its horses, going in and out of the stable, to and from the public street. But it is undisputed in

Accord, also; *Dolph* v. *Ferris*, 7 W. & S. (Pa.) 367 (1844), defendant's bull, not shown to be vicious to his knowledge, broke into plaintiff's enclosure and gored his horse pasturing therein. As to whether in such case the liability is based upon the defendant's negligence in failing to maintain his fences in good order, see Anon, *Keilway C.*, and notes thereto *ante*, p. 495.

[8] A large part of the opinion is omitted in which the court reviews and quotes at length from the following cases supporting its decision, *Dickson* v. *McCoy*, 39 N. Y. 400; *Doherty* v. *Sweetser*, 82 Hun (N. Y.) 556; *Goodman* v. *Gay*, 15 Pa. St. 188; *Fallon* v. *O'Brien*, 12 R. I. 518; *Barnes* v. *Chapin*, 4 Allen (Mass.) 444; *Baldwin* v. *Ensign*, 49 Conn. 113; *Marstand* v. *Murray*, 148 Mass. 91.

this case that the horse was not crossing the sidewalk, being led from the roadway into the stable, but was being led along the sidewalk; and it is uncontradicted that at the time this occurrence happened the horse was about half way between the opening leading from the street to the stable and the corner of Ferry and Christie streets." The court also instructed the jury that the plaintiffs could only recover by establishing a preponderance of the testimony that the servant of the defendant was in some way careless and negligent at the time.

Riding or leading a horse along the sidewalk is a nuisance; for such an unlawful use of the sidewalk, an indictment would lie. It was assumed by the English judges, in their opinions in *Hammack* v. *White, supra,* that riding and driving on the sidewalk as a voluntary act was unlawful, and that the defendant would be liable in damages for killing a man lawfully using the sidewalk, unless he showed he was carried on the sidewalk by his horse, which was restive and uncontrollable. The cases from the courts of our sister states that have been cited are also to the same effect.

The situation, too, at the time this injury was inflicted is of consequence in this case. The sidewalk along which the defendant's servant was leading the horse was fenced off by a wooden railing along the curb, separating the sidewalk from the street, and the plaintiff was endeavoring to get out of the way of the horse by going a little further out towards the railing, when the horse kicked her. There was no testimony offered on the part of the defence, and it may fairly be assumed from the testimony of the plaintiff Mary Healey that if the person leading the horse had looked he might have seen the perilous position in which she was placed by his unlawful use of the sidewalk.

We think the instruction of the trial court on this subject was correct.[4]

SECTION 2.

Liability for Fire.

BEAULIEU *v.* FINGLAM.

Y. 132 *Henry IV.* 18. 5. 1401.

One brought this writ:—"Thus Willielmus Beaulieu, &c., seeks of Rogerum Finglam, wherefore since according to the laws and

[4] *Accord: Troth* v. *Wells,* 8 Pa. Sup. C. 1 (1898), where the plaintiff was injured while attempting to drive from her son's premises a cow trespassing thereon, but see dissenting opinion of Wickham, J.; *Hardiman* v. *Whalley,* 172 Mass. 411 (1899) and, in *Decker* v. *Gammon,* 44 Maine 322 (1857), where, though the action was on the case, the defendant's horse which had escaped from the defendant's close or from the highway had entered the plaintiff's close and injured the latter's horse pasturing therein, Davis, J., says, p. 329, "The owner of domestic animals, *if they are wrongfully in the place where they do any mischief,* is liable for it, though he had no notice that they had been accustomed to do so before."

customs hitherto obtaining in this our kingdom of England, that everyone of this kingdom shall keep his fire safe and secure and keep control of it, nor by his fire damage come forth to any of his neighbors in any manner, the aforesaid Roger kept his fire at Caerlon so negligently that through a defect in this duty of guarding the aforesaid fire the goods and chattels of the aforesaid Willielmus, to the estimated value of forty pounds in the house of the same, and the aforesaid house, then and there were consumed and destroyed to the damage of the same Willielmus, etc.," and he counted accordingly. *Horneby,* Judgment of the count for he has counted of a common custom of the realm, and has not said that this custom has been used, etc. To which all the court said, pass over, for common law of this realm is common custom of the realm, and then *Thirning* said that a man shall answer for his fire which by misfortune burns the goods of another. And certain of them were of opinion that the fire cannot be called his fire because a man cannot have property in fire. And his opinion was not allowed. MARKHAM. A man is held to answer for the deed of his servant or of his housekeeper (*hosteller*) in such case, for if my servant or my housekeeper put a candle on a wall and the candle falls into the straw, and burns all my house and the house of my neighbor also, in that case I shall answer to my neighbor for the damage that he has. Which was conceded by the court. *Horneby,* Then he should have had a writ "Because he burned or set fire to his house." *Hull,* That would be against all reason to put guilt or default on a man when there is none in him, for negligence of his servants cannot be called his doing. *Thirning,* If a man kill or stab a man by accident he shall forfeit his goods, and it is necessary that he have his charter of pardon of mercy. To which the court agreed. MARKHAM, I shall answer to my neighbor for him who enters my house by my leave or my knowledge, or is entertained by me or by my servant, if he does, or any of them do such a thing as (that of the) candle or other thing, by which act the house of my neighbor is burned. But if a man out of my house, against my will sets fire to the straw of my house or anything by which my house is burned

The owner of a dog who suffers it to run at large in the streets is not liable for the injuries it does there unless the vicious nature of the animal is known to its owner. *Leonard* v. *Donoghue,* 87 App. Div. (N. Y.) 104 (1903), see also, *Marsh* v. *Koons,* 78 Ohio St. 68 (1908), where it was held that, in the absence of a statute, it was the duty of an owner not to suffer an animal, though not known to be vicious, to run at large upon the highway "under" (but only under) "circumstances where he should apprehend that the safety of passengers would be in danger," and held that the defendant was not liable to the plaintiff whose horse took fright at the former's cow lying by the highway, and *Zurnstein* v. *Shrumm,* 22 Ont. App. Ref. 263 (1895), horse frightened by a turkey-cock straying upon the highway and *cf. Hadwell* v. *Righton,* L. R. 1907, 2 K. B. 345, and *Higgings* v. *Searle,* 100 L. J. 280 (1909), note 1.

and the houses of my neighbors are also burned, for that I shall not be held to answer to them, etc., for that cannot be called malice on my part, but against my will. *Horneby,* This defendant is undone and impoverished forever if this action is maintained against him, for then twenty other such suits will be taken against him for such matters. THIRNING, What is that to us? It is better that he be wholly undone than that the law be changed for him. And then they were at issue that the house of the plaintiff was not burned by the fire of the defendant, ready, etc. And the others alleged the contrary.[1]

[1] See Professor John H. Wigmore's learned and valuable articles on Responsibility for Tortious Acts. Its History, 7 Harvard L. R. 315, 383, 441; especially pp. 448-449.

TUBERVIL *v.* STAMP.

Court of King's Bench, 1691. 1 *Salkeld.* 13[1]

Case on the custom of the realm *quare negligenter*[2] *custodivit ignum suum in clauso suo, ita quod per flammas blada quer. in quodam clauso ipsius quer. combusta fuerunt.* After verdict *per quer* it was objected, the custom only extends to fire in his house, or curtilage, (like goods of guests[3]) which are in his power. *Non alloc.* For the fire in the field is his fire as well as that in his house; he made it, and must see it does no harm, and answer in damages if it does. Every man must use his own so as not to hurt another; but if a sudden storm had risen which he could not stop, it was matter of evidence and he should have showed it.[4] And Holt, Rokesby, and Eyre against the opinion of Lurton, who went upon the difference between fire in an house which is in a man's custody and power, and fire in a field, which is not properly so; and it would discourage husbandry, it being usual for farmers to burn stubble, &c. But the plaintiff had judgment according to the opinion of the other three.

CLARK *v.* FOOT.

Supreme Court of Judicature of New York, 1811. 8 *Johnson,* 421.

In error, on certiorari, from a justice's court.

Clark sued Foot before the justice, to recover damages sustained by reason of Foot's setting fire to the plaintiff's woods.

[1] The pleadings are given, 2 Salk. 726. See the same case somewhat differently reported under the name of *Turberville* v. *Stamp,* in Carthew, 425 and under the name of *Turberville* v. *Stampe,* in 1 Ld. Raym. 264.

[2] As to what is meant by negligenter, see the pleadings, 2 Salk. 726, Rastell Ent. 8 and Prof. Wigmore, in 7 How. L. R., p. 448.

[3] Of an innkeeper, see 1 Ld. Raym. 264.

[4] "As for the matter of the tempest that appeared only upon the evidence, not upon the record, and therefore the King's Bench cannot take notice of it, but it was good evidence to excuse the defendant at the trial," 1 Ld. Raym. 264.

The cause was tried by a jury. A witness testified that he set fire, by the direction of the defendant, to certain fallow ground, belonging to the defendant, which fire run into the woodlands of the plaintiff; that he told the defendant of it, who tried only to prevent the fire from burning his own farm. The fire burnt during six or seven days, on the pine hill of the plaintiff, and damaged his woodland to the amount of sixty dollars.

The return stated that the defendant produced a number of witnesses, who testified nothing contradicting the materiality of the above evidence, and that the jury found a verdict for the defendant, on which the justice gave judgment.

Per Curiam. The point to be tried was, whether there was negligence on the part of Foot, or his agent; for Foot was as much accountable for the negligence of his servant, whilst employed in his business, as if the fire had spread by his own neglect.

It is a lawful act for a person to burn his fallow; and if his neighbor is injured thereby, he will have a remedy, by action on the case, if there be sufficient ground to impute the act to the negligence or misconduct of the defendant or his servants.

Should a man's house get on fire, without his neglect, or default, and burn his neighbor's, no action would lie against him, notwithstanding the fire originated in his house, because it was lawful for him to keep fire there. (3 Bl. Comm. 43. 2 Noy's Max. c. 44.) The same rule would apply to this case.

Here there is no evidence of negligence, and the jury have passed on the case.[1]

Judgment affirmed.

SECTION 3.

Liability for escape of substances collected or kept upon Land.

FLETCHER *v.* RYLANDS, ET AL.

In the Exchecquer. 1865. 3 Hurlstone and Coltman, 774.

In the Exchecquer Chamber. 1866. L. R. 1 Ex. 265.

In the House of Lords, *sub nomine, Rylands, et al.*, v. *Fletcher.* 1868. L. R. 3 H. L. 330.

This was an action brought in 1861[1] and tried at the Liverpool Summer Assizes (1862), when a verdict was found for the plaintiff subject to the award of an arbitrator, who was afterwards empow-

[1] *Accord: Lehigh Bridge Co.* v. *Lehigh Nav. Co.*, 4 Rawle, 9 (1833), *semble, per* Gibson C. J., pp. 24-25; *Bachelder* v. *Heagan*, 18 Me. 32 (1840); *Tourtellot* v. *Rosebrook*, 11 Met. (52 Mass.) 460 (1846); *Streaet* v. *Hawley*, 22 Barb. (N. Y.) 619 (1856); *Lahn* v. *Roberts*, 8 Wis. 255 (1859); *P. C. & St. L. R. R.* v. *Culver*, 60 Ind. 469 (1878); *Johnson* v. *Veneman*, 75 Kans. 278 (1907); and see case given in note 4 to *Smith* v. *Ry. Co., ante*, p. 66. The citation from Blackstone's Commentaries is a misquotation for 1 Bl. Com. 431, where the learned commentator states that the common law is changed by statute of 6 Anne c. 3 which, he says, "ordains that no action shall be maintained against any one in whose house or chamber (extended by 14 Geo. III. c. 78 to include one in whose estate) any fire shall accidentally arise":

ered by a Judge's order to state a special case instead of making an award. The material facts in the special case stated by the arbitrator[2] were as follows: The defendants were the owners of a mill; in order to supply it with water they constructed upon the nearby land of Lord Wilton, with his permission, a reservoir. The plaintiff under lease from Lord Wilton was working certain coal mines under lands close to but not adjoining the premises on which the reservoir was constructed. They worked their mine in the direction of the reservoir until they came upon certain old workings, part of which at least had been made and abandoned at a time beyond living memory. These consisted of horizontal passages and vertical shafts, the latter apparently filled with rubbish and marl similar to that of the solid earth surrounding them. The defendant employed a competent engineer and competent contractors to plan and construct the reservoir, and it was so planned and constructed solely by them upon a site, in the choice of which the defendants were guilty of no personal fault, though in fact the above mentioned old workings lay beneath it and continuing under the intermediate lands communicated, at the point to which the plaintiff had pushed its workings in that direction, with the workings of the plaintiff. The contractors in excavating for the bed of the reservoir came upon five of the above mentioned vertical shafts, the sides or walls of some of these were of timber, but, being filled with soil of the same kind as that composing the surrounding ground, neither the contractors, nor the defendants suspected that they were abandoned mine shafts. The arbitrator found that the defendants were guilty of no personal negligence or fault, but that the engineer and contractors had not in fact exercised proper care, with reference to the shafts discovered, to provide for the sufficiency of the reservoir to bear the pressure which it was designed to bear when in use. The reservoir was completed early in December, 1860, when the defendants had it partly filled. Within a few days, one of the shafts, which had been met while excavating, gave way and burst downward, letting the water into the old abandoned workings beneath, through which it flowed, through the communications which the plaintiffs in working their mine had made between the two, into the plaintiffs' workings, flooding their mine.

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for, he says, "their own loss is sufficient punishment for their own or their servants carelessness." All the earlier American cases either cite this passage or adopt Mr. Justice Blackstone's view of the effect of this statute, but in *Filliter* v. *Phippard*, 11 Q. B. (A. & E. N. S.) 347 (1847) the court saying, p. 356, that "it would appear that Blackstone had drawn a conclusion from the enactment cited (Stat. 6 Anne c. 3) which it by no means sustains," held that the statutes only relieved one in whose house or on whose estate a fire was accidentally started not one who intentionally and "knowingly lighted" a fire thereon or through whose negligence, or that of his servants, it originated. In *Lansing* v. *Stone*, 37 Barb. (N. Y.) 17 (1862), Blackstone's view is carried to its logical conclusion and it is held that a defendant is not liable for the spread of a fire started in his room, even by his own negligence.

[1] The declaration containing three counts, all alleging negligence on the defendant's part is set out in L. R. 1 Ex., pp. 265-266.

[2] The facts given are condensed from those given in the case stated by the arbitrator which is given at length in 3 H. & C., pp. 775 to 780.

The question for the opinion of the Court was whether the plaintiff was entitled to recover damages from the defendants by reason of the matters thus stated by the arbitrator.

Manisty (with whom was *J. A. Russell*), for the plaintiff.[a] The defendants are liable for the damage resulting to the plaintiff from their diverting the water from its natural course, and collecting it in a reservoir. [POLLOCK, C. B. It is not an unlawful act for a man to collect water in a reservoir upon his own land.] Provided he does not allow it to escape so as to injure his neighbor's land. If he does it is a trespass. The maxim applies: *Sic utere tuo ut alienum non lædas.* The plaintiff has a right to enjoy his land free from the injury resulting from an act, not in the ordinary course, done by the defendants on their land. A person who collects on his land a dangerous element, be it fire or water, and allows it to escape and injure his neighbor's land, is liable for the consequences. If a man employed the most skilful person to make a fence on his land to prevent his cattle trespassing on his neighbor's land, and the fence proved insufficient, he would be liable for the damage, although there was no negligence on his part and he had no reason to suppose that the fence would not be sufficient.

Mellish (*T. Jones* with him), for the defendants. The question before the Court must be decided on principle, since there is no decision directly in point. The question is substantially this: The plaintiff on his own land does a secret act, the doing of which was not naturally to be anticipated; the defendants on their land do an act lawful in itself, and not apparently likely to produce damage, but which, by reason of the plaintiff's secret act becomes dangerous to the plaintiff's land; are the defendants responsible, without negligence, for the damage which ensues? Such a liability, if it exists, must, in most cases, necessarily entail considerable hardship. The argument on the other side is that the plaintiff has a right to be free from the water coming from the defendant's reservoir, and that this right is of an absolute character. Precisely the same may be said of the right which every one has to be free from damage to his person; and yet, where a collision takes place without negligence, no action will lie for the injury resulting from it. The maxim, *Sic utere tuo ut alienum non lædas,* is not absolute in its application. By virtue of it a man is no doubt responsible for acts which he knows, or has the means of knowing, will cause injury, and also for acts which cause injury from the negligent mode in which he performs them. But, on the other hand, if he uses due care, and the consequences of his acts are such as could not be foreseen, then it is submitted that he is not responsible. Now the essence of this case is that the possibility of the defendants' act causing the damage it did was unknown to the defendants. It has been argued, indeed, that in trespass knowledge is immaterial, and that here there was a trespass by the defendants. But that is not so. The circumstance of water escaping from the defendants' reservoir by means of a defect of which the defendants neither did nor could know cannot

[a] Throughout only a small part of the arguments is given.

be treated as the defendants' trespass. The defendants did not themselves bring the water to their land; the water coming to their land naturally, they used it when there for an ordinary purpose. If trespass will not lie, neither will an action on the case, for that involves the violation of some duty. To support that form of action negligence must be made out, or, at all events, a knowledge on the defendants' part that their act was dangerous.

Manisty replied. *Cur. adv. vult.*

The learned judges having differed in opinion, the following judgments were delivered in the ensuing Trinity Vacation (June 23).

BRAMWELL, B. The facts on which, as it seems to me, the question here depends are as follows: The plaintiff is the occupier of mines which he has worked to the boundary of the property in or under which they are. The defendants have made a reservoir, and filled it with water, on the surface of property separated from the plaintiff's by property of an intervening owner. The water has escaped down old shafts into old workings on the defendants' premises, has passed through other old workings in the intermediate premises, has reached the plaintiff's workings, and done him damage. The defendants were not aware of the old underground workings nor of the communication between them. I agree with Mr. Mellish the case is singularly wanting in authority, and therefore, while it is always desirable to ascertain the principle on which a case depends, it is especially so here.

Now, what is the plaintiff's right? He had the right to work his mines to their extent, leaving no boundary between himself and the next owner. By so doing he subjected himself to all consequences resulting from natural causes, among others to the influx of all water naturally flowing in. But he had a right to be free from what has been called "foreign" water, that is, water artificially brought or sent to him directly or indirectly by its being sent to where it would flow to him. The defendants had no right to pour or send water on to the plaintiff's works. Had they done so knowingly it is admitted an action would lie; and that it would if they did it again. That is also proved by the case of *Hodgkinson* v. *Ennor*, *supra*. The plaintiff's right then has been infringed; the defendants in causing water to flow to the plaintiff have done that which they had no right to do; what difference in point of law does it make that they have done it unwittingly? I think none, and consequently that the action is maintainable. The plaintiff's case is, you have violated my rights, you have done what you had no right to do, and have done me damage. If the plaintiff has the right I mention, the action is maintainable. If he has it not, it is because his right is only to have his mines free from foreign water by the act of those who know what they are doing. I think this is not so. I know no case of a right so limited. As a rule the knowledge or ignorance of the damage done is immaterial. The burthen of proof of this proposition is not on the plaintiff.

I proceed to deal with the arguments the other way. It is said

there must be a trespass,[4] a nuisance,[5] or negligence. I do not agree, and I think *Backhouse* v. *Bonomi, supra,* shows the contrary. But why is not this a trespass? See *Gregory* v. *Piper,* 9 B. & C. 591 (E. C. L. R. vol. 17). Wilfulness is not material: *Leame* v. *Bray,* 3 East, 593. Why is it not a nuisance? The nuisance is not in the reservoir, but in the water escaping.[6] As in *Backhouse* v. *Bonomi,* the act was lawful, the mischievous consequence is a wrong. Where two carriages come in collision, if there is no negligence in either it is as much the act of the one driver as of the other that they meet. The cases of carriers and innkeepers are really cases of contract, and though exceptional, furnish no evidence that the general law in matters wholly independent of contract is not what I have stated. The old common-law liability for fire created a liability beyond what I contend for here.

I think, therefore, on the plain ground that the defendants have caused water to flow into the plaintiff's mines which but for their, the defendants', act would not have gone there, this action is maintainable. I think that the defendants' innocence, whatever may be its moral bearing on the case, is immaterial in point of law.

MARTIN, B. The circumstances of this case raise two questions. First, assuming the plaintiff and defendants to be the owners of two adjoining closes of land, and at some time or other beyond living memory coal had been worked under both closes, and that the workings under the close of the defendants communicated with the workings under the close of the plaintiff, but of the existence of such workings both plaintiff and defendants were ignorant, and that the defendants, without any negligence or default whatever, made a reservoir upon their own land for the purpose of collecting water to supply a manufactory, and that the water escaped from an old shaft at the bottom of the reservoir into the old workings below the defendants' close and thence into the plaintiff's close, and did damage there, are the defendants responsible?

The second question is, assuming the defendants not to be responsible upon the above state of facts, does it make any difference that the defendants employed a competent engineer and competent contractors who were ignorant of the existence of the old workings, and who selected the site of the reservoir and planned and constructed it, and on the part of the defendants themselves there was no personal negligence or default whatever, but in point of fact reasonable and proper care and skill were not exercised by and on behalf of the persons so employed with reference to the old shafts found at the bottom of the reservoir to provide for the sufficiency of the reservoir to bear the pressure of the water which, when filled to the height proposed, it would have to bear.

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[4] See *Lawson* v. *Price,* 45 Md. 123 (1876).

[5] In many jurisdictions rejecting or not definitely accepting the rule in the principal case it is held that where there is "an abiding nuisance" as a slow continuous leakage and percolation of oil or waste into the plaintiff's premises he may recover damages. *Pottstown Gas Co.* v. *Murphy,* 39 Pa. 257 (1861); *Ottawa Gas Co.* v. *Graham,* 28 Ill. 74 (1862); *Kinnaird* v. *Standard Oil Co.,* 89 Ky. 468 (1890).

[6] Compare Fletcher Moulton, L. R. 1909, 2 K. B., p. 665.

First, I think there was no trespass. In the judgment of my brother Bramwell, to which I shall hereafter refer, he seems to think the act of the defendants was a trespass, but I cannot concur, and I own it seems to me that the cases cited by him, viz., *Leame* v. *Bray, supra,* and *Gregory* v. *Piper, supra,* prove the contrary. I think the true criterion of trespass is laid down in the judgments in the former case, viz., that to constitute trespass the act doing the damage must be immedate, and that if the damage be mediate or consequential (which I think the present was), it is not a trespass. Secondly, I think there was no nuisance in the ordinary and generally understood meaning of that word, that is to say, something hurtful or injurious to the senses. The making a pond for holding water is a nuisance to no one. The digging a reservoir in a man's own land is a lawful act. It does not appear that there was any embankment, or that the water in the reservoir was ever above the level of the natural surface of the land, and the water escaped from the bottom of the reservoir and in ordinary course would descend by gravitation into the defendants' own land, and they did not know of the existence of the old workings. To hold the defendants liable would therefore make them insurers against the consequence of a lawful act upon their own land when they had no reason to believe or suspect that any damage was likely to ensue.

No case was cited in which the question has arisen as to real property; but as to personal property the question arises every day, and there is no better established rule of law than that when damage is done to personal property, and even to the person, by collision either upon the road or at sea, there must be negligence in the party doing the damage to render him legally responsible, and if there be no negligence the party sustaining the damage must bear with it. The existence of this rule is proved by the exceptions to it, viz., the cases of the innkeeper and common carrier of goods for hire, who are *quasi* insurers. These cases are said to be by the custom of the realm, treating them as exceptions from the ordinary rule of law. In the absence of authority to the contrary, I can see no reason why damage to real property should be governed by a different rule or principle than damage to personal property. There is an instance also of damage to real property when the party causing it was at common law liable upon the custom of the realm as a *quasi* insurer, viz., the master of a house, if a fire had kindled there and consumed the house of another. In such case the master of the house was liable at common law without proof of negligence on his part: *Comyns' Digest, Actions upon the Case for Negligence* (A. 6). This seems to be an exception from the ordinary rule of law and, in my opinion, affords an argument that in other cases, such as the present, there must be negligence to create a liability. For these reasons I think the first question ought to be answered in favor of the defendants.

I have already referred to the judgment of my brother Bramwell, which I have carefully read and considered, but cannot concur in it. I entertain no doubt that if the defendants directly and by their immediate act cast water upon the plaintiff's land it would

have been a trespass, and that they would be liable to an action for it. But this they did not do. What they did was this, they dug a reservoir in their own land and put water in it which, by underground openings of which they were ignorant, escaped into the plaintiff's land. I think this a very different thing from a direct casting water upon the land, and that the legal liabilities consequent upon it are governed by a different principle.[1]

Judgment for the defendants.

The plaintiff brought error to the Exchequer Chamber.

Feb. 8, 1866. *Manisty*, Q. C. (*J. A. Russell* with him), for plaintiff.

[Argument omitted.]

Mellish, Q. C. (*T. Jones* with him), for defendants.

The only obligation on the defendants is to take care, that is, reasonable care, not to injure the property of others; and to establish their liability in this action it will be necessary to go the length of saying that an owner of real property is liable for all damage resulting to his neighbor's property from anything done upon his own land. It is clear that there is no such obligation with respect to personal property. The right not to have "foreign water" sent upon one's land is not a greater or more important right than the right not to have one's person injured, but in the latter case no right of action arises unless the damage is caused by the direct act of the defendant himself or by his negligence. The same rule applies to real property, and though the cases are fewer they are to this effect. The instances in which the owner of real property has been held liable may be classified thus: first, acts of trespass; second, acts purposely done, and which are calculated to cause the injury complained of, as in *Aldred's Case*, 9 Rep. 57 b; third, cases where, by reason of the natural relation of the properties, a legal relation has been constituted between them; as in the case of the right to support, or the right to a watercourse, which are natural easements, and as to which the plaintiff need not allege any special title in himself, nor any negligence in the defendant.

The distinction between the surface and underground passages is only material as a circumstance of negligence; with reference to the surface, the facts are known which give rise to the obligation to take care, but the ignorance of the state of things underground takes away the opportunity of exercising care, and therefore the duty to exercise it.

[BLACKBURN, J. The present point may be illustrated thus: Suppose a man leans against my cart, if I remove the cart suddenly, and without warning, not knowing he is there, I am not liable; but if I do so knowing that he is there, though he has no right to lean against my cart, yet I am liable if my act injures him.

WILLES, J. Take the case of a continuous nuisance, I mean continuous in its own character; the person who erects it is liable at once, the person who suceeds to it is not liable unless he has notice and continues it, but it is said that as soon as he has notice of it

[1] The opinion of Pollock, C. B., concurring with Martin, B., is omitted.

he must abate. Suppose a man to collect a quantity of springs in such a manner as to cause them to pour down his neighbor's mine. Assuming that the person who succeeded to the possession of the land where the springs were so collected would not be liable until notice, yet you would admit that upon receiving notice he would be liable for continuing it. Then is there any case where the same doctrine has been held to apply to the originator of the nuisance?][*]

It is submitted that the liability would turn on the defendants' knowledge, and that in each case knowledge is the essential condition of liability. In the absence of any authority distinguishing liability in respect of injury to real property from liability in respect of other injuries, the doctrine laid down as to actions of the latter kind applies, and in these it is clear that negligence must be shown. This is illustrated by the case of *Scott* v. *London Dock Company*, 3 H. & C. 596, 34 L. J. (Ex.) 17, 220, where it was never doubted that negligence must be alleged and proved, and the only question was whether the fact that the bale which fell was under the management of the defendants' servants, was sufficient *prima facie* evidence of negligence. A common instance is that of collisions of ships at sea, or accidents caused by driving or riding along the highway as *Hammock* v. *White*, 11 C. B. N. S. 588 (E. C. L. R. vol. 103), 31 L. J. (C. P.) 129, in all which cases without negligence there is no liability.

[LUSH, J. Suppose the case of a gunpowder magazine bursting, what liability do you say its owners would incur?]

None, if there was no negligence as to the place where the powder was kept, or in the manner of keeping it. The liability as to fire, formerly an absolute duty to insure against all mischief caused to your neighbors by fire arising on your own property, is said to have been by the custom of the realm.

[*] See *Kinnaird* v. *Standard Oil Co.*, 89 Ky. 468 (1890), where it was held that one who stores oil on his premises so that leaking oil penetrates the ground is liable for damage done by the pollution of his neighbor's spring, though he was ignorant of the fact that his oil was affecting the spring; see also, *Ottawa Gas Light & Coke Co.* v. *Graham*, 28 Ill. 73 (1862); and *Pottstown Gas Co.* v. *Murphy*, 39 Pa. St. 257 (1861); *Hauck* v. *Tidewater Pipe Line Co.*, 153 Pa. St. 366 (1893); *Evans* v. *Reading Chemical Fertilising Co.*, 160 Pa. St. 209 (1894), per Endlich, J., *semble*; *Gavrigan* v. *Atlantic Refining Co.*, 186 Pa. St. 604 (1898); *Brady* v. *Detroit Steel & Spring Co.*, 102 Mich. 277 (1894), oil percolated into a sewer, generating gas, which invaded plaintiff's bakery; *Pensacola Gas Co.* v. *Pebley*, 25 Fla. 381 (1881); *Columbus Gas Light and Coke Co.* v. *Freeland*, 12 Ohio St. 392 (1861); *Texas & P. R. Co.* v. *O'Mahoney*, 24 Tex. Civ. App. 631 (1900); *Kankakee Water Co.* v. *Reeves*, 45 Ill. App. 285 (1892), leaky water tower: *contra*, *Griffith* v. *Lewis*, 17 Mo. App. 605 (1885), no liability for injury by escape of filth upon plaintiff's property until he has had reasonable time after notice of the nuisance, to abate it; *Quinn* v. *Chicago, B. & Q. R. R. Co.*, 63 Iowa 510 (1884); *Upjohn* v. *Board of Health*, 46 Mich. 542 (1881). For the destruction between the pollution of wells and springs and their destruction by intercepting the subterranean waters supplying them, see *Ballard* v. *Tomlinson*, 1 R. 29 Ch. D. 115 (1885), in some jurisdictions a distinction is made between pollution of a well by filth washed by surface water into a spring or well or percolating into it through the earth and its pollution by the contamination of underground streams or currents which supply it, *Brown* v. *Illius*, 25 Conn. 583 (1858); *Dillon* v. *Acme Oil Co.*, 49 Hun (N. Y.) 565 (1888).

May 14, 1866. The judgment of the Court (WILLES, BLACKBURN, KEATING, MELLOR, MONTAGUE SMITH, and LUSH, JJ.) was delivered by

BLACKBURN, J. This was a special case stated by an arbitrator, under an order of *nisi prius*, in which the question for the Court is stated to be, whether the plaintiff is entitled to recover any and, if any, what damages from the defendants by reason of the matters thereinbefore stated.

In the Court of Exchequer, the Chief Baron and Martin, B., were of opinion that the plaintiff was not entitled to recover at all, Bramwell, B., being of a different opinion. The judgment in the Exchequer was consequently given for the defendants, in conformity with the opinion of the majority of the Court. The only question argued before us was whether this judgment was right, nothing being said about the measure of damages in case the plaintiff should be held entitled to recover. We have come to the conclusion that the opinion of Bramwell, B., was right, and that the answer to the question should be that the plaintiff was entitled to recover damages from the defendants by reason of the matters stated in the case, and consequently that the judgment below should be reversed, but we cannot at present say to what damages the plaintiff is entitled.

It appears from the statement in the case that the plaintiff was damaged by his property being flooded by water which, without any fault on his part, broke out of a reservoir constructed on the defendants' land by the defendants' orders, and maintained by the defendants.

It appears from the statement in the case (see pp. 267-268), that the coal under the defendants' land had, at some remote period, been worked out; but this was unknown at the time when the defendants gave directions to erect the reservoir, and the water in the reservoir would not have escaped from the defendants' land, and no mischief would have been done to the plaintiff, but for this latent defect in the defendants' subsoil. And it further appears (see pp. 268-269) that the defendants selected competent engineers and contractors to make their reservoir, and themselves personally continued in total ignorance of what we have called the latent defect in the subsoil; but that these persons employed by them in the course of the work became aware of the existence of the ancient shafts filled up with soil, though they did not know or suspect that they were shafts communicating with old workings.

It is found that the defendants, personally, were free from all blame, but that in fact proper care and skill was not used by the persons employed by them to provide for the sufficiency of the reservoir with reference to these shafts. The consequence was that the reservoir when filled with water burst into the shafts, the water flowed down through them into the old workings, and thence into the plaintiff's mine, and there did the mischief.

The plaintiff, though free from all blame on his part, must bear the loss, unless he can establish that it was the consequence of some default for which the defendants are responsible. The question of law therefore arises, what is the obligation which the law

casts on a person who, like the defendants, lawfully brings on his land something which, though harmless whilst it remains there, will naturally do mischief if it escape out of his land. It is agreed on all hands that he must take care to keep in that which he has brought on the land and keeps there, in order that it may not escape and damage his neighbors; but the question arises whether the duty which the law casts upon him, under such circumstances, is an absolute duty to keep it in at his peril, or is, as the majority of the Court of Exchequer have thought, merely a duty to take all reasonable and prudent precautions in order to keep it in, but no more. If the first be the law, the person who has brought on his land and kept there something dangerous, and failed to keep it in, is responsible for all the natural consequences of its escape. If the second be the limit of his duty, he would not be answerable except on proof of negligence, and consequently would not be answerable for escape arising from any latent defect which ordinary prudence and skill could not detect.

Supposing the second to be the correct view of the law, a further question arises subsidiary to the first, viz., whether the defendants are not so far identified with the contractors whom they employed as to be responsible for the consequences of their want of care and skill in making the reservoir in fact insufficient with reference to the old shafts, of the existence of which they were aware, though they had not ascertained where the shafts went to.

We think that the true rule of law is that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes,[*] must keep it in at his peril, and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default; or perhaps that the escape was the consequence of *vis major*, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbor, or whose mine is flooded by the water from his neighbor's reservoir, or whose cellar is invaded by the filth of his neighbor's privy, or whose habitation is made unhealthy by the fumes and noisome vapors of his neighbor's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbor, who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his

[*] In *Berger* v. *Minneapolis Gaslight Co.*, 60 Minn. 297 (1895) an instruction that every one who for his own profit keeps on his premises anything not naturally belonging there, is liable for injury done by its escape was said to be too broad "for it is only those things the natural tendency of which is to become a nuisance or to do mischief if they escape, which the owner keeps at his peril"; and see Doe, J., *Brown* v. *Collins*, 53 N. H. 442 (1873), p. 448; "Everything that a man can bring on his land is capable of escaping—against his will, and without his fault, with or without assistance, in some form, solid, liquid, or gaseous, changed or unchanged by the transforming processes of nature or art—and of so doing damage after its escape."

own property, but which he knows to be mischievous if it gets on his neighbor's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there, so that no mischief may accrue, or answer for the natural and anticipated consequences. And upon authority, this we think is established to be the law, whether the things so brought be beasts, or water, or filth, or stenches.

The case that has most commonly occurred and which is most frequently to be found in the books is as to the obligation of the owner of cattle which he has brought on his land to prevent their escaping and doing mischief. The law as to them seems to be perfectly settled from early times; the owner must keep them in at his peril, or he will be answerable for the natural consequences of their escape; that is, with regard to tame beasts, for the grass they eat and trample upon, though not for an injury to the person of others, for our ancestors have settled that it is not the general nature of horses to kick, or bulls to gore; but if the owner knows that the beast has a vicious propensity to attack man, he will be answerable for that too.

As early as the Year Book, 20 Ed. 4, 11, placitum 10, Brian, C. J., lays down the doctrine in terms very much resembling those used by Lord Holt in *Tenant* v. *Goldwin*, 2 Ld. Raym, 1089, 1 Salk. 360, which will be referred to afterwards. It was trespass with cattle. Plea, that the defendant's land adjoined a place where defendant had common, that the cattle strayed from the common, and defendant drove them back as soon as he could. It was held a bad plea. Brian, C. J., says: "It behoves him to use his common so that he shall do no hurt to another man, and if the land in which he has common be not enclosed, it behoves him to keep the beasts in the common and out of the land of any other." He adds, when it was proposed to amend by pleading that they were driven out of the common by dogs, that although that might give a right of action against the master of the dogs, it was no defence to the action of trespass by the person on whose land the cattle went. In the recent case of *Cox* v. *Burbidge*, 13 C. B. N. S. 438 (E. C. L. R. vol. 106), 32 L. J. C. P. 89, Williams, J., says: "I apprehend the general rule of law to be perfectly plain. If I am the owner of an animal in which by law the right of property can exist, I am bound to take care that it does not stray into the land of my neighbor, and I am liable for any trespass it may commit, and for the ordinary consequences of that trespass. Whether or not the escape of the animal is due to my negligence is altogether immaterial." So in *May* v. *Burdett*, 9 Q. B. 112 (E. C. L. R. vol. 42), the Court, after an elaborate examination of the old precedents and authorities, came to the conclusion that "a person keeping a mischievous animal, with knowledge of its propensities, is bound to keep it secure at his peril." And in 1 Hale's Pleas of the Crown, 430, Lord Hale states that where one keeps a beast, knowing its nature or habits are such that the natural consequence of his being loose is that he will harm men, the owner

"must at his peril keep him up safe from doing hurt; for though he use his diligence to keep him up, if he escape and do harm, the owner is liable to answer damages;" though, as he proceeds to show, he will not be liable criminally without proof of want of care. In these latter authorities the point under consideration was damage to the person, and what was decided was, that where it was known that hurt to the person was the natural consequence of the animal being loose, the owner should be responsible in damages for such hurt, though where it was not known to be so, the owner was not responsible for such damages; but where the damage is, like eating grass or other ordinary ingredients in damage feasant, the natural consequence of the escape, the rules as to keeping in the animal is the same. In Com. Dig. *Droit.* (M. 2)., it is said that "if the owner of 200 acres in a common moor enfeoffs B. of 50 acres, B. ought to enclose at his peril, to prevent damage by his cattle to the other 150 acres. For if his cattle escape thither they may be distrained damage feasant. So the owner of the 150 acres ought to prevent his cattle from doing damage to the 50 acres at his peril." The authority cited is *Dyer,* 372 b., where the decision was that the cattle might be distrained; the inference from that decision, that the owner was bound to keep in his cattle at his peril, is, we think, legitimate, and we have the high authority of Comyns for saying that such is the law. In the note to Fitzherbert, Nat Brevium, 128, which is attributed to Lord Hale, it is said, "If A. and B. have lands adjoining, where there is no enclosure, the one shall have trespass against the other on an escape of their beasts respectively: Dyers, 372, Rastal Ent. 621, 20 Ed. 4, 10; although wild dogs, &c., drive the cattle of the one into the lands of the other." No case is known to us on which in replevin it has ever been attempted to plead in bar to an avowry for distress damage feasant, that the cattle had escaped without any negligence on the part of the plaintiff, and surely if that could have been a good plea in bar, the facts must often have been such as would have supported it. These authorities, and the absence of any authority to the contrary, justify Williams, J., in saying, as he does in *Cox* v. *Burbridge, supra,* that the law is clear that in actions for damage occasioned by animals that have not been kept in by their owners, it is quite immaterial whether the escape is by negligence or not.

As has been already said, there does not appear to be any difference in principle between the extent of the duty cast on him who brings cattle on his land to keep them in, and the extent of the duty imposed on him who brings on his land water, filth, or stenches, or any other thing which will, if it escape, naturally do damage, to prevent their escaping and injuring his neighbor; and the case of *Tenant* v. *Goldwin, supra,* is an express authority that the duty is the same, and is, to keep them in at his peril.[10]

[10] In *Marshall* v. *Wellwood,* 38 N. T. L. 338 (1876), Beasley, C. J., says, p. 341: "The fallacy (of this reasoning) appears to consist in this: That the rule mainly applicable to a class of cases which, I think, should be regarded as, in a great degree, exceptional, is amplified into a general, if not universal, principle." The rule as to cattle, he goes on to say, "is the

As Martin, B., in his judgment below, appears not to have understood that case in the same manner as we do, it is proper to examine it in some detail. It was a motion in arrest of judgment after judgment by default, and therefore all that was well pleaded in the declaration was admitted to be true. The declaration is set out at full length in the report in 6 Mod. p. 311. It alleged that the plaintiff had a cellar which lay contiguous to a messuage of the defendant, "and used (*solebat*) to be separated and fenced from a privy house of office, parcel of the said messuage of defendant, by a thick and close wall, which belongs to the said messuage of the defendant, and by the defendant of right ought to have been repaired (*jure debuit reparari*)." Yet he did not repair it, and for want of repair filth flowed into plaintiff's cellar. The case is reported by Salkeld, who argued it, in 6 Mod., and by Lord Raymond, whose report is the fullest. The objection taken was that there was nothing to show that the defendant was under any obligation to repair the wall, that, it was said, being a charge not of common right, and the allegation that the wall *de jure debuit reparari* by the defendant being an inference of law which did not arise from the facts alleged. Salkeld argued that this general mode of stating the right was sufficient in a declaration, and also that the duty alleged did of common right result from the facts stated. It is not now material to inquire whether he was or was not right on the pleading point. All three reports concur in saying that Lord Holt, during the argu-

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doctrine of the Year Books, but I do not find that it is grounded in any theoretical principle, making a man answerable for his acts or omissions without regard to his culpability." "That the beasts of the land owner should be successfully restrained was a condition of considerable importance to the unmolested enjoyment of property, and the right to plead that the escape had occurred by inevitable accident would have seriously impaired, if it did not entirely frustrate, the process of distress damage feasant. Custom has much to do in giving shape to the law, and what is highly convenient readily runs into usage, and is accepted as a rule. It would but rarely occur that cattle would escape from a vigilant owner, and in this instance such rare exceptions seem to have passed unnoticed, for there appears no example to the point presented for judicial consideration; for the conclusion of the liability of the unnegligent owner rests in *dicta* and not in express decision." But he says the owner of such tame cattle are liable only for the damage which the known nature shows them prone to commit (but see *Healey* v. *Ballantine, ante,* p. 531), such as eating and trampling grass and not for hurt done to the person of others. "A restriction on liability which is hardly consistent with the notion that this class of cases proceeds from a principle so wide as to embrace all persons whose lawful acts produce, without fault in them, and in an indirect manner, ill results which disastrously affect innocent persons." Doe, C. J., in *Brown* v. *Collins,* 53 N. H. 442 (1873) says, p. 149, that "it is not improbable that the rules of liability for damage done by brutes or by fire, found in the early English cases were introduced by sacerdotal influence, from what was supposed to be the Roman or the Hebrew law. It would not be singular if these rules were spontaneously produced at a certain period in the life of any community. They were certainly introduced in England at an immature stage of English Jurisprudence, and an undeveloped state of agriculture, manufactures, and commerce, when the nation had not settled down to those modern, progressive, industrial pursuits, which the spirit of the common law, adopted to all conditions of society, encourages and defends."

ment, intimated an opinion against him on that, but that after consideration the Court gave judgment for him on the second ground. In the report of 6 Mod. 314, it is stated: "And at another day *per totam curiam:* The declaration is good; for there is sufficient cause of action appearing in it but not upon the word *'solebat.'* If the defendant has a house of office enclosed with a wall which is his, he is of common right bound to use it so as not to annoy another. . . . The reason here is, that one must use his own so as thereby not to hurt another, and as of common right one is bound to keep his cattle from trespassing on his neighbor, so he is bound to use anything that is his so as not to hurt another by such user. . . . Suppose one sells a piece of pasture lying open to another piece of pasture which the vendor has, the vendee is bound to keep his cattle from running into the vendor's piece; so of dung or anything else." There is here an evident allusion to the same case in Dyer, see *ante,* p. , as is referred to in Com. Dig. *Droit.* (M. 2). Lord Raymond in his report, 2 Ld. Raym. at p. 1092, says: "The last day of term, Holt, C. J., delivered the opinion of the Court that the declaration was sufficient. He said that upon the face of this declaration there appeared a sufficient cause of action to entitle the plaintiff to have his judgment; that they did not go upon the *solebat,* or the *jure debuit reparari,* as if it were enough to say that the plaintiff had a house and the defendant had a wall, and he ought to repair the wall; but if the defendant has a house of office, and the wall which separates the house of office from the plaintiff's house is all the defendant's, he is of common right bound to repair it. . . . The reason of this case is upon this account, that every one must so use his own as not to do damage to another; and as every man is bound so to look to his cattle as to keep them out of his neighbor's ground, that so he may receive no damage; so he must keep in the filth of his house of office that it may not flow in upon and damnify his neighbor. . . . So if a man has two pieces of pasture which lie open to one another, and sells one piece, the vendee must keep in his cattle so as they shall not trespass upon the vendor. So a man shall not lay his dung so high as to damage his neighbor, and the reason of these cases is because every man must so use his own as not to damnify another." Salkeld, who had been counsel in the case, reports the judgment much more concisely (1 Salk. 361), but to the same effect; he says: "The reason he gave for his judgment was because it was the defendant's wall and the defendant's filth, and he was bound to common right to keep his wall so as his filth might not damnify his neighbor, and that it was a trespass on his neighbor, as if his beasts should escape, or one should make a great heap on the border of his ground, and it should tumble and roll down upon his neighbor's, . . . he must repair the wall of his house of office, for he whose dirt it is must keep it that it may not trespass." It is worth noticing how completely the reason of Lord Holt corresponds with that of Brian, C. J., in the cases already cited in 20 Ed. 4. Martin,

B, in the Court below says that he thinks this was a case without difficulty, because the defendant had, by letting judgment go by default, admitted his liability to repair the wall, and that he cannot see how it is an authority for any case in which no such liability is admitted. But a perusal of the report will show that it was because Lord Holt and his colleagues thought (no matter for this purpose whether rightly or wrongly) that the liability was not admitted, that they took so much trouble to consider what liability the law would raise from the admitted facts, and it does therefore seem to us to be a very weighty authority in support of the position that he who brings and keeps anything, no matter whether beasts, or filth, or clean water, or a heap of earth or dung on his premises, must at his peril prevent it from getting on his neighbor's, or make good all the damage which is the natural consequence of its doing so. No case has been found in which the question as to the liability for noxious vapors escaping from a man's works by inevitable accident has been discussed, but the following case will illustrate it. Some years ago several actions were brought against the occupiers of some alkali works at Liverpool for the damage alleged to be caused by the chlorine fumes of their works. The defendants proved that they at great expense erected contrivances by which the fumes of chlorine were condensed and sold as muriatic acid, and they called a great body of scientific evidence to prove that this apparatus was so perfect that no fumes possibly could escape from the defendants' chimneys. On this evidence it was pressed upon the jury that the plaintiff's damage must have been due to some of the numerous other chimneys in the neighborhood; the jury, however, being satisfied that the mischief was occasioned by chlorine, drew the conclusion that it had escaped from the defendants' works somehow, and in each case found for the plaintiff. No attempt was made to disturb these verdicts on the ground that the defendants had taken every precaution which prudence or skill could suggest to keep those fumes in, and that they could not be responsible unless negligence were shown; yet, if the law be as laid down by the majority of the Court of Exchequer, it would have been a very obvious defence. If it had been raised the answer would probably have been that the uniform course of pleading in actions on such nuisances is to say that the defendant caused the noisome vapors to arise on his premises, and suffered them to come on the plaintiff's, without stating that there was any want of care or skill in the defendant, and that the case of *Tenant* v. *Goldwin, supra,* showed that this was founded on the general rule of law, that he whose stuff it is must keep it that it may not trespass. There is no difference in this respect between chlorine and water; both will, if they escape, do damage, the one by scorching and the other by drowning, and he who brings them there must at his peril see that they do not escape and do that mischief.[11] What is said by

[11] "But," says Beasley, C. J., in *Marshall* v. *Wellwood,* 38 N. J. L., at p. 343; *Tenant* v. *Golding,* and the cases of fumes from alkali works "stand

Gibbs, C. J., in *Sutton* v. *Clarke,* 6 Taunt, 44 (E. C. L. R. vol. 1), though not necessary for the decision of the case, shows that that very learned judge took the same view of the law that was taken by Lord Holt. But it was further said by Martin, B., that when damage is done to personal property, or even to the person, by collision, either upon land or at sea, there must be negligence in the party doing the damage to render him legally responsible; and this is no doubt true, and as was pointed out by Mr. Mellish during his argument before us, this is not confined to cases of collision, for there are many cases in which proof of negligence is essential, as, for instance, where an unruly horse gets on the footpath of a public street and kills a passenger, *Hammack* v. *White,* 11 C. B. N. S. 588 (E. C. L. R. vol. 103); 31 L. J. (C. P.) 129; or where a person in a dock is struck by the falling of a bale of cotton which the defendant's servants are lowering: *Scott* v. *London Dock Company,* 3 H. & C. 596; 35 L. J. (Ex.) 17, 220; and many other similar cases may be found. But we think these cases distinguishable from the present. Traffic on the highways, whether by land or sea, cannot be conducted without exposing those whose persons or property are near it to some inevitable risk; and that being so, those who go on the highway, or have their property adjacent to it, may well be held to do so subject to their taking upon themselves the risk of injury from that inevitable danger; and persons who by the license of the owner pass near to warehouses where goods are being raised or lowered, certainly do so subject to the inevitable risk of accident. In neither case, therefore, can they recover without proof of want of care or skill occasioning the accident; and it is believed that all the cases in which inevitable accident has been held an excuse for what *prima facie* was a trespass, can be explained on the same principle, viz., that the circumstances were such as to show that the plaintiff had taken that risk upon himself.[12] But there is no

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by themselves and have this peculiarity; that the things in their nature partake largely of the character of nuisances. Take the alkali works as an example. Placed in a town, under ordinary circumstances, they would be a nuisance. When the attempt is made by scientific methods to prevent the escape of the fumes, it is an attempt to legalize that which is illegal, and * * * it may well be held that failing in the attempt, the nuisance remains."

[12] As to this see the criticism of Doe, C. J., in *Brown* v. *Collins, supra,* at page 449; "Such a doctrine would open more questions than it would settle. At what distance from a highway would an object be near it? What part of London is not near a street? And then, as the defendant has as good a right to be at home with his horses as to be in the highway, why might not his neighbor, by electing to live in an inhabited country, as well be held to take upon himself the risk of an inevitable accident happening by reason of the country being inhabited, as to assume a highway risk by living near a road. If neighborhood is the test, who are a man's neighbors but the whole human race? If a person, by remaining in England, is held to take upon himself one class of the inevitable dangers of that country, because he could avoid that class by emigrating to a region of solitude, why should he not, for a like reason, also be held to expose himself voluntarily to other classes of the inevitable dangers of that country? And where does this reasoning end?"

ground for saying that the plaintiff here took upon himself any risk arising from the uses to which the defendants should choose to apply their land. He neither knew what these might be, nor could he in any way control the defendants, or hinder their building what reservoirs they liked, and storing up in them what water they pleased, so long as the defendants succeeded in preventing the water which they there brought from interfering with the plaintiff's property.

The view which we take of the first point renders it unnecessary to consider whether the defendants would or would not be responsible for the want of care and skill in the persons employed by them, under the circumstances stated in the case [pp. 268-269].

We are of opinion that the plaintiff is entitled to recover, but as we have not heard any argument as to the amount, we are not able to give judgment for what damages. The parties probably will empower their counsel to agree on the amount of damages; should they differ on the principle the case may be mentioned again.

Judgment for the plaintiff.

Rylands and Horrocks brought error to the House of Lords against the judgment of the Exchequer Chamber, which had reversed the judgment of the Court of Exchequer.

July, 1868. *Sir R. Palmer,* Q. C., and *T. Jones,* Q. C., for the original defendants, now plaintiffs in error.

Manisty, Q. C., and *J. A. Russell,* Q. C., for the plaintiff below, now defendant in error.

[Arguments omitted.]

THE LORD CHANCELLOR (Lord Cairns). My Lords, in this case the plaintiff (I may use the description of the parties in the action) is the occupier of a mine and works under a close of land. The defendants are the owners of a mill in his neighborhood, and they proposed to make a reservoir for the purpose of keeping and storing water to be used about their mill upon another close of land, which, for the purposes of this case, may be taken as being adjoining to the close of the plaintiff, although in point of fact some intervening land lay between the two. Underneath the close of land of the defendants on which they proposed to construct their reservoir there were certain old and disused mining passages and works. There were five vertical shafts and some horizontal shafts communicating with them. The vertical shafts had been filled up with soil and rubbish, and it does not appear that any person was aware of the existence either of the vertical shafts or of the horizontal works communicating with them. In the course of the working by the plaintiff of his mine he had gradually worked through the seams of coal underneath the close, and had come into contact with the old and disused works underneath the close of the defendants.

In that state of things the reservoir of the defendants was constructed. It was constructed by them through the agency and inspection of an engineer and contractor. Personally, the defendants appear to have taken no part in the works, or to have been aware

of any want of security connected with them. As regards the engineer and the contractor, we must take it from the case that they did not exercise, as far as they were concerned, that reasonable care and caution which they might have exercised, taking notice, as they appear to have taken notice, of the vertical shafts filled up in the manner which I have mentioned. However, my Lords, when the reservoir was constructed and filled, or partly filled, with water, the weight of the water bearing upon the disused and imperfectly filled-up vertical shafts, broke through those shafts. The water passed down them and into the horizontal workings, and from the horizontal workings under the close of the defendants it passed on into the workings under the close of the plaintiff, and flooded his mine, causing considerable damage, for which this action was brought.

The Court of Exchequer, when the special case stating the facts to which I have referred was argued, was of opinion that the plaintiff had established no cause of action. The Court of Exchequer Chamber, before which an appeal from this judgment was argued, was of a contrary opinion, and the judges there unanimously arrived at the conclusion that there was a cause of action, and that the plaintiff was entitled to damages.

My Lords, the principles on which this case must be determined appear to me to be extremely simple. The defendants, treating them as the owners or occupiers of the close on which the reservoir was constructed, might lawfully have used that close for any purpose for which it might in the ordinary course of the enjoyment of land be used; and if, in what I may term the natural user of that land, there had been any accumulation of water, either on the surface or underground, and if, by the operation of the laws of nature, that accumulation of water had passed off into the close occupied by the plaintiff, the plaintiff could not have complained that that result had taken place. If he had desired to guard himself against it, it would have lain upon him to have done so by leaving, or by interposing, some barrier between his close and the close of the defendants in order to have prevented that operation of the laws of nature.

As an illustration of that principle, I may refer to a case which was cited in the argument before your Lordships, the case of *Smith* v. *Kenrick*, in the Court of Common Pleas, 7 C. B. 515 (E. C. L. R. vol. 62).

On the other hand, if the defendants, not stopping at the natural use of their close, had desired to use it for any purpose which I may term a non-natural use, for the purpose of introducing into the close that which in its natural condition was not in or upon it, for the purpose of introducing water either above or below ground in quantities and in a manner not the result of any work or operation on or under the land; and if in consequence of their doing so, or in consequence of any imperfection in the mode of their doing so, the water came to escape and to pass off into the close of the plaintiff, then it appears to me that that which the defend-

ants were doing they were doing at their own peril; and if in the course of their doing it the evil arose to which I have referred, the evil, namely, of the escape of the water and its passing away to the close of the plaintiff and injuring the plaintiff, then for the consequence of that, in my opinion, the defendants would be liable.[18]

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[18] Doe, C J., in *Brown* v. *Collins, supra,* at p. 448, criticises the above distinction between natural and non-nature use of land, which, "if it mean anything more than the difference between a reasonable use and an unreasonable one, is," he says, "not established in the law. Even if the arbitrary test were applied only to things which a man brings on his land, it would still recognize the peculiar rights of savage life in a wilderness, ignore the rights growing out of a civilized state of society, and make a distinction not warranted by the enlightened spirit of the common law; it would impose a penalty, made in a reasonable, skilful, and careful manner, to rise above a condition of barbarism. It is impossible that legal principle can throw so serious an obstacle in the way of progress and improvement. Natural rights are, in a general sense, legal rights; and the rights of civilization are, in a legal sense, as natural as any others. If men ever were in any other than the social state it is neither necessary nor expedient that they should now govern themselves on the theory that they ought to live in some other state. The common law does not usually establish responsibility on any other basis than the propriety of their living in the social state, and the relative and qualified character of the rights incident to that state."

The liability of a land owner to an owner of adjacent land as depending upon either his natural or unnatural use, or on his reasonable or unreasonable use of his land has been discussed almost exclusively in cases of trespass, where by his acts in using his land he has directly invaded that of his neighbor or of nuisance, where his use or the conditions created thereby has affected his neighbor's right to light, air, support of soil, to the use of the water of a stream, or to the undisturbed flow of surface or subterranean water, or has caused a constant succession of individually minute invasions of his premises or has rendered the occupation of his premises so substantially disagreeable or dangerous as to materially interfere with his enjoyment thereof.

In some courts the distinction is drawn between the natural and unnatural, in others between the reasonable or unreasonable use of land.

In the former jurisdictions those uses are held natural which are necessary "to develop the natural resources of land", *Robb* v. *Carnegie,* 145 Pa. 324 (1891), p. 339, and without which it would be impossible to utilize it for those purposes for which its very character show it to be marked out by nature as fitted for human enjoyment. The two principal classes of natural use of land are the cultivation of the surface and the development of valuable natural deposit placed by nature thereunder, *Robb* v. *Carnegie, supra,* p. 338. So it is held that no proprietor of land adjoining that of another which contains coal or other minerals can complain of the injurious effects of conditions created by the other's careful and proper mining operations, Cotton, L. J., and Brett, L. J., in *West Cumberland Co.* v. *Kenyon,* L. R. 11 Ch. Div. 779 (1879), pp. 787, 788; *Penna. Coal Co.* v. *Sanderson,* 113 Pa. 126 (1886); or of damage incidental to the appropriation of oil, *Pfeiffer* v. *Brown,* 165 Pa. 267 (1895), or the use of medicinal mineral springs, *Barnard* v. *Sherley,* 135 Ind. 547 (1893).

The following have been considered acts so necessary to develop the natural resources of the land as to be natural and permissible without liability; the pumping of acid mine water to the surface whence it ran by gravity into a nearby stream, *Pa. Coal Co.* v. *Sanderson, supra; contra, Young & Co.* v. *Bankier Co.,* L. R. 1893 A. C. 691, see especially pp. 701, 702, the discharge of salt water, pumped from an oil well, with the oil, from the tank in which it was placed for subsidence and separation, *Pfeiffer* v. *Brown, supra; contra, Straight* v. *Hover,* 79 Ohio St. 263 (1909) and even the discharge of

As the case of *Smith* v. *Kenrick* is an illustration of the first principle to which I have referred, so also the second principle to which I have referred is well illustrated by another case in the same Court, the case of *Baird* v. *Williamson*, 15 C. B. N. S. 317 (E. C. L. R. vol. 109), which was also cited in the argument at the Bar.

My Lords, these simple principles, if they are well founded, as it appears to me they are, really dispose of this case.

The same result is arrived at on the principles referred to by Mr. Justice Blackburn in his judgment in the Court of Exchequer Chamber, where he states the opinion of that Court as to the law in these words: "We think that the true rule of law is that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default; or, perhaps, that the escape was the consequence of *vis major*, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient.

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drainage from the baths in a sanitorium erected for the exploitation of a mineral spring, *Barnard* v. *Sherley, supra.*

On the other hand a use is held to be unnatural which is not necessary or appropriate to the utilization of the natural resources of the land in question, "but is the consequence of his (the owner's) election to devote his land to the establishment of a particular sort of manufacturing, having no connection with the soil or the subjacent strata" and which therefore could have been done elsewhere, even though not so conveniently or economically; in doing this he is "serving himself in his own way and has no right to claim exemption from the natural consequences of his act," *Robb* v. *Carnegie, supra*, pp. 339 and 341, coke burning on premises near to the fields whence the coal was obtained.

So it being "no more natural that water should descend than that land should be farmed," Woodward, J., *Kauffman* v. *Greisemer*, 26 Pa. 407 (1856), p. 414, no action lies where an upper owner by conditions created in the ordinary course of careful husbandry interferes with the natural flow of surface water, *Taylor* v. *Fickas*, 64 Ind. 167 (1878), *Peck* v. *Herrington*, 109 Ill. 611 (1884), *Tuttle* v. *Goodale*, 29 N. Y. 459 (1864), p. 467, or where in an arid country water percolates from an upper owner's irrigation ditches and renders marshy the land below, *Gibson* v. *Fuchta*, 33 Cal. 310 (1867).

In those jurisdictions which regard the defendant's liability as dependent upon the reasonableness of his use, many uses are held reasonable which are not required to develop the natural resources of the land, but are dictated by the personal convenience and desires of the owner. What is reasonable does not depend solely upon the convenience or profit of the user or the effect upon his neighbor but "the effect of the use upon the interests of both parties, the benefits derived by the one, the injury caused by it to the other and all the circumstances affecting either of them are to be considered," Carpenter, J., *Rindge* v. *Sargent*, 64 N. H. 294 (1886), and the question is one of fact, *Ladd* v. *Granite, etc. Co.*, 68 N. H. 504 (1894), though what is done in the usual course of careful cultivation, such as the laying down of ordinary fertilizers, is regarded as a matter of law, as reasonable, *Middlesex Co.* v. *McCae*, 149 Mass. 103 (1889).

As to what is a reasonable expenditure and so required in order to protect one's neighbors from the injurious results of "the development of the natural resources" of one's land, see *Pfeiffer* v. *Brown, supra*, where it is held that no expenditure which would destroy the owner's profit is reasonable.

The general rule, as above stated, seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbor, or whose mine is flooded by the water from his neighbor's reservoir, or whose cellar is invaded by the filth of his neighbor's privy, or whose habitation is made unhealthy by the fumes and noisome vapors of his neighbor's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbor who has brought something on his own property (which was not naturally there), harmless to others so long as it is confined to his own property, but which he knows will be mischievous if it gets on his neighbor's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there, so that no mischief may accrue, or answer for the natural and anticipated consequence. And upon authority this we think is established to be the law, whether the things so brought be beasts, or water, or filth, or stenches."

My Lords, in that opinion I must say I entirely concur. Therefore, I have to move your Lordships that the judgment of the Court of Exchequer Chamber be affirmed, and that the present appeal be dismissed with costs.

LORD CRANWORTH. My Lords, I concur with my noble and learned friend in thinking that the rule of law was correctly stated by Mr. Justice Blackburn in delivering the opinion of the Exchequer Chamber. If a person brings, or accumulates, on his land anything which, if it should escape, may cause damage to his neighbor, he does so at his peril. If it does escape and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage.

In considering whether a defendant is liable to a plaintiff for damage which the plaintiff may have sustained, the question in general is not whether the defendant has acted with due care and caution, but whether his acts have occasioned the damage. This is all well explained in the old case of *Lambert* v. *Bessey,* reported by Sir Thomas Raymond (Sir T. Raym. 421). And the doctrine is founded on good sense. For when one person, in managing his own affairs, causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer. He is bound *sic uti suo ut non lædat alienum.* This is the principle of law applicable to cases like the present, and I do not discover in the authorities which were cited anything conflicting with it.

The doctrine appears to me to be well illustrated by the two modern cases in the Court of Common Pleas referred to by my noble and learned friend. I allude to the two cases of *Smith* v. *Kenrick, supra,* and *Baird v. Williamson, supra.* In the former the owner of a coal mine on the higher level worked out the whole of his coal, leaving no barrier between his mine and the mine on the lower level, so that the water percolating through the upper mine flowed into the lower mine, and obstructed the owner of it in getting his

coal. It was held that the owner of the lower mine had no ground of complaint. The defendant, the owner of the upper mine, had a right to remove all his coal. The damage sustained by the plaintiff was occasioned by the natural flow or percolation of water from the upper strata. There was no obligation on the defendant to protect the plaintiff against this. It was his business to erect or leave a sufficient barrier to keep out the water, or to adopt proper means for so conducting the water as that it should not impede him in his workings. The water in that case was only left by the defendant to flow in its natural course.

But in the later case of *Baird* v. *Williamson,* the defendant, the owner of the upper mine, did not merely suffer the water to flow through his mine without leaving a barrier between it and the mine below, but in order to work his own mine beneficially he pumped up quantities of water which passed into the plaintiff's mine in addition to that which would have naturally reached it, and so occasioned him damage. Though this was done without negligence and in the due working of his own mine, yet he was held to be responsible for the damage so occasioned. It was in consequence of his act, whether skillfully or unskillfully performed, that the plaintiff had been damaged, and he was therefore held liable for the consequences. The damage in the former case may be treated as having arisen from the act of God; in the latter, from the act of the defendant.

Applying the principle of these decisions to the case now before the House, I come without hesitation to the conclusion that the judgment of the Exchequer Chamber was right. The plaintiff had a right to work his coal through the lands of Mr. Whitehead and up to the old workings. If water naturally rising in the defendants' land (we may treat the land as the land of the defendants for the purpose of this case) had by percolation found its way down to the plaintiff's mine through the old workings, and so had impeded his operations, that would not have afforded him any ground of complaint. Even if all the old workings had been made by the plaintiff, he would have done no more than he was entitled to do; for, according to the principle acted on in *Smith* v. *Kenrick,* the person working the mine under the close in which the reservoir was made had a right to win and carry away all the coal without leaving any wall or barrier against Whitehead's land. But that is not the real state of the case. The defendants, in order to effect an object of their own, brought on to their land, or on to land which for this purpose may be treated as being theirs, a large accumulated mass of water, and stored it up in a reservoir. The consequence of this was damage to the plaintiff, and for that damage, however skillfully and carefully the accumulation was made, the defendants, according to the principles and authorities to which I have adverted, were certainly responsible.

I concur, therefore, with my noble and learned friend in thinking that the judgment below must be affirmed, and that there must be judgment for the defendant in error.

Judgment of the Court of Exchequer Chamber affirmed.[14]

[14] In addition to water artificially collected upon land, the following substances have in England been held to fall within the rule of *Fletcher* v. *Rylands;* electricity, *East African Tel. Co.* v. *Cape Town Tramways Co., post,* p. 577; gas, *Batcheller* v. *Tunbridge Wells Gas Co.,* 84 T. L. R. 765 (1901); fumes from creosoted wood blocks used in laying a pavement on a highway, *West* v. *Bristol Tramway Co.,* L. R. 1908, 2 K. B. 14; sparks from an engine operating without legislative authority, *Jones* v. *Festiniog,* L. R. 3 Q. B. 733 (1868), see *contra, Burbank* v. *Bethel Mill Co.,* 75 Me. 373 (1883), and *Davis* v. *R. R.,* 72 S. C. 112 (1905). In *Wing* v. *London Omnibus Co.,* L. R. 1902, 2 K. B. 652, Fletcher Moulton, L. J., discusses the liability of a company which uses motor-buses on slippery streets, upon which they are liable to unpreventable skidding, upon the analogy of *Fletcher* v. *Rylands* and holds that such vehicles are not shown by experience to be so dangerous as to be nuisances and as such to be operated at the users' risk.

In America, the principle of *Fletcher* v. *Rylands* has been approved in Massachusetts, *Shipley* v. *Fifty Associates,* 106 Mass. 194 (1871); Minnesota, *Cahill* v. *Eastman,* 18 Minn. 292 (1872); *Berger* v. *Gaslight Co.,* 60 Minn. 296 (1895); *Wiltse* v. *Red Wing,* 99 Minn. 255 (1906), and Ohio, *Defiance Water Co.* v. *Olanger,* 54 Ohio St. 532 (1890); *Bradford Co.* v. *St. Mary's Co.,* 60 Ohio St. 560 (1899); *Laugabaugh* v. *Anderson,* 68 Ohio St. 131 (1903), though the defendant was held not to be liable for the burning of plaintiff's buildings, because, though the natural and probable result of the escape of the oil stored on the defendant's land, it was not the direct and immediate consequence of its invasion of the plaintiff's premises, and was not caused by such invasion alone, the final cause being the contact of the oil with a fire some distance away and it burning back from this point to the plaintiff's buildings; District of Columbia *Brennan Construction Co.* v. *Cumberland,* 29 App. D. C. 554 (1907). In *Kinnaird* v. *Standard Oil Co.,* 89 Ky. 469 (1890), the court uses general expressions, p. 476, similar to the rule in *Fletcher* v. *Rylands,* but in the later cases of *Triple State Natural Gas Co.* v. *Wellman,* 114 Ky. 79 (1902) and *Mangan's Adm.* v. *Louisville Electric Co.,* 122 Ky. 476 (1896) it is held that "the manufacturer of a useful article (gas or electricity) being lawful, the manufacturer in supplying it to his customers is bound only to exercise such care and skill as the dangerous character of the thing demand" and in *Owensboro* v. *Knox's Adm.,* 116 Ky. 451 (1903), it is held that the escape of electricity from wires in a public highway establishes a *prima facie* case of negligence.

In those jurisdictions which in whole or in part accept *Fletcher* v. *Rylands* the rule is held to apply under the following circumstances, water from a river broke into a tunnel dug by defendants under its bed and through the tunnel flowed upon and flooded the plaintiff's land, *Cahill* v. *Eastman, supra;* water percolating into plaintiff's property from defendant's reservoir, *Wilson* v. *New Bedford,* 108 Mass. 261 (1871), but see *Davis* v. *Rich,* 180 Mass. 235 (1902) where p. 238 this case is cited by Holmes, C. J., for the proposition that "where there is a permanent visible defect which will undoubtedly cause a nuisance the law requires the person responsible for it to fix it out within a reasonable time" and see *Pixley* v. *Clark,* 35 N. Y. 520 (1866) where on practically identical facts the defendant was held liable for nuisance; *Mears* v. *Dale,* 135 Mass. 508 (1883), sea water collecting in excavation made by defendant and percolating upon plaintiff's land and undermining it; filth flowing from defendant's cellar into plaintiff's land, *Ball* v. *Nye,* 99 Mass. 582 (1868) here however the condition was of long standing and the defendant is taken to have known of the percolations; ice or water collecting upon defendant's roof, by reason of its manner of construction, and falling on plaintiff's premises, *Shipley* v. *Associates, supra, Fitzpatrick* v. *Welch,* 174 Mass. 486 (1899), see *contra, Garland* v. *Towne,* 55 N. H. 55 (1874) and *Underwood* v. *Waldron,* 33 Micn. 232 (1876); oil and petroleum stored on defendant's premises and thence percolating gradually into the plaintiff's land, *Berger* v. *Gas*

NICHOLS v. MARSLAND.

Court of Exchecquer, 1875. *L. R.* 10 *Exchecquer* 255.

THE plaintiff sued as the serveyor for the County of Chester of bridges repairable at the expense of the county.

The first count of the declaration alleged that the defendant was possessed of lands and of artificial pools constructed thereon for receiving and holding, and wherein were kept, large quantities of water, yet the defendant took so little and such bad care of the pools and the water therein that large quantities of water escaped from the pools and destroyed four county bridges, whereby the inhabitants of the county incurred expense in repairing and rebuilding them.

The second count alleged that the defendant was possessed of large quantities of water collected and contained in three artificial pools of the defendant near to four county bridges, and stated the breach as in the first count.

Plea, not guilty, and issue thereon.

At the trial before Cockburn, C. J., at the Chester Summer Assizes, 1874, the plaintiff's witness gave evidence to the following effect.[1] The defendants occupied a mansion house and grounds in the county of Chester. A natural stream called Bagbrook ran

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Co., supra, (compare *Kinnaird* v. *Co., supra, Ottawa Gas Co.* v. *Graham*, 28 Ill. 73 [1862] and *Pottstown Gas Co.* v. *Murphy*, 39 Pa. 257 [1861]. In the two latter cases the defendants were held liable the condition being considered an "abiding" nuisance) or being cast upon it in bulk by the bursting of the tank or reservoir, *Brennan Co.* v. *Cumberland, supra* and *Laugabaugh* v. *Anderson, supra*, (*semble*); water precipitated on plaintiff's land by the bursting of his neighbor's water tank, *Defiance Co.* v. *Olinger, supra* (*semble*); plaintiff's premises injured by explosion of nitroglycerine stored on defendant's nearby land, *Bradford Co.* v. *St. Mary's Co., supra.; Flynn* v. *Butler*, 189 Mass. 377 (1905) (*semble*). In no case however has a riparian owner who has dammed his stream so as to more conveniently utilize it for agricultural, manufacturing or mining purposes been held liable for the bursting of his dam in the absence of proof of negligence in its construction or maintenance, *Shrewsbury* v. *Smith*, 66 Mass. 177 (1853), *Todd* v. *Cockhill*, 17 Cal. 97 (1860), *Everett* v. *Hydraulic Flume Co.*, 23 Cal. 225 (1863), *Kug* v. *Miles City Irrigating Co.*, 16 Mont. 463 (1895); *City Water Power Co.* v. *Fergus Falls*, 113 Minn. 33 (1910), distinguishing *Wiltse* v. *Red Wing*, 99 Minn. 255 (1906), on the ground that in the one case the defendant brought no foreign substance on the ground while in the other case the city collected water in the reservoir on a high bluff above the river; see also note to *Brennan Co.* v. *Cumberland*, 15 L. R. A. (N. S.) 545; so it was held that where mine owner who had carefully erected a dam to protect his mine from water from mines above was not liable to the owner of a lower mine, who had for years enjoyed the protection of the dam, for damage done to him by its giving way, *Jones* v. *Robertson*, 116 Ill. 543 (1886); so to recover damages for injury to lands due to leakage from a canal it is necessary to prove negligence in its construction or maintenance, *Delaware, etc., Canal Co.* v. *Goldstein*, 125 Pa. 246 (1887). In *Gould* v. *Winona Gas Co.*, 100 Minn 258 (1907) it is held that gas, whether natural or artificial, is not a substance which if stored on one's land must be confined thereon at one's peril, while in *Gas Fuel Co.* v. *Andrews*, 50 Ohio St. 695 (1893) the court refused to discuss the question of the company's liability at common law since by the very terms of the statute which empowered it to transport gas through the highways it was expressly made liable for any damages that may result from the transportation of the same. See as to Bermuda grass spreading from a railroad's right of way, where it had been planted, to the plaintiff's fields, *Gulf C. & S. F. R. Co.* v. *Oakes*, 94 Tex. 155.

through their grounds and after leaving them flowed under the four county bridges in question. After entering the defendant's grounds the stream was diverted and dammed up by a series of artificial embankments to form a succession of ornamental pools, three in number, communicating by weirs. These pools had existed before the defendant began to occupy the property and no similar accident had, to the knowledge of any witness, happened before. On June 18, 1872, a terrible thunder storm, accompanied by heavy rain and lasting twelve hours, occurred. The rainfall was greater than any within the memory of living man and swelled the stream both above and in the defendants' grounds. The next morning it was found that the violence and volume of the water had carried away the embankments of the three pools, the water, accumulated therein, being let loose, had so swelled the stream below that it carried away the county bridges mentioned in the declaration. Several witnesses testified that the weir from the upper pool was in their opinion too small for so large a pool and that the mischief happened through the insufficiency of the means for carrying off the water.

After hearing the address of the defendant's counsel, the jury said they did not wish to hear his witnesses, and that in their opinion the accident was caused by *vis major*. In answer to Cockburn, C. J., they found that there was no negligence in the construction or maintenance of the works, and that the rain was most excessive. Cockburn, C. J., being of opinion that the rainfall, though extraordinary and unprecedented, did not amount to *vis major* or excuse the defendant from liability, entered the verdict for the plaintiff for 4092*l.*, the agreed amount, reserving leave to the defendant to move to enter it for her if the Court (who were to draw inferences of fact) should be of opinion that the rainfall amounted to *vis major*, and so distinguished the case from *Rylands* v. *Fletcher*, L. R. 3 H. L. 330.

A rule *nisi* having been accordingly obtained to enter the verdict for the defendant on the ground that there was no proof of liability, the plaintiff on showing cause to be at liberty to contend that a new trial should be granted on the ground that the finding of the jury was against the weight of evidence—

May 27. *McIntyre*, Q. C., and *Coxon*, for the plaintiff, showed cause. The defendant, having for her own purposes and advantage stored a dangerous element on her premises, is liable if that element escapes and injures the property of another, even though the escape be caused by an earthquake or any form of *vis major*.

[CLEASBY, B. Was not the flood brought on to the defendant's land by *vis major*?]

The pools were made by those through whom the defendant claims, and if there had been no pools the water of the natural stream would have escaped without doing injury. The case falls within the rule laid down by the judgment in *Fletcher* v. *Rylands*.

[CLEASBY, B. There the defendant brought the water on to his own land. Not so here.]

[1] The facts given are slightly abridged from those set forth in L. R. 10 Ex. 255.

The intimation that *vis major* would perhaps be an excuse is not confirmed by any decision or any other *dictum*. But the facts here do not amount to *vis major*. If the weirs had been larger, or the banks stronger, the mischief would not have happened. *Vis major* means something which cannot be foreseen or resisted, as an earthquake or an act of the Queen's enemies.

Hughes and *Dunn* (*Sir J. Holker*, S. G., with them), in support of the rule.

[Argument omitted.]

[The question of the verdict being against the evidence was then argued.] *Cur. adv. vult.*

June 12. The judgment of the Court (KELLY, C. B., BRAMWELL, and CLEASBY, BB.) was read by

BRAMWELL, B. In this case I understand the jury to have found that all reasonable care had been taken by the defendant, that the banks were fit for all events to be anticipated, and the weirs broad enough; that the storm was of such violence as to be properly called the act of God, or *vis major*. No doubt, as was said by Mr. McIntyre, a shower is the act of God as much as a storm; so is an earthquake in this country: yet every one understands that a storm, supernatural in one sense, may properly, like an earthquake in this country, be called the act of God, or *vis major*. No doubt not the act of God or a *vis major* in the sense that it was physically impossible to resist it, but in the sense that it was practically impossible to do so. Had the banks been twice as strong, or if that would not do, ten times, and ten times as high, and the weir ten times as wide, the mischief might not have happened. But those are not practical conditions, they are such that to enforce them would prevent the reasonable use of property in the way most beneficial to the community.

So understanding the finding of the jury, I am of opinion the defendant is not liable. What has the defendant done wrong? What right of the plaintiff has she infringed? She has done nothing wrong, she has infringed no right. It is not the defendant who let loose the water and sent it to destroy the bridges. She did indeed store it, and store it in such quantities that, if it was let loose, it would do, as it did, mischief. But suppose a stranger let it loose, would the defendant be liable? If so, then if a mischievous boy bored a hole in a cistern in any London house, and the water did mischief to a neighbor, the occupier of the house would be liable. That cannot be. Then why is the defendant liable if some agent over which she has no control lets the water out? Mr. McIntyre contended that she would be in all cases of the water being let out, whether by a stranger or the Queen's enemies, or by natural causes, as lightning or an earthquake. Why? What is the difference between a reservoir and a stack of chimneys for such a question as this? Here the defendant stored a lot of water for her own purposes; in the case of the chimneys some one has put a ton of bricks fifty feet high for his own purposes; both equally harmless if they stay where placed, and equally mischievous if they do not.

The water is no more a wild or savage animal than the bricks while at rest, nor more so when in motion: both have the same property of obeying the law of gravitation. Could it be said that no one could have a stack of chimneys except on the terms of being liable for any damage done by their being overthrown by a hurricane or an earthquake? If so, it would be dangerous to have a tree, for a wind might come so strong as to blow it out of the ground into a neighbor's land and cause it to do damage; or a field of ripe wheat, which might be fired by lightning and do mischief.

I admit that it is not a question of negligence. A man may use all care to keep the water in, or the stack of chimneys standing, but would be liable if through any defect, though latent, the water escaped or the bricks fell. But here the act is that of an agent he cannot control.

This case differs wholly from *Fletcher* v. *Rylands,* L. R. 1 Ex. 265, 279. There the defendant poured the water into the plaintiff's mine. He did not know he was doing so; but he did it as much as though he had poured it into an open channel which led to the mine without his knowing it. Here the defendant merely brought it to a place whence another agent let it loose. I am by no means sure that the likeness of a wild animal is exact. I am by no means sure that if a man kept a tiger, and lightning broke his chain, and he got loose and did mischief, that the man who kept him would not be liable. But this case and the case I put of the chimneys, are not cases of keeping a dangerous beast for amusement, but of a reasonable use of property in a way beneficial to the community. I think this analogy has made some of the difficulty in this case. Water stored in a reservoir may be the only practical mode of supplying a district and so adapting it for habitation. I refer to my judgment [3 H. & C. 788; 34 L. J. (Ex.) 181] in *Fletcher* v. *Rylands,* and I repeat that here the plaintiff had no right that has been infringed, and the defendant has done no wrong. The plaintiff's right is to say to the defendant, *Sic utere tuo ut alienum non lædas,* and that the defendant has done, and no more.

The CHIEF BARON and my brother CLEASBY agree in this judgment. As to the plaintiff's application for a new trial on the ground that the finding of the jury is against evidence, we have spoken to Cockburn, C. J.; he is not dissatisfied therewith, and we cannot see it is wrong. Consequently the rule will be absolute to enter a verdict for the defendant.

Rule absolute.

In Court of Appeal, 1876, *L. R. 2 Ex. Div.* 1.

Cotton, Q. C. (*McIntyre,* Q. C., and *Coxon* with him), for the plaintiff, appellant.

Assuming the jury to be right in finding that the defendant was not guilty of negligence, and that the rainfall amounted to *vis major,* or the act of God, still the defendant is liable because she has, without necessity and voluntarily for her own pleasure, stored on her premises an element which was liable to be let loose, and which, if let loose, would be dangerous to her neighbors. Even

if she be considered innocent of wrong-doing, why should the plaintiff suffer for the defendant's voluntary act of turning an otherwise harmless stream into a source of danger? But for the defendant's embankments, the excessive rainfall would have escaped without doing injury.

Gorst, Q. C., and *Hughes* (*Dunn* with them), for defendant.

The judgment of the Court (COCBURN, C. J., JAMES, and MELLISH, L. JJ., and BAGGALLAY, J. A.) was read by MELLISH, L. J.

The appellant relied upon the decision in the case of *Rylands* v. *Fletcher, supra.*

It appears to us that we have two questions to consider: First, the question of law, which was left undecided in *Rylands* v. *Fletcher, supra,*—Can the defendant excuse herself by showing that the escape of the water was owing to *vis major*, or, as it is termed in the law books, the "act of God?" And, secondly, if she can, did she in fact make out that the escape was so occasioned?

Now, with respect to the first question, the ordinary rule of law is that when the law creates a duty and the party is disabled from performing it without any default of his own, by the act of God, or the King's enemies, the law will excuse him; but when a party by his own contract creates a duty, he is bound to make it good notwithstanding any accident by inevitable necessity. We can see no good reason why that rule should not be applied to the case before us. The duty of keeping the water in and preventing its escape is a duty imposed by the law, and not one created by contract. If, indeed, the making a reservoir was a wrongful act in itself, it might be right to hold that a person could not escape from the consequences of his own wrongful act. But it seems to us absurd to hold that the making or the keeping a reservoir is a wrongful act in itself. The wrongful act is not the making or keeping the reservoir, but the allowing or causing the water to escape. If, indeed, the damages were occasioned by the act of the party without more—as where a man accumulates water on his own land, but, owing to the peculiar nature or condition of the soil, the water escapes and does damage to his neighbor—the case of *Rylands* v. *Fletcher, supra,* establishes that he must be held liable. The accumulation of water in a reservoir is not in itself wrongful; but the making it and suffering the water to escape, if damage ensue, constitute a wrong. But the present case is distinguished from that of *Rylands* v. *Fletcher, supra,* in this, that it is not the act of the defendant in keeping this reservoir, an act in itself lawful, which alone leads to the escape of the water, and so renders wrongful that which but for such escape would have been lawful. It is the supervening *vis major* of the water caused by the flood, which, superadded to the water in the reservoir (which of itself would have been innocuous), causes the disaster. A defendant cannot, in our opinion, be properly said to have caused or allowed the water to escape, if the act of God or the Queen's enemies was the real cause of its escaping without any fault on the part of the defendant. If a reservoir was destroyed by an earthquake, or the

Queen's enemies destroyed it in conducting some warlike operation, it would be contrary to all reason and justice to hold the owner of the reservoir liable for any damage that might be done by the escape of the water. We are of opinion, therefore, that the defendant was entitled to excuse herself by proving that the water escaped through the act of God.

The remaining question is, did the defendant make out that the escape of the water was owing to the act of God? Now the jury have distinctly found, not only that there was no negligence in the construction or the maintenance of the reservoirs, but that the flood was so great that it could not reasonably have been anticipated, although, if it had been anticipated, the effect might have been prevented; and this seems to us in substance a finding that the escape of the water was owing to the act of God. However great the flood had been, if it had not been greater than floods that had happened before and might be expected to occur again, the defendant might not have made out that she was free from fault; but we think she ought not to be held liable because she did not prevent the effect of an extraordinary act of nature, which she could not anticipate. In the late case of *Nugent* v. *Smith*, 1 C. P. D. 423, we held that a carrier might be protected from liability for a loss occasioned by the act of God, if the loss by no reasonable precaution could be prevented, although it was not absolutely impossible to prevent it.

It was indeed ingeniously argued for the appellant that at any rate the escape of the water was not owing solely to the act of God, because the weight of the water originally in the reservoirs must have contributed to break down the dams, as well as the extraordinary water brought in by the flood. We think, however, that the extraordinary quantity of water brought in by the flood is in point of law the sole proximate cause of the escape of the water. It is the last drop which makes the cup overflow.

On the whole we are of opinion that the judgment of the Court of Exchequer ought to be affirmed.

Judgment affirmed.[2]

BOX *v.* JUBB, ET AL.

Exchecquer Division, 1879. *L. R.* 4 *Ex. Div.* 76.

CASE stated in an action brought in the County Court of Yorkshire, holden at Bradford, to recover damages by reason of the overflowing of a reservoir of the defendants.

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[2] See *Carstairs* v. *Taylor*, L. R. 6 Ex. 217 (1871). Kelly, C. B., regards the act of a rat which gnawed a hole in a wooden water conduit as "*vis major* as much as if a thief had broken the hole in attempting to enter the house or a flash of lightning or a hurricane had caused the rent," p. 221. In *Murphy* v. *Gillum*, 73 Mo. App. 487 (1897) the court seems to regard the usual winter freezing and spring thaws as acts of God relieving the owner of a dam from liability under rule of *Fletcher* v. *Rylands* for the seepage from the embankment which occurred every spring, see also *Livingston* v. *Adams*, 8 Cowen 175 (1828).

The case stated was in effect as follows: 1. The defendants were the owners and occupiers of a woolen cloth mill and for the necessary supply of water for it a reservoir was constructed and has been so used, as at the time of its overflow, for many years. 2. The plaintiff is the tenant of the premises adjoining the reservoir. 3 and 4. The reservoir is supplied with water, and its surplus water is discharged into, a watercourse which they have the right to use but which they do not own and over which they have no control. The inlets from and outlets to such watercourse are furnished with proper doors or sluices. 5. During December, 1877, the plaintiff's premises were flooded by the overflowing of the defendant's reservoir, which, (6), was brought about by the fact that a large quantity of water had been emptied into the watercourse, above the defendant's mill, from a reservoir owned by a third party and by an obstruction of the watercourse below the outlet of the defendant's reservoir whereby the water from the watercourse was forced through the closed sluices into the reservoir. 7. Such obstruction was caused by circumstances over which the defendants had no control, and without their knowledge; and had it not been for such obstruction the overflowing of the reservoir would not have happened. 8. The defendants' reservoir, and the communications between it and the main drain or watercourse, and the doors or sluices, are constructed and maintained in a proper manner, so as to prevent the overflowing of the reservoir under all ordinary circumstances. 9. No negligence or wrongful act is attributable to either party.

Under the circumstances the judge of the County Court was of opinion that the defendants were liable for the damage sustained by the plaintiff, and accordingly gave judgment for the plaintiff.

The question for the opinion of the Court, having regard to the facts set out in the case, was whether the defendants were liable for the damage sustained by the plaintiff by reason of the flooding of his premises, such flooding being caused by water from a reservoir belonging to a third party, over which the defendants had no control, and without any knowledge or negligence on defendants' part, the overflowing of the defendants' reservoir being occasioned by the act of a third party, over whom the defendants had no control, and no wrongful act or negligence being attributable to the defendants, and the direct cause of the damage being the obstruction in the main drain or watercourse, which was caused by circumstances over which the defendants had no control and without their knowledge.

Gully, Q. C. (*George C. Thompson*, with him), for defendants.

Bray, for plaintiff.

KELLY, C. B. I think this judgment must be reversed. The case states that for many years the defendants have been possessed of a reservoir to which there are gates or sluices. There has been an overflow from the reservoir which has caused damage to the plaintiff. The question is, what was the cause of this overflow? Was it anything for which the defendants are responsible—did it proceed from their act or default, or from that of a stranger over which they had no control? The case is abundantly clear on this, proving beyond

a doubt that the defendants had no control over the causes of the overflow, and no knowledge of the existence of the obstruction. The matters complained of took place through no default or breach of duty of the defendants, but were caused by a stranger over whom and at a spot where they had no control. It seems to me to be immaterial whether this is called *vis major* or the unlawful act of a stranger; it is sufficient to say that the defendants had no means of preventing the occurrence. I think the defendants could not possibly have been expected to anticipate that which happened here, and the law does not require them to construct their reservoir and the sluices and gates leading to it to meet any amount of pressure which the wrongful act of a third person may impose. The judgment must be entered for the defendants.

POLLOCK, B. I also think the defendants are entitled to judgment. Looking at the facts stated, that the defendants had no control over the main drain, and no knowledge of or control over the obstruction, apart from the cases, what wrong have the defendants done for which they should be held liable? The case of *Rylands* v. *Fletcher,* L. R. 3 H. L. 330, is quite distinguishable. The case of *Nichols* v. *Marsland,* L. R. 10 Ex. 255, 14 Eng. R. 538, is more in point. The illustrations put in that case clearly go to show that if the person who has collected the water has done all that skill and judgment can do he is not liable for damage by acts over which he has no control. In the judgment of the Court of Appeal, 2 Ex. D. 1, at p. 5, Mellish, L. J., adopts the principle laid down by this Court. He says: "If indeed the damages were occasioned by the act of the party without more—as where a man accumulates water on his own land, but owing to the peculiar nature or condition of the soil the water escapes and does damage to his neighbor—the case of *Rylands* v. *Fletcher, supra,* establishes that he must be held liable." Here this water has not been accumulated by the defendants, but has come from elsewhere and added to that which was properly and safely there. For this the defendants, in my opinion, both on principle and authority, cannot be held liable.

Judgment for the defendant.[1]

BLAKE AND CO. *v.* WOOLF.

Queen's Bench Division, 1898. *L. R.* 1898, 2 *Q. B.* 426.

WRIGHT, J.—I am not at all clear that this case is covered by any of the authorities. The matter stands in this way. The de-

[1] *Accord: Triple State Gas Co.* v. *Wellman,* 114 Ky. 79 (1902): and see *Carstairs* v. *Taylor,* L. R. 6 Ex. 217 (1871). In Cooley on Torts, 680, 3rd Ed., p. 1186, the effect of *Fletcher* v. *Rylands,* as modified by *Nichols* v. *Marsland and Box* v. *Jubb,* is said to be that: "The proprietor is not liable if the water escapes because of the wrongful act of a third party, or from *vis major,* or from any other cause consistent with the observance of due and reasonable care by him. Due care must of course be a degree of care proportioned to the danger of injury from the escape; but it is not very clear that the English rule, as thus explained, differs from that of this country."

fendant was the landlord of these premises which were let out in rooms. He had the water supply of the premises by means of a cistern, and the plaintiffs, who were his tenants, took part of the premises after the water had been laid on, and obtained their supply of water from the landlord's cistern. One Friday a leak was discovered from the cistern, and the landlord was informed of it, and he employed a competent person, who was a plumber, to set the matter right. This plumber did the work negligently, and the consequence was that when the premises were opened on the Monday morning the place was found to be flooded, and the plaintiffs' goods were damaged. The question that arises now is whether the landlord is liable for that damage. The first observation I make is that Mr. Tindale Atkinson has not put his case upon any obligation arising from any express contractual liability from the relation between the parties of landlord and tenant, and there was no evidence of the terms of their tenancy. What then is the position at common law? Apart from contractual liability the rule of the common law is, I think, that laid down in *Rylands* v. *Fletcher* (*ubi, sup.*), that *prima facie* an occupier of land has an absolute proprietary right not to have his premises invaded by injurious matter which his neighbour keeps upon his land, and which comes from his neighbour's land otherwise than in the course of nature. That general rule is, however, qualified by some exceptions, one of which is that where a person uses his land in an ordinary and reasonable manner of use, and damage ensues to the adjoining property of his neighbour, without wilfulness or negligence, then there is no liability for such damage, and no action lies. Here the bringing of the water on to these premises and the maintaining a cistern in the usual way, seems to me to be a usual and reasonable user of the house; and, therefore, if the water escapes without any negligence or wilfulness on the part of the owner of the cistern who has brought the water there, as between the owner and the occupier, the owner is not liable.[1] Then another exception to the general rule laid down in *Rylands* v. *Fletcher* (*ubi. sup.*), is where the party who has sustained the damage has consented to the dangerous matter being brought upon the premises, and in such a case he cannot recover. Here the plaintiffs took these premises with the water laid on, and they must be

[1] *Accord:* Valliant, J., *McCord Rubber Co.* v. *St. Joseph Water Co.*, 181 Mo. 678 (1904), p. 694: "There is a wide difference between a great volume of water collected in a reservoir in dangerous proximity to the premises of another and water brought into a house through pipes in the manner usual in all cities, for the ordinary use of the occupants of the house, whilst water so brought into a house cannot literally be said to have come in the course of what might be called * * * 'natural user' of the premises, yet it is brought in by the method universally in use in cities and is not to be treated as an unnatural gathering of a dangerous agent. The law applicable to the caging of wild animals is not applicable to water brought into a house by pipes in the usual manner"; see also Bradbury, C. J., who suggests, 60 Ohio St. p. 574, that the explosion of a steam boiler would not fall within the rule of *Fletcher* v. *Rylands*, because, in using it, "the owner was using his premises in an ordinary manner."

In *Sutton* v. *Card*, W. N. 120 (England, 1886), a distinction is drawn between fair water escaping from a pipe and the escape of water fouled by the defendant's use. In the first case there was said to be no liability, "such mode of supply being the ordinary mode of using a man's own property."

taken to have consented to the water being brought there, and they also consented to the water being supplied to their own part of the premises, so that they must be taken to have consented to the water being kept on the premises by the defendant in the way it was kept.[2] Instances of this kind occur in the cases of *Carstairs* v. *Taylor* (L. R. 6 Ex. 217), *Ross* v. *Fedden* (L. R. 7 Q. B. 661), *Anderson* v. *Oppenheimer* (L. R. 5 Q. B. D. 602), and *Gill* v. *Edouin* (71 L. T. R. 762). That being so, the defendant would not be liable unless this damage was caused by his wilful default or neglect.

MADRAS RAILWAY CO. *v.* THE ZEMINDAR OF CARVATENAGARUM.

Privy Council, 1874. L. R. 1 Indian Appeal Cases, 364.

THE RIGHT HON. SIR ROBERT P. COLLIER:—

The *Madras Railway Company* claimed in this suit damages against the Defendant, the Zemindar of *Carvatenagarum,* for injuries occasioned to their railway and works by the bursting of two tanks upon his land.

The Defendant denied that the injuries complained of resulted from the bursting of the tanks; he asserted that if they did so arise, the bursting was caused by no act or negligence of his, but by *vis major,* or the act of God. He further pleaded in these terms:—

"The tanks referred to in the plaint have existed from time immemorial, and are requisite and absolutely necessary for the cultivation and enjoyment of the land, which cannot be otherwise irrigated; and the practice of storing water in such tanks in *India,* and particularly in this district and in the Zemindary of *Carvatenagaram* and the adjacent districts, is lawful, and is sanctioned by usage and custom. The said zemindary is a hilly district, and the ryots will be unable to carry on their cultivation without such tanks, they being the chief source of irrigation, and the omission to store quantities of water in such tanks will be attended with consequences dreadful to the inhabitants of the country.

"The Defendant could not have avoided collecting a quantity

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[2] *Compare: Mangan's Adm.* v. *Louisville Electric Light Co.,* 122 Ky. 476 (1906) with *City of Owensboro* v. *Knox's Adm.,* 116 Ky. 451 (1903). In *Carstairs* v. *Taylor,* L. R. 6 Ex. 217 (1871), a case where water escaping from a gutter on the roof of a warehouse injured the goods of a tenant of one floor thereof, said, p. 221: "In *Rylands* v. *Fletcher,* the defendant, for his own purposes, conducted the water to the place from which it got onto the plaintiff's premises. Here the conducting was no more for the benefit of the defendant than of the plaintiff. If they had been adjacent owners, it would have been for the benefit of the adjacent owner that the water from *his* roof was collected, and the case would have been within the decision of *Rylands* v. *Fletcher;* but here the roof was the common protection of both, and the collection of the water running from it was also for their joint benefit. * * * Here the plaintiff must be taken to have consented to the collection of the water which was for their benefit, and the defendant can only be liable if he was guilty of negligence"; see also *Gill* v. *Edouin,* 71 L. T. R. 762 (1895).

of water in the tanks during the monsoon, and he has not failed to use any reasonable care that may be expected from him. There were also several tanks and channels above his tank belonging to Government and other people, which also burst at the same time."

He also contended that the damage arose through want of proper care on the part of the Appellants in the construction of their works, but this contention was abandoned. It was found by both Courts, and it is not now disputed, that the works of the plaintiffs did suffer serious damage from the bursting of the tanks; these last two questions, therefore, need not be further referred to.

The issues, as far as they are material to this appeal, agreed to by the parties, were:—

1. Whether the injuries complained of were the result of *vis major,* or the act of God, or other influences beyond the Defendant's control.

2. Whether Defendant is liable for any, and if so what, damages sustained by the Plaintiffs.

The evidence given in the cause may be summarized as follows:—It was shewn that the tanks of the Defendant, which were ancient tanks, the date of their origin not appearing, were constructed in the usual manner, that the banks were properly attended to and kept in repair, that sluices and outlets for the water were provided of the kind usually employed both in private and Government tanks, and usually found sufficient, and which had proved sufficient to prevent any overflow or bursting of the tanks in question for twenty years; but that an improved description of sluice, of recent introduction, would be still more efficacious. That at or some days before the accident there had been an unusual and almost unprecedented fall of rain, described by the deputy-inspector of the railway as the heaviest he had ever seen during his residence of thirteen years in the locality, and by witnesses for the Defendant as exceeding any fall of rain for twenty years; that this extraordinary flood, which caused the neighbouring river to overflow, and possibly brought down to the tanks, whose overflowing is complained of, the contents of other tanks at higher levels, proved more than the sluices could carry off, that the banks of the tanks were overflowed, and finally carried away.

Upon these facts the Acting Civil Judge of the Civil Court of *Chittoor* found for the Defendant, holding that he was not liable in the absence of negligence, and that he had not been negligent. This judgment was affirmed by the High Court on appeal.

The Appellant now contends that the judgment of the High Court should be reversed on two grounds:—

1st. That the Defendant, by storing up water on his land, rendered himself liable in damages, should it escape and do injury to other persons, even though he might not have been guilty of negligence.

2nd. That both the Indian Courts have applied an erroneous rule of law to the consideration of the question of negligence.

The case mainly relied upon in support of the first contention is *Fletcher* v. *Rylands,* which it becomes necessary to examine.

Lord *Cranworth* thus states the principle of the decision:—

"If a person brings and accumulates on his land anything which, if it should escape, may cause damage to his neighbour, he does so at his peril. If it does escape and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage . . . . and the doctrine is founded in good sense. For when one person in managing his own affairs, causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer. He is bound *sic uti suo ut non lædat alienum.*"

But the principle that a man, in exercising a right which belongs to him, may be liable, without negligence, for injury done to another person, has been held inapplicable to rights conferred by statute. This distinction was acted upon in *Vaughan* v. *Taff Vale Railway Company*, 5 H. & N. 679, where it was held by the Exchequer Chamber that a railway company were not responsible for damage from fire kindled by sparks from their locomotive engine, in the absence of negligence, because they were authorized to use locomotive engines by statute. Chief Justice *Cockburn* observes, "where the Legislature has sanctioned and authorized the use of a particular thing, and it is used for the purpose for which it was authorized, and every precaution has been observed to prevent injury, the sanction of the Legislature carries with it this consequence, that if damages result from the use of such a thing independently of negligence, the person using it is not responsible." This view is fortified by the consideration that the Legislature may be presumed not to have conferred special powers on persons or companies without being satisfied that the exercise of them would be for the benefit of the public, as well as of the grantees. On the same principle it was decided that a water works company laying down pipes by a statutory power, were not liable for damages occasioned by water escaping in consequence of a fire-plug being forced out of its place by a frost of unusual severity: *Blyth* v. *Birmingham Waterworks Company* (25 L. J. [Ex.] 212).[1]

On the other hand, in *Jones* v. *Festiniog Railway Company* (L.

[1] *Accord: Price* v. *South Metropolitan Gas Co.*, 65 L. J. Q. B. 126 (1895), "it is clear that where a gas company such as this, having statutory authority to lay pipes, does so in the exercise of its statutory powers, the 'wild beast' theory referred to in the well-known case of *Fletcher* v. *Rylands* is inapplicable"; Russell, C. J., p. 127; Jaggard, J., in *Gould* v. *Winona Gas Co.*, 100 Minn. 258 (1907), p. 261; and see Peckham, J., in *Schmeer* v. *Gas Co.*, 147 N. Y. 529 (1895), p. 541. As to the effect of a clause in the Gasworks Clause Act of 1871, under which the defendant derived its power to lay pipes in the highway, providing that nothing in the act should exonerate the undertakers from responsibility for any nuisance created by them, see *Batcheller* v. *Tunbridge Wells Gas Co.*, 84 T. L. R. 765 (1901). The defendant is bound to show statutory power to do the particular thing complained of, *West* v. *Bristol Tramways Co.*, L. R. 1908, 2 K. B. 14, authority to lay wood pavement held not to authorize the use of creosoted wood, the fumes from which injured adjacent property; nor will such power be implied unless the thing done is necessary to the carrying out of the work authorized, it is not enough that it is convenient, profitable or advantageous to the undertaker, *McAndrews* v. *Collerd*, 42 N. T. L. 189 (1880).

Where the defendant is by prescription bound to receive foreign matter —as where drains from neighboring lands run under his land—he is liable for the escape not only of the drainage of his own land but also for the escape of that from the neighboring land, and this though it be due to the bad condition of a "return drain" of whose existence he did not know, *Humphries* v. *Cousins*, L. R. 2 C. P. D. 243 (1877).

R. 3 Q. B. 733), it was held that a railway company which had not express statutable power to use locomotive engines, was liable for damage done by fire proceeding from them, though negligence on the part of the company was negatived.

It has been argued on the part of the Respondent that the case of *Fletcher* v. *Rylands,* decided on the relations subsisting between adjoining landowners in this country, has no application whatever to *India.* Though that case would not be binding as an authority upon a Court in *India* not administering English law, their Lordships are far from holding that, decided as it was, on the application of the maxim *sic utere tuo ut alienum non lædas,* expressing a principle recognized by the laws of all civilized countries, it does not afford a rule applicable to circumstances of the same character in *India*—they are of opinion, however, that the circumstances of the present case are essentially distinguishable.

The tanks are ancient, and formed part of what may be termed a national system of irrigation, recognized by Hindu and Mahometan law, by regulations of the *East India Company,* and by experience older than history, as essential to the welfare, and, indeed, to the existence of a large portion of the population of *India.* The public duty of maintaining existing tanks, and of constructing new ones in many places, was originally undertaken by the Government of *India,* and upon the settlement of the country has, in many instances, developed on zemindars, of whom the Defendant is one. The zemindars have no power to do away with these tanks, in the maintenance of which large numbers of people are interested, but are charged under Indian law, by reason of their tenure, with the duty of preserving and repairing them. From this statement of facts referred to in the judgment of the High Court, and vouched by history and common knowledge, it becomes apparent that the Defendant in this case is in a very different position from the Defendants in *Fletcher* v. *Rylands.*

In that case the Defendants, for their own purposes, brought upon their land and there accumulated a large quantity of water by what is termed by Lord *Cairns* "a non-natural use" of their land. They were under no obligation, public or private, to make or to maintain the reservoir; no rights in it had been acquired by other persons, and they could have removed it if they had thought fit. The rights and liabilities of the Defendant appear to their Lordships much more analogous to those of persons or corporations on whom statutory powers have been conferred and statutory duties imposed. The duty of the Defendant to maintain the tanks appears to their Lordships a duty of very much the same description as that of the railway company to maintain their railway; and they are of opinion that, if the banks of his tank are washed away by an extraordinary flood without negligence on his part, he is no more liable for damage occasioned thereby than they would be for damage to a passenger on their line, or to the lands of an adjoining proprietor occasioned by the banks of the railway being washed away under similar circumstances. See *Withers* v. *North Kent Railway Company,* 27 L. J. (Ex.) 417.

For these reasons their Lordships will humbly advise Her Majesty that the judgment of the Court below should be affirmed, and the appeal dismissed with costs.

EASTERN AND SOUTH AFRICAN TELEGRAPH CO. *v.* CAPE TOWN TRAMWAYS CO.

Privy Council, 1902. L. R. 1902 Appeal Cases, 381.

LORD ROBERTSON. The question raised by this appeal is whether the respondents are liable in damages for certain disturbances in the workings of the appellants' submarine telegraph cable at Cape Town. That such disturbances did take place, that they were caused by electricity which had been stored by the respondents and used in propelling their tramcars in Cape Town and its suburbs, but from time to time had left the tramway system and found its way to the appellants' cable in the sea near Cape Town, and that pecuniary losses resulted, are matters beyond dispute.

In order to the adequate understanding of the question thus raised, it is not necessary to enter into minute or highly technical descriptions. It may conduce to clearness in the discussion of the legal questions which result if, leaving over in the meantime the mode in which the electricity left the respondents' system, it be in the first place stated how the electricity injured the appellants. At some point then in Table Bay this electricity, having escaped and being at large, was attracted by the appellants' cable, entered the sheathing of the cable, and by the sheathing, as a conductor, found its way back to the tramway central station whence it had started, and thus completed its circuit. While travelling along the sheathing of the appellants' cable, the current varied very frequently and at irregular intervals, in accordance with the starting and stopping of the tramway cars. It was this irregularity and jerking which did the mischief; and but for this the current might have used the sheathing as a conductor without any injury. As things were, the current in the sheathing induced similar irregular currents in the conducting wire of the cable, with the result that the signals were interfered with, and as recorded were confused and unreadable. None of the apparatus was damaged; but the working of the apparatus was so interfered with as to take away its utility for the time of the interruption.

In order to complete the description of the nature of the injury, it is necessary to add that the difficulty has now been completely got over by laying what is called a twin-core cable for several miles out, the two wires rectifying one another's action. Now that this has been done, the electricity from the tramways can pass along the sheathing without any harm being done. The cost of this remedial measure forms a large part of the claim in the suit, much of the rest representing experimental and tentative measures. Into this, however, it is unnecessary further to enter, as the quantum of damage is not raised in this appeal, but only the question of liability.

Turning now to the mode of escape of the electricity from the tramways, there is again no controversy; and for present purposes a succinct statement is sufficient. The respondents' tramway runs along the shore of the sea, and their tramcars are run by the tolerably familiar system of overhead trolley. All that is necessary to take note of is that the electricity which is used is generated at a power-station erected by the respondents for that purpose, and that the conductor which is provided for the return of the current, after driving the tramcars, consists of the tramway rails. Now, when uninsulated (and safety requires that this should be their condition) the rails are so far from being (even comparatively speaking) a perfect conductor that necessarily, and as matter of course, a considerable proportion of the electricity, instead of going directly back to the station, leaves the rails; and some portion of the escaped current it was which reached the appellants' cable.

Upon these facts the appellants' main contention is that, on the principle of *Rylands* v. *Fletcher,* the respondents are liable for the interruption of the appellants' business, and must recoup them for the protective measures necessarily taken to prevent a recurrence of such interruption. To this the respondents have a two fold answer: (1.) they say that they are protected as regards all but a small portion of their tramway system by certain provisions which occur in each of the series of Colonial statutes incorporating their constituent companies; and, (2.) as regards the part of their line not so protected by statute, they maintain that *Rylands* v. *Fletcher* does not apply to the facts. Two other contentions have been advanced on the latter branch of the case (the first of which received more countenance in the Supreme Court than support at their Lordships' bar), namely: (1.) that the law of *Rylands* v. *Fletcher* has no place in the Roman-Dutch law, and (2.) that it was not established that any escape of electricity injurious to the appellants took place from that section of the tramway to which none of the statutes apply.

(He then discusses the evidence and finds that it sufficiently shows that there was an escape of electricity, from that section of the tramway not constructed under statutory authority, injurious to the appellant.)

The question of common law is thus raised directly (as well as indirectly in relation to the just construction of the statutory provisions).

Now, if regard be had solely to the action of the respondents in storing electricity on their lands, it must be allowed that the analogy is very close to the illustrations given in *Rylands* v. *Fletcher* of the kind of things which a proprietor can only do at his own peril. Electricity (in the quantity which we are now dealing with) is capable when uncontrolled of producing injury to life and limb and to property; and in the present instance it was artificially generated in such quantity, and it escaped from the respondents' premises and control. So far as the respondents are concerned, it appears to their Lordships that, given resulting injury such as is postulated in *Rylands* v. *Fletcher,* and the principle would apply.

But this is only one-half of the question, and it remains to be seen if the injury postulated is present. Was there such resulting injury as to found a claim on the principle of *Rylands* v. *Fletcher?* Now in the present case neither person nor property was injured (unless the ingenious suggestion of Mr. Bousfield could be entertained, that physical injury was done to the paper which was smudged by the electric action of the recording apparatus). Certainly there is here no injury of the same genus or species with the tangible and sensible injuries which have hitherto founded liability on the principle in question, and which have always constituted some interference with the ordinary use of property. Now the kind and degree of interference with the respondents' property is pretty well illustrated by the fact that it can only take place if the cable is constructed without certain precautions, for, given the cable as it now is, there is no injury. This is referred to, not because their Lordships consider that the respondents have made out that the twin cable had the general use and recognition which they ascribed to it, but as shewing that it cannot be predicated of the electric escape in question that it is destructive of telegraphic communication generally, but only that it affects instruments made in a certain way. Now, if the instrument be taken as it was when the injury occurred, its nature is such that to insure its immunity from disturbance is a somewhat serious liability to cast on neighbours. To describe this as a delicate instrument might be inaccurate, if the term were used in relation to other electrical instruments of extreme sensibility. But in the present discussion this is not the true comparison at all.

The true comparison is with things used in the ordinary enjoyment of property, and this instrument differs from such things in its peculiar liability to be affected by even minute currents of electricity. Now, having regard to the assumptions of the appellants' argument, it seems necessary to point out that the appellants, as licensees to lay their cable in the sea and as owners of the premises in Cape Town where the signals are received, cannot claim higher privileges than other owners of land, and cannot create for themselves, by reason of the peculiarity of their trade apparatus, a higher right to limit the operations of their neighbours than belongs to ordinary owners of land who do not trade with telegraphic cables. If the apparatus of such concerns requires special protection against the operations of their neighbours, that must be found in legislation; the remedy at present invoked is an appeal to a common law principle which applies to much more usual and less special conditions. A man cannot increase the liabilities of his neighbour by applying his own property to special uses, whether for business or pleasure. The principle of *Rylands* v. *Fletcher,* which subjects to a high liability the owner who uses his property for purposes other than those which are natural, would become doubly penal if it implied a liability created and measured by the non-natural uses of his neighbour's property. Nor need the law be regarded as shewing any want of adaptability to modern circumstances if this be the true

view for the liability thus limited is of insurance and not for negligence, and all the remedies for negligence remain.

While agreeing in the result with the Supreme Court on the common law branch of this case, their Lordships are not prepared to accede to some of the comments made on *Rylands* v. *Fletcher.*

The learned judges of the Supreme Court have indicated considerable reluctance to accept the doctrine of that case, and seem to regard it as more or less inconsistent with the principles of the Roman law, upon which the law of the Colony is based. Their Lordships are unable to find adequate grounds for this view, and it was not maintained at the bar. It is not supported by the texts or decisions which illustrate the full recognition of the right of an owner freely to use his property for natural purposes, even although loss to his neighbour may result. Nor, on the other hand, does the prominence given to culpa in Roman law preclude the reception of the doctrine now under consideration into legal systems founded on the civil law. The learned judges, and also Kekewich, J., in *National Telephone Co.* v. *Baker,* L. R. 1898, 2 Ch. 186, seem to have been inaccurately informed on this point; for as matter of fact not only is the principle of *Rylands* v. *Fletcher* fully accepted in Scotland, but it had formed part of the law of Scotland before *Rylands* v. *Fletcher* was decided, and *Rylands* v. *Fletcher* has been treated by the Scottish Courts as an authoritative exposition of law common to both countries.[1]

LOSEE *v.* BUCHANAN, ET AL.

Court of Appeals of New York, 1873. 51 *N. Y.* 476.

APPEAL by defendants, Coe S. Buchanan and Daniel A. Bullard, from an order of the General Term of the Supreme Court in the fourth judicial district, reversing a judgment entered in their favor upon a verdict. (Reported below, 61 Barb., 86.)

The action was brought to recover damages occasioned by the explosion of a steam boiler, while the same was owned and being used by the Saratoga Paper Company, at their mill, situated in the village of Schuylerville, Saratoga county. The boiler exploded on the 13th day of February, 1864, by means whereof it was projected and thrown on to the plaintiff's premises, and through several of his buildings, thereby injuring and damaging the same, and destroying personal property therein.

Buchanan and Bullard were joined with the paper company as defendants in the action, on the ground that they were trustees, stockholders and agents of the corporation, and superintending its business as such, and therefore jointly liable with the company in the action. The Clutes, who manufactured the boiler, were also made defendants, on the ground that they made it in a negligent manner, in consequence of which negligence the boiler exploded.

The case was twice tried. Upon the first trial the complaint was dismissed as to the Clutes, and a verdict rendered against the other defendants for $3,420.

[1] *Accord: Lake Shore etc. R. R.* v. *Chicago etc. R. R.,* 48 Ind. App. 584 (1910), electricity from the defendant's trolley wires interfered with the plaintiff's nearby electric signals.

The General Term set aside the verdict and granted a new trial, on the ground that the judge at the circuit erred in excluding evidence to show that the defendants were not guilty of any negligence in procuring or in the use of the boiler in question.

Upon the second trial (reported in 42 How., 385) a verdict was rendered against the paper company for $2,703.36 damages, and in favor of the defendants Buchanan and Bullard. The plaintiff moved for a new trial on the minutes of the judge, as to the defendants Buchanan and Bullard; the motion was denied, and judgment entered on the verdict in favor of Buchanan and Bullard.

Further facts appear in the opinion.

EARL, C. Upon the first trial of this action, the presiding judge dismissed the complaint as against the defendants Clute, who manufactured the engine, and held that the other defendants were liable irrespective of negligence, and excluded all evidence to show that they were not guilty of negligence. For this error, upon appeal to the General Term, the judgment was reversed and new trial granted, the court holding that the defendants could be made liable only by proof against them of negligence. Upon the second trial, the presiding judge held in accordance with the law as thus laid down by the General Term, and upon the question of negligence the jury decided against the Saratoga Paper Company and in favor of the other two defendants. The plaintiff claimed, as he did upon the first trial, that the defendants were liable without the proof of any negligence, and requested the justice so to rule, and the refusal of the justice to comply with this request raises the principal question for our consideration upon this appeal.

Upon the last appeal, the majority of the court held the law to be as it had been held upon the first appeal, but a new trial was granted for certain alleged errors in the charge of the justice, which will hereafter be considered.

The claim on the part of the plaintiff is, that the casting of the boiler upon his premises by the explosion was a direct trespass upon his right to the undisturbed possession and occupation of his premises, and that the defendants are liable just as they would have been for any other wrongful entry and trespass upon his premises.

I do not believe this claim to be well founded, and I will briefly examine the authorities upon which mainly an attempt is made to sustain it.[1]

In *Hay* v. *The Cohoes Company* (2 Comst., 159), the defendant, a corporation, dug a canal upon its own land for the purposes authorized by its charter. In so doing it was necessary to blast rocks with gunpowder, and the fragments were thrown against and injured the plaintiff's dwelling upon lands adjoining. It was held that the defendant was liable for the injury, although no negli-

[1] Parts of the opinion, in which the cases of *Farrand* v. *Marshall*, 4 Barb. 409, *Bellinger* v. *R. R.*, 23 N. Y. 47, and *Selden* v. *Canal Co.*, 24 Barb. 362, and Blackstone's exposition of the action of trespass *vi et armis* is discussed, are omitted.

gence or want of skill in executing the work was alleged or proved. This decision was well supported by the clearest principles. The acts of the defendant in casting the rocks upon plaintiff's premises were direct and immediate. The damage was the necessary consequence of just what the defendant was doing, and it was just as much liable as if it had caused the rocks to be taken by hand, or any other means, and thrown directly upon plaintiff's land. This is far from an authority for holding that the defendants, who placed a steam boiler upon their lands, and operated the same with care and skill, should be liable for the damages caused by the explosion, without their fault or any direct or immediate act of theirs. It is true that Judge GARDNER, in writing the opinion of the court, lays down broadly the principle that "every individual is entitled to the undisturbed possession and lawful enjoyment of his own property," citing the maxim *sic utero tuo*, etc. But this principle, as well as the maxim, as will be seen, has many exceptions and limitations, made necessary by the exigencies of business and society..

In *Pixley* v. *Clark* (35 N. Y., 520) it was held, that if one raises the water in a natural stream above its natural banks, and to prevent its overflow constructs embankments which answer the purpose perfectly, but by the pressure of the water upon the natural banks of the stream percolation takes place so as to drain the adjoining lands of another, an action will lie for the damages occasioned thereby; and that it matters not whether the damage is occasioned by the overflow of or the percolation through the natural banks, so long as the result is occasioned by an improper interference with the natural flow of the stream. This decision was an application of the maxim *aqua currit et debet currere* to the facts of that case. It was held that the liability was the same whether the water was dammed up and caused to overflow or to percolate through the banks of the stream. It was a case of flooding lands by damming up the water of a stream, and the liability of a wrongdoer in such a case has never been disputed.

In the case of *McKeon* v. *Lee* (4 Rob. Superior Court R., 449) it was held, that the defendant had no right to operate a steam engine and other machinery upon his premises so as to cause the vibration and shaking of plaintiff's adjoining buildings to such an extent as to endanger and injure them. This case was decided upon the law of nuisances. It was held that the engine and machinery, in the mode in which they were operated, were a nuisance, and the decision has been affirmed at this term of this court. The decision in this case, and in scores of similar cases to be found in the books, is far from an authority that one should be held liable for the accidental explosion of a steam boiler which was in no sense a nuisance. We are also cited to a class of cases holding the owners of animals responsible for injuries done by them. There is supposed to be a difference as to responsibility between animals *mansuetæ naturæ* and *feræ naturæ*. As to the former, in which there can be an absolute right of property, the owner is bound at

common law to take care that they do not stray upon the lands of another, and he is liable for any trespass they may commit, and it is altogether immaterial whether their escape is purely accidental or due to negligence. As to the latter, which are of a fierce nature, the owner is bound to take care of them and keep them under control, so that they can do no injury. But the liability in each case is upon the same principle. The former have a known, natural disposition to stray, and hence the owner knowing this disposition is supposed to be in fault if he do not restrain them and keep them under control. The latter are known to be fierce, savage and dangerous, and their nature is known to their owner, and hence the owner for the same reason is bound to keep them under control. (As to the former, the owner is not responsible for such injuries as they are not accustomed to do, by the exercise of vicious propensities which they do not usually have, unless it can be shown that he has knowledge of the vicious habit and propensity.) As to all animals, the owner can usually restrain and keep them under control, and if he will keep them he must do so. If he does not, he is responsible for any damage which their well-known disposition leads them to commit. I believe the liability to be based upon the fault which the law attributes to him, and no further actual negligence need be proved than the fact that they are at large unrestrained. But if I am mistaken as to the true basis of liability in such cases, the body of laws in reference to live animals, which is supposed to be just and wise, considering the nature of the animals and the mutual rights and interest of the owners and others, does not furnish analogies absolutely controlling in reference to inanimate property.

By becoming a member of civilized society, I am compelled to give up many of my natural rights, but I receive more than a compensation from the surrender by every other man of the same rights, and the security, advantage and protection which the laws give me. So, too, the general rules that I may have the exclusive and undisturbed use and possession of my real estate, and that I must so use my real estate as not to injure my neighbor, are much modified by the exigencies of the social state. We must have factories, machinery, dams, canals and railroads. They are demanded by the manifold wants of mankind, and lay at the basis of all our civilization. If I have any of these upon my lands, and they are not a nuisance and are not so managed as to become such, I am not responsible for any damage they accidentally and unavoidably do my neighbor. He receives his compensation for such damage by the general good, in which he shares,[2] and the right which he has to place the same things upon his lands. I may not place or keep a nuisance upon my land to the damage of my neighbor, and I have

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[2] *Compare:* Peckham, J., in *Schineer* v. *Gas Co.*, 147 N. Y. 529 (1895), p. 541, and the comments thereon of Jaggard, J., in *Gould* v. *Gas Co.*, 100 Minn. 258 (1907), p. 261, and see the distinction drawn by Bradbury, C. J., in *Bradford Glycerine Co.* v. *St. Mary's Co.*, 60 Ohio St. 560 (1899), p. 573, between the storage of nitroglycerine and the use of steam engine and boiler.

my compensation for the surrender of this right to use my own as I will by the similar restriction imposed upon my neighbor for my benefit.[8] I hold my property subject to the risk that it may be unavoidably or accidentally injured by those who live near me; and as I move about upon the public highways and in all places where other persons may lawfully be, I take the risk of being accidentally injured in my person by them without fault on their part. Most of the rights of property, as well as of person, in the social state, are not absolute but relative, and they must be so arranged and modified, not unnecessarily infringing upon natural rights, as upon the whole to promote the general welfare.

I have so far found no authorities and no principles which fairly sustain the broad claim made by the plaintiff, that the dedendants are liable in this action without fault or negligence on their part to which the explosion of the boiler could be attributed.

But our attention is called to a recent English case (*Fletcher* v. *Rylands*), decided in the Exchequer Chamber, which seems to uphold the claim made.

It is sufficient, however, to say that the law, as laid down in that case, is in direct conflict with the law as settled in this country. Here, if one builds a dam upon his own premises and thus holds back and accumulates the water for his benefit, or if he brings water upon his premises into a reservoir, in case the dam or the banks of the reservoir give away and the lands of a neighbor are thus flooded, he is not liable for the damage without proof of some fault or negligence on his part. (Angell on Water-courses, § 336; *Taphan* v. *Curtis*, 5 Vt., 371; *Todd* v. *Cochell*, 17 Cal., 97;

"Doubtless gunpowder, nitroglycerine, and other dangerous explosives are useful agencies in many industries, as well as steam, but conceding that in the case of steam boilers the extensive and various uses to which steam is devoted, the comparatively slight danger arising from its use, require on principles of public policy, which regards the interest of the great body of the people, that every owner of real property should be held to possess it subject to the right of his neighbor to erect a manufactory and employ steam on adjacent premises, yet it does not necessarily follow that such owner should possess his property also subject to the right of his neighbor to erect a powder or nitroglycerine in his vicinity. The existence of a manufacturing establishment, although it employ steam as a motive power, may and doubtless is in many instances a positive benefit to real property in its vicinity, while on the contrary, the erection and use of a nitroglycerine magazine can have no other than a disastrous effect on the value of all real property in the neighborhood. We think therefore the right to maintain the former may be placed on grounds that cannot apply to the latter."

[8] See Bramwell, B., in *Bamford* v. *Turnley*, 3 B. & S. 62 (1862), p. 83. "Those acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without subjecting those who do them to an action. * * * There is an obvious necessity for such a principle. * * * It is as much for the benefit of one owner as of another: for the very nuisance the one complains of, as the ordinary use of his neighbor's land, he himself will create in the ordinary use of his own and the reciprocal nuisances are of a comparatively trifling character. The convenience of such a rule may be indicated by calling it a rule of give and take, of live and let live."

Everett v. *Hydraulic, etc., Co.*, 23 id., 225; *Shrewsbury* v. *Smith*, 12 Cushing, 177; *Livingston* v. *Adams*, 8 Cowen, 175; *Bailey* v. *Mayor, etc., of New York*, 3 Hill, 531; S. C., 2 Denio, 433; *Pixley* v. *Clark*, 35 N. Y., 520, 524; *Sheldon* v. *Sherman*, 42 id., 484.)

The true rule is laid down in the case of *Livingston* v. *Adams* as follows: "Where one builds a mill-dam upon a proper model, and the work is well and substantially done, he is not liable to an action though it break away, in consequence of which his neighbor's dam and mill below are destroyed. Negligence should be shown in order to make him liable."

In conflict with the rule as laid down in the English cases is a class of cases in reference to damage from fire communicated from the adjoining premises. Fire, like water or steam is likely to produce mischief if it escapes and goes beyond control; and yet it has never been held in this country that one building a fire upon his own premises can be made liable if it escapes upon his neighbor's premises and does him damage without proof of negligence. (*Clark* v. *Foot*, 8 J. R., 422; *Stuart* v. *Hawley*, 22 Barb., 619; *Calkins* v. *Barger*, 44 id., 424; *Lansing* v. *Stone*, 37 id., 15; *Barnard* v. *Poor*, 21 Pick., 378; *Tourtellot* v. *Rosebrook*, 11 Metcalf, 460; *Batchelder* v. *Heagan*, 18 Maine, 32). The rule, as laid down in *Clark* v. *Foot*, is as follows: "If A sets fire to his own fallow ground, as he may lawfully do, which communicates to and fires the woodland of B, his neighbor, no action lies against A unless there was some negligence or misconduct in him or his servant." And this is the rule throughout this country except where it has been modified by statute. *Tourtellot* v. *Rosebrook* was an action to recover damage caused by a fire communicated to the plaintiff's land from a coal-pit which the defendant lawfully set on fire upon his own land, and it was held that the burden was on the plaintiff to prove negligence on the part of the defendant.

All these cases and the class of cases to which they belong are in conflict with the rule as claimed by the plaintiff. A man may build a fire in his house or his steam boiler, and he does not become liable without proof of negligence if sparks accidentally pass directly from his chimney or smoke-stack to the buildings of his neighbor. The maxim of *sic utere tuo, etc.*, only requires, in such a case the exercise of adequate skill and care.

The same rule applies to injuries to the person. No one in such case is made liable without some fault or negligence on his part, however serious the injury may be which he may accidentally cause; and there can be no reason for holding one liable for accidental injuries to property when he is exempt from liability for such injuries to the person. It is settled in numerous cases that if one driving along a highway accidentally injures another he is not liable without proof of negligence. (*Center* v. *Finney*, 17 Barb., 94; *Hammock* v. *White*, 103 Eng. Com. Law, 587.)

In *Spencer* v. *Campbell* (9 Watts & S., 32) a man drove a horse to defendant's steam grist-mill to get some grist which he had had ground, and he was thus lawfully upon defendant's premises

and was just as much entitled to protection there as if he had been upon his own premises. While there the steam boiler exploded and killed his horse, and the action was brought for the value of the horse; and it was held that, to entitle the plaintiff to recover, he was bound to show the want of ordinary care, skill and diligence. I am unable to see how that case differs in principle from the one at bar. To sustain the broad claim of the plaintiff here, it should have been held in that case that the owner of the steam boiler was absolutely liable, irrespective of any care, skill or diligence on his part, for any damage which the boiler by its explosion occasioned to any property lawfully in the vicinity. Within the rules laid down by these authorities, the defendants in this case could not, without proof of negligence, be made liable for injuries caused to the persons of those who were near at the time of the explosion; and it would be quite illogical to hold them liable for injuries to property, while they were not liable for injuries to persons by the same accident.

In support of the plaintiff's claim in this action the rule has been invoked that, where one of two innocent parties must suffer, he who puts in motion the cause of the injury must bear the loss. But, as will be seen by the numerous cases above cited, it has no application whatever to a case like this.

This examination has gone far enough to show that the rule is, at least in this country, a universal one, which, so far as I can discern, has no exceptions or limitations, that no one can be made liable for injuries to the person or property of another without some fault or negligence on his part.

In this case the defendants had the right to place the steam boiler upon their premises. It was in no sense a nuisance, and the jury have found that they were not guilty of any negligence. The judgment in their favor should, therefore, have been affirmed at the General Term, unless there were errors in the charge, or refusal to charge, of the judge who presided at the trial, and these alleged errors I will now briefly examine.

I have, therefore, reached the conclusion that no error was committed upon the trial of this action, and it follows that the order of the General Term must be reversed, and the judgment entered upon the verdict must be affirmed, with costs.

All concur.

Order reversed and judgment accordingly.[4]

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[4] *Accord: Marshall* v. *Wellwood*, 38 N. J. L. 339 (1876); *Brown* v. *Collins*, 53 N. H. 442 (1873), *semble*, in which, while the precise question involved was the liability of a defendant whose gentle horses had, without fault in him, been frightened by a locomotive engine and had run away and in their flight struck and injured the plaintiff's lamppost, Doe, C. J., discussed the rule in *Fletcher* v. *Rylands* and repudiates it in an able opinion much of which is quoted in the notes to *Fletcher* v. *Rylands*, *ante* p. 558; *Garland* v. *Towne*, 55 N. H. 55 (1874); *Pennsylvania Coal Co.* v. *Sanderson*, 113 Pa. 126 (1886) *semble*, pp. 149-154, water which had naturally flowed into the defendant's mine was artificially expelled (by pumping) into a neighboring stream. As to the liability in America of those damming streams or building reservoirs, see note 12 to *Fletcher* v. *Rylands*, *ante*, p. 558.

TUCKACHINSKY *v.* LEHIGH AND WILKES-BARRE COAL COMPANY.

Supreme Court of Pennsylvania, 1901. 199 *Pa.* 515.

POTTER, J.: It is contended in this case, upon the part of the appellant, that it was for the jury to say, whether or not the powder house of the defendant company was a private nuisance, and if they so found, that then the defendant was liable for damages caused by the explosion, regardless of the question of negligence. When originally located, the magazine was not in the vicinity of a residence district; but with the growth of the community, the population has settled near the shaft and near the magazine, in apparent disregard of any danger from explosion.

At the time of the accident, the defendant company had four and one half boxes of dynamite, and four and one half kegs of black powder, stored in a wooden building, fourteen feet square and twelve feet high, in an open space near the shaft of its colliery. The mine was not in operation at the time, but some dead work was being done, in which powder was necessary.

The testimony shows that the explosion was caused by lightning.

The plaintiff was standing in the doorway of her father's house, and seems to have been thrown backwards and down a flight of stairs, by the concussion of the air, receiving injuries for which it is here sought to recover damages. The trial court gave binding instructions to the jury, to find for the defendant, in the following language: "There is not, therefore, any evidence in the case of any negligence on the part of the defendant, unless it consists in its having the kind and quantity of explosives in the place at the time, for the purpose and under the circumstances already stated. As to this there is no controversy, no dispute, no question of fact to be determined; the only question to be decided is, whether under the law, this state of facts constitutes negligence in itself, for which plaintiff may recover in this action. This is a question, not of fact for the jury, but of law, the duty of deciding which is laid upon the court. In the discharge of this duty, we say to you, gentlemen, that in our opinion, the fact that the defendant had at the time and place of the accident, four boxes and a part of a box of dynamite, and four kegs and a part of a keg of black powder, in its powder house, located as it was shown to be, did not in itself constitute negligence for which the plaintiff is entitled to recover in this action; and we therefore instruct and direct you to return a verdict in this case in favor of the defendant." This action of the court is assigned as error. A nuisance has been defined as "that which annoys and disturbs one in the possession of his property, rendering its ordinary use or occupation physically uncomfortable to him."[1] The evidence in this case shows that the powder

[1] Whether or not the storage of explosives, gunpowder, dynamite, etc., is or is not a nuisance *per se* is to be decided upon the circumstances of

magazine has been in use by the defendant company for more than thirty years, and that the plaintiff has resided within about 700 feet of it, for some sixteen years. Yet there is no testimony to show that any apprehension of danger, or any fear of explosion, was felt, or expressed by any one, during that time. No objection to the location or maintenance of the magazine has been shown. The explosives were stored in small quantities, to meet current needs. Such materials are always dangerous, but as their use is essential to the work of mining, it is impossible to protect absolutely, persons or property in the immediate vicinity. The risk is similar to that arising from the operation of steam boilers, and other machinery, and apparatus necessary to the prosperity of great communities.

Negligence in the care of the explosives or in the management of the magazine, was neither charged nor proven. The only question in the case, was as to whether or not the magazine was in itself a nuisance. We can see nothing in the evidence to support such a finding. The explosives were kept only for use in the mine, and were kept in small quantities. The explosion was caused by no act of the defendant, but by a stroke of lightning. The trial court could not have sustained a verdict for the plaintiff, upon the evidence. His instructions to the jury, to find in favor of defendant, were proper, and the judgment is affirmed.[2]

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each case, the nature of the building used as a magazine, the quantity of explosives stored therein, its proximity to other buildings and to public highways, the character of the neighboring country, etc., *Heeg* v. *Licht*, 80 N. Y. 579 (1880); *Weir's Appeal*, 74 Pa. 230 (1873); *Kinsey* v. *Koopman & Geddes*, 116 Ala. 310 (1896) and *Rudder* v. *the same*, *ib.* 332 and cases cited therein. In *Dilworth's Appeal*, 91 Pa. 243 (1879), the court set aside an injunction issued by the court below restraining the defendant from erecting a magazine which the master's report showed to have "been located so as to endanger as few people and as little property as possible, and yet be reasonably accessible as a point of supply and distribution"; but see *McAndreds* v. *Collerd*, 42 N. J. L. 189 (1880), which held that even legislative authority to build a tunnel does not excuse the collection of powder within city limits in such quantities as to be dangerous and a nuisance *per se*, because it is necessary to the convenient prosecution of the work to do so; to fall within the protection of such authority it must be shown that the work could not have been done in any other way; as to the limits of the exemption from liability of one acting under legislative command or authority and difference, in respect thereto, between public agents constructing public works and "private corporations authorized by law to construct and operate works for their own emolument, though (incidentally or ultimately) for the public advantage", see *Tinsman* v. *R. R.*, 2 Dretcher (26 N. J. L) 148 (1857) and *G. B. & L. Ry.* v. *Eagles*, 9 Colo. 544 (1886).

[2] *Accord: Heeg* v. *Licht; Kinney* v. *Kloopman, etc.*, and *Rudder* v. *the same, supra*, note 1 and *Kliebauer* v. *Western Fuse Co.*, 138 Cal. 497 (1903); *contra, Bradford & Glycerine Co.* v. *St. Mary's Mill Co.*, 60 Ohio St. 560 (1899). It is held in the majority of jurisdictions that the bare fact of an explosion is *prima facie* evidence of improper construction or management of such a magazine throwing on the defendant the burden of proving that the explosion was caused by persons over whom he had no control, (as in *Kliebauer* v. *Co.*, *supra*, where the magazine was blown up by a Chinese fugitive from justice, who preferred death to arrest), or that he has observed that high degree of care which the dangerous nature of his business required, *Judson* v. *Giant Powder Co.*, 107 Cal. 549 (1895) and cases cited therein; *contra, Sowers* v. *McManus*, 214 Pa. 244 (1906).

AINSWORTH *v.* LAKIN.

Supreme Court of Massachusetts, 1902. 180 Mass. 397.

TORT for damage to property of the plaintiff caused by the falling of a wall alleged to have been upon the land and within the control of the defendant's intestate, which had been left standing after the building of which it formed a part had been destroyed by fire. Writ dated December 2, 1899.

At the trial in the Superior Court, before *Aiken*, J., the jury returned a verdict for the plaintiff in the sum of $4,257.28; and the defendant alleged exceptions.

KNOWLTON, J. The defendant's intestate was the owner of the land and of the first two stories of the building which stood upon it before the fire. The third story had been conveyed by the former owners to Lewis, Noble and Laflin, trustees, to hold during the life of the building. By the fire the life of the building was destroyed, and the ownership of Lewis and others in the third story was terminated. *Ainsworth* v. *Mount Moriah Lodge*, 172 Mass. 257. The defendant's intestate was left with his land and the walls and some other parts of the first and second stories standing upon it, and with the walls of the third story, which had previously belonged to the trustees, resting on the structure below, and connected with it as a part of the realty. All rights of other persons in the walls of the third story had come to an end. As owner of the land and of the first and second stories of the building, he was owner of everything upon it which was a part of the real estate. *Stockwell* v. *Hunter*, 11 Met. 448. *Shawmut National Bank* v. *Boston*, 118 Mass. 125. His position in reference to the walls of the third story was like that of a landlord whose tenant leaves the leased land at the end of the term with structures that he has erected upon it, which have become a part of the realty. These structures which are abandoned by the tenant immediately becomes the property of the landlord to whose land they are affixed. *Burk* v. *Hollis*, 98 Mass. 55. *Madigan* v. *McCarthy*, 108 Mass. 376. *Watriss* v. *First National Bank of Cambridge*, 124 Mass. 571. *McIver* v. *Estabrook*, 134 Mass. 550.

As owner of the land, and the structures upon it which were subject to the power of gravitation and likely to do injury to others if they fell, the defendant's intestate owed certain duties to adjacent landowners. His duty immediately after the fire was affected by the fact that until then he had had no ownership or control of the upper part of the wall, and that the condition of the whole had been greatly changed by the effect of the fire and the destruction of the connected parts. For dangers growing out of changes which he could not prevent he was not immediately liable. *Gray* v. *Boston Gas Light Co.* 114 Mass. 149. *Mahoney* v. *Libbey*, 123 Mass. 20. The jury were therefore rightly instructed that, before a liability could grow up against the defendant's intestate after the fire, he was entitled to a reasonable time to make necessary

investigation, and to take such precautions as were required to prevent the wall from doing harm.

We come next to the question, "What was his duty and what was his liability after the lapse of such a reasonable time?" There is a class of cases in which it is held that one who, for his own purposes, brings upon his land noxious substances or other things which have a tendency to escape and do great damage, is bound at his peril to confine them and keep them on his own premises. This rule is rightly applicable only to such unusual and extraordinary uses of property in reference to the benefits to be derived from the use and the dangers or losses to which others are exposed, as should not be permitted except at the sole risk of the user. The standard of duty established by the courts in these cases is that every owner shall refrain from these unwarrantable and extremely dangerous uses of property unless he provides safeguards whose perfection he guarantees. The case of *Rylands* v. *Fletcher,* L. R. 3 H. L. 330; *Fletcher* v. *Ryalls,* L. R. 1 Ex. 265, rests upon this principle. In this Commonwealth the rule has been applied to the keeping of manure in a vault very near the well and the cellar of a dwelling house of an adjacent owner. *Ball* v. *Nye,* 99 Mass. 582. See also *Fitzpatrick* v. *Welch,* 174 Mass. 486. That there are uses of property not forbidden by law to which this doctrine properly may be applied is almost universally acknowledged.[1]

This rule is not applicable to the construction and maintenance of the walls of an ordinary building near the land of an adjacent owner. In *Quinn* v. *Crimmings,* 171 Mass. 255, 258, Mr. Justice Holmes shows that in reference to the danger from the falling of a structure erected on land "the decision as to what precautions are proper naturally may vary with the nature of the particular structure." He says, "As it is desirable that buildings and fences should be put up, the law of this Commonwealth does not throw the risk of that act any more than of other necessary conduct upon the actor, or make every owner of a structure insure against all that may happen, however little to be foreseen."

The principle applicable to the erection of common buildings whose fall might do damage to persons or property on the adjacent premises holds owners to a less strict duty. This principle is that where a certain lawful use of property will bring to pass wrongful consequences from the condition in which the property is put, if these are not guarded against, an owner who makes such a use is bound at his peril to see that proper care is taken in every particular to prevent the wrong. *Woodman* v. *Metropolitan Railroad,* 149 Mass. 335, and cases cited. *Curtis* v. *Kiley,* 153 Mass. 123. *Pye* v. *Faxon,* 156 Mass. 471. *Harding* v. *Boston,* 163 Mass. 14, 19, and cases cited. *Cabot* v. *Kingman,* 166 Mass. 403, 406. *Robbins* v. *Atkins,* 168 Mass. 45. *Thompson* v. *Lowell, Lawrence & Haverhill Street Railway,* 170 Mass. 577. *Quinn* v. *Crimmings,* 171 Mass. 255, 256. *Boomer* v. *Wilbur,* 176 Mass. 482. *Sessengut*

[1] See Fletcher Moulton, L. J., in *Wing* v. *Bristol Tramways Co.,* L. R. 1909, 2 K. B. 652, p. 665.

v. *Posey,* 67 Ind. 408. *Anderson* v. *East,* 117 Ind. 126. *Chicago* v. *Robbins,* 2 Black, 418, 428. *Homan* v. *Stanley,* 66 Penn. St. 464. *Mayor of New York* v. *Bailey,* 2 Denio, 433. *Bower* v. *Peate,* 1 Q. B. D. 321. *Tarry* v. *Ashton,* 1 Q. B. D. 314. *Gray* v. *Pullen,* 5 B. & S. 970, 981. *Dalton* v. *Angus,* 6 App. Cas. 740, 829. The duty which the law imposes upon an owner of real estate in such a case, is to make the conditions safe so far as it can be done by the exercise of ordinary care on the part of all those engaged in the work. He is responsible for the negligence of independent contractors as well as for that of his servants. This rule is applicable to every one who builds an ordinary wall which is liable to do serious injury by falling outside of his own premises. It is the rule on which the decision in *Gorham* v. *Gross,* 125 Mass. 232, rests, and the case is not an authority for any liability of a landowner that goes beyond this. See also *Gray* v. *Harris,* 107 Mass. 492; *Shrewsbury* v. *Smith,* 12 Cush. 177. The uses of property governed by this rule are those that bring new conditions which involve risks to the persons or property of others, but which are ordinary and usual and in a sense natural, as incident to the ownership of the land. The rule first referred to applies to unusual and extraordinary uses which are so fraught with peril to others that the owner should not be permitted to adopt them for his own purposes whithout absolutely protecting his neighbors from injury or loss by reason of the use. In England this rule which was laid down in *Rylands* v. *Fletcher, ubi supra,* in reference to a reservoir of water, has since been held to be inapplicable where the collection of the water is in the natural and ordinary use of the land. *Fletcher* v. *Smith,* 2 App. Cas. 781. See *Carstairs* v. *Taylor,* L. R. 6 Ex. 217. So far as we know there is no case in which it has been applied to the erection or maintenance of the walls of an ordinary building.

SECTION 4.

Liability of persons doing inherently dangerous work.

THE FITZ SIMONS & CONNELL CO. *v.* BRAUN & FITTS.

Supreme Court of Illinois, 1902. 199 *Ill.* 390.

BOGGS, J.: This in an appeal from the judgment of the Appellate Court for the First District affirming the judgment entered in the superior court of Cook county in favor of the appellees, against the appellant company, in the sum of $2750. The declaration was in trespass on the case, and, in substance, alleged that the appellant company and the city of Chicago, in the prosecution of the work of constructing a tunnel intended for the use of the city in supplying the inhabitants thereof with water, near, through or under certain premises belonging to the appellees, in excavating and digging the tunnel exploded heavy charges of dynamite, which so shook and jarred the foundations, walls and floors of the building, on the premises of appellees, and boilers, engines, machinery and fixtures in said building, that

the foundations, walls and floors were made to sag, crack and separate, which greatly, permanently and irreparably impaired the appearance, strength and stability of the said foundations, walls and floors, and rendered said building less safe and useful and much less valuable to plaintiffs, and because said building was originally constructed with the intention and in such a manner that other and additional stories would and could be added to it, which said additions have been rendered impossible by such injuries to said building, as the foundation and walls are now, on account of the said injuries, too weak to sustain additional weight. Each of the defendants filed a plea of not guilty, and the cause was submitted to a jury for trial. During the hearing of the cause the same was dismissed as to the city of Chicago. Verdict in the sum of $2750 was returned and judgment entered thereon against the appellant company, and on appeal the judgment was affirmed by the Appellate Court.

The remaining assignments of error[1] present for decision the correctness of the rulings of the court in giving and refusing instructions. We need not set forth in full the instructions with relation to the liability of the appellant company for any injury or damage resulting from the use of dynamite. They announced, in substance, the proposition that one who makes use of an explosive in the ground near the property of another, when the natural and probable, though not the inevitable, result of the explosion is injury to such property of the other, is liable for the resulting injury, however high a degree of care or skill may have been exercised in making use of the explosive.

The evidence disclosed that appellant was engaged in constructing a tunnel under contract with the city of Chicago. The contract forbade the use of explosives except where the excavation was in rock. The tunnel was of the depth of about ninety feet beneath the surface of the ground, and passed within a few feet of the corner of appellees' building. The appellant company used dynamite in excavating that portion of the tunnel, and the evidence showed that the explosions of the dynamite caused the earth upon which appellees' building stood, to shake and vibrate, and that the walls of appellees' building were cracked and injured because of the explosions. The excavation at the time of the explosions in question was not in rock, but in indurated clay, with some gravel and boulders imbedded in it. It was clearly shown the excavation through the clay and gravel might have been effected without the use of explosives, but that it could be more cheaply done with the aid of dynamite. As before said, however, the contract with the city forbade the use of explosives except where the excavation was in rock.

The performance of the work of excavating the tunnel underneath the buildings of a populous city with dynamite was intrinsically dangerous, no matter how carefully and skillfully the explosions were conducted. The nature and power of dynamite as an explosive

[1] A part of the opinion, discussing assignments of error in the trial court's rulings upon questions of evidence, is omitted.

have been demonstrated by universal experience, and it is a matter of common knowledge that the use of dynamite as an explosive is intrinsically dangerous, and of this the courts will take judicial notice. (17 Am. & Eng. Ency. of Law,—2d ed.—909; *Norwalk Gaslight Co.* v. *Norwalk,* 63 Conn. 527.) In some jurisdictions, notably New York and New Jersey, it has been held that one who discharges blasts upon ground where he has the lawful right to blast, if he exercises due care in the process and manner of handling the explosive, is not liable for an injury to adjacent property caused by the mere disturbance of the earth or air, if no substance is thrown upon the premises so as to constitute a physical invasion of it. In New York (*Benner* v. *Atlantic Dredging Co.* 134 N. Y. 156,) and Massachusetts (*Murphy* v. *City of Lowell,* 128 Mass. 396,) the rule was announced that in the construction of public works, as by the general government or by cities, the contractors with government or the municipal authorities could not be held liable for the vibrations caused by explosions, in the absence of proof of want of care in the performance of the work.[2] But a different rule obtains in other jurisdictions. In California the opposing doctrine was stated in *Colton* v. *Onderdonk,* 69 Cal. 155, thus: "The fact that the

[2] In New York this distinction is firmly established; in *Hay* v. *Cohoes,* 2 N. Y. 169 (1849), it was held that one who by blasting, done upon his own land, casts debris directly upon the land of another is liable in trespass irrespective of his motive and that in such case his carefulness or negligence is immaterial, the language used by Gardiner, J., is very general; "The means by which it (the defendant's admittedly lawful and proper improvement of his property) was prosecuted are illegal notwithstanding. For they disturbed the rightful possession of the plaintiff and caused a direct and immediate injury to his property; see *accord, Bay* v. *Scott,* 3 Md. 431 (1853); *R. R.* v. *Eagles,* 9 Colo. 544 (1886). Subsequent discisions have both narrowed and extended the principle of this case, for, while in *Booth* v. *R. R.* and *French* v. *Vix, infra,* note 3, it was *held* that there could be no recovery unless foreign and physically substantial matter was thrown by the blasting directly upon the plaintiff's land so as to constitute a technical trespass (though in *Hay* v. *Cohoes* one of the things which it is said "would violate the right of domain," and which the defendant might not do "by any act of their agents, neglect or otherwise, was "to pollute the air upon the plaintiff's premises, *Morley* v. *Pragnell,* Cro. Car. 510"), recovery has been allowed without proof of negligence where a laborer was struck while at work upon his employer's premises, *St. Peter* v. *Denison,* 58 N. Y. 416 (1874), where a wayfarer was struck while travelling on the highway by debris ejected by blasting done by the defendant upon his adjacent premises, *Dunham* v. *Sullivan,* 161 N. Y. 290 (1900), and where a traveller was struck while upon a city street by a stone thrown by a blast set off by a contractor engaged in constructing an underground railway, "a public improvement authorized and directed by the legislature" and who, as such, had a right to use the street at least equal to that of the plaintiff, *Turner* v. *Degron, McLean Co.,* 90 N. Y. Supp. 948 (1904). In *Wheeler* v. *Norton,* 86 N. Y. Supp. 1095 (1904) it was held that a contractor, whose blasting by its force had broken a water main, was liable without proof of negligence to an adjacent owner whose house was flooded by the water so allowed to escape. In *Klepsech* v. *Donald,* 4 Wash. 436 (1892), it is held that this only applies where the debris is cast upon nearby property; where it is cast to an abnormal distance, while the liability depends on proof of negligence, this circumstance shows a *prima facie* case. See also an able discussion of the whole question by Henry P. Erdman, in an article upon "Liability for injuries done by blasting," 54 Am. L. Reg. 677 (1906).

defendant used quantities of gunpowder,—a violent and dangerous explosive,—to blast out rocks upon his own lot contiguous to another person's, situate in a large city, must be taken as an unreasonable, unusual and unnatural use of his own property, which no care or skill in so doing can excuse him from being responsible to the plaintiff for the damages he actually did to her dwelling house as the natural and proximate result of his blasting, for an act which in many cases is in itself lawful becomes unlawful when by it damage has occurred to the property of another; and it would make no material difference whether that damage, resulting proximately and naturally from the act of blasting by the defendant, was caused by rocks thrown against Mrs. Colton's dwelling house, or by concussion of the air around it, which had either damaged or entirely destroyed it. The defendant seems by his contention to claim that he had the right to blast rocks with gunpowder on his own lot in San Francisco even if he had shaken Mrs. Colton's house to ruins, provided he used care and skill in so doing, and although he ought to have known that by such act, which was intrinsically dangerous; the damage would be the necessary, probable or natural consequence; but in this he is mistaken." The doctrine of this case was reaffirmed by the same court in *Munroe* v. *Pacific Dredging Co.* 84 Cal. 515.

In *Bradford Co.* v. *St. Mary's Co.* 60 Ohio St. 560, the injury resulting from an explosive was by concussion or vibration—*i. e.*, consequential injury. The Supreme Court of Ohio said: "When the owner of a stone quarry, by blasting with gunpowder, destroys the buildings of an adjoining land owner, it is no defense to show that ordinary care was exercised in the manner in which the quarry was worked." In that case the ground of liability invoked and asserted was the storing of nitroglycerin upon the defendant's own premises, and the court, in affirming a liability without regard to any negligence in the manner of storing and without distinction as to direct or consequential injury, and because of the inherent dangers of storing it at all, based its conclusion, by analogy, upon the rule as to blasting as above quoted.

Mr. Thompson, in his Commentary on the Law of Negligence, (vol. 1, sec. 764,) says decisions can be collected responding to three propositions: (1) If by an explosion dirt or stones are thrown upon the property of the adjoining owner, injuring such property, such owner may recover damages irrespective of the question of negligence, since this is a trespass upon his property; (2) where the work of blasting is done in a situation where it is necessarily dangerous to the public, as in a thickly settled portion of a city, damages are recoverable without proof of negligence, for the reason that in such case the work itself is so inherently dangerous that the doing of it no matter how carefully, is of itself negligence; (3) liability will attach to the person carrying on the dangerous work where the work has been negligently done.

Though the law as to the liability arising in such instances does not seem to have been harmoniously declared in the courts of the different States to which we have referred, the rule in this jurisdic-

tion was indicated by this court in the case of *City of Joliet* v. *Harwood,* 86 Ill. 110. In that case it appeared that it was necessary, in the construction of a public work, that blasting of rocks should be done in a public street of the city. The contractor used all due care, skill and caution in performing the work of blasting. A stone was thrown by the blast against a building of the plaintiff and injury thereby caused. Judgment was given against the city, and in affirming, we said: "In this case the work which the contractor was required by the city to do was intrinsically dangerous, however carefully or skillfully done. The right of recovery in this case does not rest upon a charge of negligence on the part of the contractor. It rests upon the fact that the city caused work to be done which was intrinsically dangerous, the natural (though not the necessary) consequence of which was the injury to plaintiff's property. In such case the city is responsible." It is true that in that case there was an actual invasion of the property of the plaintiff, the explosion having precipitated a rock against his building; but liability for injuries caused by actual invasion of the property, or by the concussion or vibration of the earth or air, are within the doctrine there announced. If one who, for his own purposes and profit, undertakes to perform a work, by means of explosives, inherently dangerous to the property of another, should be held liable for an injury occasioned by any substance cast by the explosives on the property of such other, it is only by the merest subtility of reasoning he should be held not liable to respond for equal or greater damage caused by the concussion of the air or of the earth. There is no ground of substantial or practical distinction.[8] The case of *Bradford Co.* v. *St. Mary's Co. supra,* may be regarded as authority for the view that liability in such cases is not restricted to an actual invasion of the property, but damages for consequential injuries may be recovered. The doctrine of the charge to the jury we think correct.

Judgment affirmed.

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[8]While in *Murphy* v. *City of Lowell,* the sole point decided was that a city was not liable for injury resulting from the careful performance of work necessary to the construction of public works planned and ordained by the proper municipal authorities, and while in *Benner* v. *Co.,* the court laid emphasis upon the fact that the blasting was necessary to the performance of a public work, the improvement of the entrance to Long Island Sound, authorized by Congress and properly let to the defendant, and that it was not done in the exercise of privileges granted to private persons or corporations for the benefit of private ownership, in *Booth* v. *Rome, etc., R. R.,* 140 N. Y. 267 (1893) it was held that a railroad company, doing blasting on its own premises in order to make a properly authorized cutting across a public highway, was not liable for damage to adjacent property by concussion of the atmosphere or jarring of the ground and in *French* v. *Vix,* 143 N. Y. 90 (1894) the same was held though the blasting was done upon the premises of one who had employed the defendant to build a house for him without any state or municipal permission, authority or direction, express or implied; see also *Simon* v. *Henry,* 62 N. J. L. 486 (1898) where though the defendant was a contractor for public work the rule is stated generally and *Booth* v. *R. R.* and *French* v. *Vix, supra,* are cited as authorities see also *Fox* v. *Borkey,* 126 Pa. 164 (1889).

CHAPTER VI.

Liability for the Acts and Omissions of Independent Contractors.

STORRS *v.* UTICA.

Court of Appeals of New York, 1858. 17 N. Y. App. 104.

COMSTOCK, J. The charge of the judge under which the jury found a verdict against the defendant asserted the doctrine, in substance, that if, in the course of a public improvement, it became necessary for the city corporation to make an excavation in a street so as to render it unfit or dangerous to be traveled upon, it became the duty of the city to take measures, either by lighting the street or otherwise, to warn travelers of the danger, and that this duty did not rest upon the contractor unless he had specially agreed to perform it. I am of opinion that there was no error in this charge, unless it be in the apparent concession that a municipal corporation can avoid the duty in question, and the consequent liability to persons who suffer injury from its neglect, by bringing the contractor into a stipulation that he will perform such duty. In this case, however, there was no provision in the contract for constructing the sewer, that the contractor should place guards around the ditch, or light the streets at night, or, indeed, do anything to prevent travelers from receiving injury. The corporation merely undertook to build a sewer and let out the work by contract. It thus caused a deep and dangerous ditch to be dug in the principal street of the city, into which travelers at night were liable to fall, without making any provision, either in the contract or out of it, for preventing accidents of the kind now in question. When a case can be found, of respectable authority, holding that a city corporation, having the exclusive control of the streets, owes to the public no duty in respect to them, and is not liable for accidents occasioned by gross neglect, then some progress will have been made in the argument for exonerating the defendant from liability for the injuries now in question.

We have been referred to two or three decisions of this court which perhaps should be briefly noticed. In *Blake* v. *Ferris* (1 Seld., 48), the accident happened in consequence of a sewer in one of the streets of the city of New York being left open and unguarded at night; but the defendants in that case were not the city corporation. They had merely a license to build the sewer for their own benefit, and, as appears to have been assumed in the opinion of the court, they let the work, through their agent, to a third person by contract, binding him, as they themselves were bound to the city, to cause proper lights to be placed at the excavation, for the prevention of accidents. No question of corporate duty or liability could therefore arise. It was held that the contractor whose servants were guilty of the neglect was liable, and that the defendants were not. The opinion of Judge Mullett contains a very elaborate and; I doubt not,

a very correct exposition of the doctrine of *respondeat superior;* but I feel less sure that the doctrine was applied with strict accuracy to the facts in the case. The reason for this doubt will be more appropriately stated after referring to two later cases which have also been cited on the part of the appellant. In one of these (*Pack* v. *The Mayor, &c., of New York,* 4 Seld., 222) one Foster had contracted with the corporation of New York to furnish materials and do the work in regulating and leveling a part of the Bloomingdale road, in the city of New York. The injury, on account of which the suit was brought, was occasioned by the negligent blasting of rocks, in the execution of the work under that contract, whereby fragments were thrown into the plaintiff's house. Following the general doctrines laid down in *Blake* v. *Ferris,* it was held that the city corporation was not liable, on the ground that it was not the employer or superior of those whose negligence had caused the accident. Foster had sub-let the blasting to one Riley. Entirely similar to this in principle was the next case referred to. (*Kelly* v. *The Mayor of New York,* 1 Kern., 432.) One Quin had contracted with the corporation to grade a street, and he employed another person to do the blasting, by whose negligence a stone was thrown against the plaintiff's house. The work was to be done under the direction and to the satisfaction of the commissioner of repairs and supplies, the superintendent of roads and the surveyor having charge of the work; but the court held that this agreement with Quin only entitled those officers of the city to direct the results of the work, and not the manner of performing it. It was accordingly held that the plaintiff could not recover; this decision, like that in *Pack* v. *The Mayor, &c.,* being placed distinctly on the ground that the corporation had no right to select the workmen, and therefore was not chargeable as principal for their careless acts in doing the work.

Now, in these two cases of *Pack* v. *The Mayor, &c.,* and *Kelly* v. *The Mayor, &c.,* the general doctrines so well set forth in *Blake* v. *Ferris,* were applied with entire precision and accuracy. The injuries were caused by the negligent acts of workmen over whom the corporation had no control, and done by them in the actual performance of the very work contracted for. In grading the streets, blasting was necessary, but with the manner of doing that the corporation could not interfere; nor could it discharge one workman or employ another. By the contracts it had secured the results only. But in *Blake* v. *Ferris* there was a difference in the facts which may justify the doubt I have above suggested. In that case there was no complaint of negligence in the actual performance of the work. The ditch was carefully and skillfully dug. There was no careless projection of rocks against horses or travelers. The plaintiff's carriage and horses were driven into the ditch, because it was not guarded at night. The cause of the accident, therefore, was *not in the manner in which the work was carried on by the laborers; if it had been, their immediate employer, and he only, was liable for the injury.* But in a sense strictly logical, as it seems to me, the accident was the

result of the work itself, however skillfully performed. A ditch cannot be dug in a public street and left open and unguarded at night without imminent danger of such casualties. If they do occur, who is the author of the mischief? Is it not he who causes the ditch to be dug, whether he does it with his own hands, employs laborers or lets it out by contract? If by contract, then I admit that the contractor must respond to third parties, if his servants or laborers are negligent in the immediate execution of the work. But the ultimate superior or proprietor first determines that the excavation shall be made, and then he selects his own contractor. Can he escape responsibility for putting a public street in a condition dangerous for travel at night by interposing the contract which he himself has made for the very thing which creates the danger? I should answer this question in the negative. He may insert in the agreement, a clause that the contractor shall provide proper lights and guards, but I do not see how even that can change the principle. The contractor in that case would be liable to indemnify his employer for accidents occasioned by his neglect of the stipulation, and, perhaps, also liable directly to persons injured. He might even be liable to the latter for leaving the ditch unguarded at night, without any stipulation on his part. But, granting all this, it has no tendency, in my judgment, to shield the ultimate superior or author of the work from responsibility.

The principles suggested become plain propositions in the case of a municipal corporation which owes to the public the duty of keeping its streets in a safe condition for travel. That the duty exists is not denied; and the doctrine that persons receiving special injury from its non-observance can maintain an action therefor was examined by this court and asserted in the recent case of *Hickcock* v. *The Village of Plattsburg* (16 N. Y., 161). What then is the obligation of a city corporation when it undertakes to construct a sewer in a public street? Can it in that undertaking and in any mode of providing for the execution of the work throw off the duty in question and the responsibilities through which that duty is to be enforced? Although the work may be let out by contract, the corporation still remains charged with the care and control of the street in which the improvement is carried on. The performance of the work necessarily renders the street unsafe for night travel. This is a result which does not at all depend on the care or negligence of the laborers employed by the contractor. The danger arises from the very nature of the improvement, and if it can be averted only by special precautions such as placing guards or lighting the street, the corporation which has authorized the work is plainly bound to take those precautions. The contractor may very probably be bound by his agreement not only to construct the sewer but also to do such other acts as are necessary to protect travel. But a municipal corporation cannot I think in this way either avoid indictment in behalf of the public or its liability to individuals who are injured.[1]

[1] "Another exception to the general rule, relieving an employee from liability for an injury occasioned by an independent contractor, is, where the

These views perhaps go somewhat further than necessary to sustain the judgment now under review. In the present case the corporation of Utica determined to construct a sewer through its principal thoroughfare, and not only neglecting on its own part to take any measure for the protection of travelers, it did not even bind the contractor to anything beyond the mere execution of the work. It has been determined by this court that under such a contract the contractor is under no obligation to the corporation employer to take measures to prevent persons from falling into the ditch while in process of construction. (*The City of Buffalo* v. *Holloway*, 3 Seld., 493). In determining that point the opinion was also very clearly expressed that the corporation of Buffalo was liable to persons receiving injury by its neglect to maintain lights and guards around the excavations made in progress of the work.

The judgment should be affirmed.

ROOSEVELT, J., dissented, holding that Shippey, the contractor, was bound, not as agent of the city corporation, but as principal, so to perform the work as not injure travelers, and that he only was liable for the negligence.

DENIO, J., did not sit in the case.

All the other judges concurring,

Judgment affirmed.

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party causing the work to be done is under a primary obligation, imposed by law, to keep the subject matter of the work in safe condition" (and under the general law for the incorporation of villages, the duty to keep their streets and sidewalks in safe condition is imposed upon them). "The principle upon which this exception is predicated is, that where a duty is so imposed, the responsibility for its faithful performance cannot be avoided, and that the party under such obligation cannot be relieved therefrom by a contract made with another for the performance of such duty." Baker, J., *Village of Jefferson* v. *Chapman*, 127 Ill. 438 (1889), p. 445, and see *Dillon on Municipal Corporations*, section 1027.

Accord: Birmingham v. *McCary*, 84 Ala. 469 (1887); *City of Anderson* v. *Fleming*, 160 Ind. 597 (1903); *Detroit* v. *Cory*, 9 Mich. 165 (1861); *St. Paul* v. *Seitz*, 3 Minn. 297 (1859); *Butler* v. *Bangor*, 67 Maine, 285 (1887); *Mayor of Baltimore* v. *McDonnell*, 53 Md. 110 (1879); *Brooks* v. *Somerville*, 106 Mass. 271 (1871); *Ray* v. *Poplar Bluff*, 70 Mo. App. 252 (1897); *Omaha* v. *Jensen*, 35 Neb. 68 (1892); *Circleville* v. *Neuding*, 41 Ohio, St. 465 (1885); *McAllister* v. *Albany*, 18 Oregon, 426 (1890); *Nashville* v. *Brown*, 9 Heisk. (Tenn.), 1 (1871); *Wilson* v. *Wheeling*, 19 W. Va. 323 (1882); *Hincks* v. *Milwaukee*, 46 Wis. 559 (1879), in which it was held that a clause in the city's charter exempting it from such liability was invalid as "granting a special immunity against a general rule of law to which other municipal corporations were subject."

The municipal corporation is liable though the dangerous condition is only "momentary". *Blessington* v. *Boston*, 153 Mass. 409 (1891), neglect of workman to immediately replace barriers which had to be removed from time to time to allow cars to pass.

A municipal corporation is held to be liable though the contractor is not employed by them, but by some person or corporation who is licensed to do work which necessarily involves the creation of a dangerous condition in the highway. *Haniford* v. *Kansas*, 103 Mo. 172 (1890); *Willard* v. *Newberry*, 22 Vt. 458 (1850); *Phillips* v. *Veazie*, 40 Me. 96 (1855). It is also liable if an individual, licensed to place an obstruction in the highway, fails to properly guard and light it. *King* v. *Cleveland*, 22 Fed. 835 (1885); *Magee* v. *Troy*, 43 Hun, N. Y. 383 (1888).

VEAZIE *v.* PENOBSCOT R. R. CO.

Supreme Judicial Court of Maine, 1860. 49 Me. 119.

KENT, J.—The plaintiffs claim to recover of the defendants damages which they allege they have sustained by reason of the acts of the defendants, in causing a deep cut to be made in a highway in the town of Veazie. The first ground of damage is, the amount which the town has been compelled to pay to one Phillips, and the cost and expenses of defending a suit instituted by him against the plaintiffs, as primarily liable for the injuries caused by the defect. The second ground of damage is, the injury sustained by the town by the digging down, and the cost of repairs of the highway.

The defendants insist, in the first place, that whatever was done was done in pursuance of their legal right by their charter, § 8, and by c. 81, § 8, of R. S. of 1841.

By the provisions of those Acts, the railroad corporation had an unquestioned right to have their road pass over or under the highway; and, for that purpose, to raise or lower any part of it.

The right to make the cut did not give the right to do it without due regard to the public safety; and that required that all proper guards should be erected and continued, whenever there was danger of injury to any person by reason of the cut. The charge in this case is, that the corporation made a deep cut, partly across the road, which was not well guarded, by sufficient railing, against accident; and that one Phillips, travelling on the road in the evening, using due care, walked or fell into the hole or cut so made, and was injured.

It is further objected that this company is not liable for damages consequent upon the acts or neglects of the persons who had contracted with the corporation to do the work. It is contended that the contract was a legal one, and only authorized a legal act; and that, if the contractors performed this legal act in an illegal manner, the company is not responsible.

But we place the decision on this point on the well settled doc-

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Contra: *Painter* v. *Pittsburgh*, 46 Pa. 216 (1863), decided on the authority of *Blake* v. *Ferris*, *Pack* v. *Mayor* (see opinion in principal case), and *Barry* v. *St. Louis*, 17 Mo. 121 (1852), which is disapproved in the later case of *Haniford* v. *Kansas*, *supra*. A corporation formed for the purpose of maintaining "turnpikes" for its private gain is, however, liable if through the negligence of its independent contractor the road is unsafe, the distinction being that "the maintenance and repair of roads and streets are merely a burden imposed on a municipality, whilst a corporation created for the purpose is compensated by tolls." *Lancaster Ave. Imp. Co.* v. *Rhoads*, 116 Pa. 377 (1887). The immunity of a municipality only extends to temporary defects existing while the contractor is in complete control of the work; after the work is turned over to and accepted by the municipality it is responsible for defects due to the contractor's negligence. *Mahanoy Township* v. *Schally*, 84 Pa. 136 (1887). In *James* v. *San Francisco*, 6 Cal. 528 (1856), and *Krause* v. *Sacramento*, 48 Cal. 222 (1874), the city held to be exempt from liability since they were compelled by law to let to the lowest bidder all work necessary for the improvement of the streets; but see *Detroit* v. *Cory* and *Mahanoy* v. *Schally*, *supra*, in which this argument was advanced and rejected.

trine, that, where the Legislature, as guardian of the rights of the public in a highway, permits a corporation or individual to use or interfere with the way, and to obstruct its use, on condition, express or implied, that all requisite care is to be taken to protect others from injury, the right thus granted must be exercised by the party to whom it is granted, and cannot be assigned, so as to relieve the party from the faithful execution of the power. The company may doubtless make contracts for the performance of the work; but cannot avoid their obligation to protect the public against danger, by the stipulations they may make. The grant of the Legislature is to a known and responsible company, as it is to be presumed, over which the Legislature has more or less control. Important rights are to be affected, and it would be a dangerous, as well as an unsound doctrine, to allow such a body to transfer their liabilities and obligations to the public and the individual citizens, to irresponsible or transient contractors. In the execution of such a trust, or power, the company must be responsible, whatever contracts they may make. *Hilliard* v. *Richardson,* 3 Gray, 349; *Bailey* v. *Mayor, &c., New York,* 3 Hill, 531.

It is settled by various decisions, that, where railroads have the power by law to cut through and alter highways, and, in so doing, travellers sustain an injury, without fault on their part, by reason of an illegal defect, the towns in which the highways are situated are primarily liable for such injuries. *State* v. *Gorham,* 37 Maine, 451; *Willard* v. *Newbury,* 22 Vt., 458; *Currier* v. *Lowell,* 16 Pick., 170.

A town thus made liable may sustain an action for indemnity against the railway company, if that company was first and principally in fault and the wrongful cause of the defect or neglect. The town is compelled by law and public policy to stand as guarantors, or in a position like that of surety for the company, that it shall not be guilty of neglect. When the wrong or neglect is altogether on the part of the company, the town may nevertheless be held to make good the injury to the individual. The liability of the railroad company is to indemnify the town fully for all the damages it has been compelled to pay, and for the costs and expenses reasonably and fairly incurred. *Lowell* v. *B. & L. R. R. Co.,* 23 Pick., before cited; *Duxbury* v. *Vermont Central Railroad,* 26 Vt., 751; *Hayden* v. *Cabot,* 17 Mass., 169.[1]

[1] In *Leavitt* v. *Railroad Company,* 89 Me. 509 (1897), p. 579, the principle case is stated to have been decided on the principle that: "No private person or corporation has a right to interfere with the highway, and can only do so by authority from the legislature; and then, as the authority is personal, the act, by whomsoever done, remains personal. The act of the contractor, being unauthorized, except from the legal privilege of his employer, logically becomes the act of the latter."

Accord: Deming v. *Terminal Ry. of Buffalo,* 169 N. Y. 1 (1901), per Parker, C. J., p. 13; *Downey* v. *Low,* 22 App. Div. (N. Y.) 460 (1897); *Colegrove* v. *Smith,* 102 Cal. 220 (1894); see also Holmes, J., *Woodman* v. *R. R.,* 149 Mass. 335 (1889), p. 340. In *Darmstaedter* v. *Moynahan,* 27 Mich. 188 (1873), the defendant having a license to encumber the street while filling his ice house was held liable for the misconduct of a contractor employed to

PENNSYLVANIA CO. *v.* ROY.

Supreme Court of the United States, 1880. 102 *U. S.* 451.

MR. JUSTICE HARLAN delivered the opinion of the court.

This is a writ of error from a judgment for the sum of $10,000, the amount assessed as damages sustained by the defendant in error, in consequence of personal injuries received while riding, as a passenger, in a sleeping-car which belonged to the Pullman Palace Car Company, but constituting, at the time the injuries were received, a part of a train of cars managed and controlled by the Pennsylvania Company, as lessee and operator of the Pittsburg, Fort Wayne, and Chicago Railway. The action was commenced in the Supreme Court of Cook County, Illinois, against the Pennsylvania Company, the Pittburg, Fort Wayne, and Chicago Railroad Company, and the Pullman Palace Car Company. It was subsequently dismissed by the plaintiff against all the defendants except the Pennsylvania Company, and then removed for trial into the Circuit Court of the United States for the Northern District of Illinois, where the judgment complained of was rendered.

The facts set forth in the bill of exceptions, so far as it is material to detail them, are these:—

On the 5th of June, 1876, Roy, the defendant in error, purchased at the office of the lessee company, in the city of Chicago, a "first-class railroad ticket" from that city, to Philadelphia, over the line of that company, paying therefor the sum of $14.40. At the same time and place, and of the same person, he purchased a sleeping-car ticket, issued by the Pullman Palace Car Company, for the route between the same cities, and for that ticket he paid the additional sum of $5. He took the train the same day, going immediately into the section of the sleeping-car corresponding to his ticket.

The next morning, at Alliance, Ohio, upon the invitation of a friend, travelling upon the same train, he entered the sleeping-car in which that friend was riding, and there engaged with him in conversation. While so engaged, the upper berth of the section in which they were sitting fell. Thereupon the porter of the sleeping-car came at once and put up the berth, saying it would not fall again. Shortly thereafter the berth fell a second time, striking the

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fill it, in negligently leaving blocks of ice lying on the street after the work was done.

Contra: Chartiers Valley Coal Co. v. *Waters,* 123 Pa. 220 (1888), and *Smith* v. *Simmons,* 103 Pa. 32 (1883); *cf. Penna., etc., Canal Co.* v. *Graham,* 63 Pa. 290 (1869), where the injury was received while the bridge, the maintenance of which was by its charter imposed on the company, was in its own possession and under its own control.

In *Halliday* v. *National Telephone Co.,* L. R. 1899, 1 Q. B. 392, Lord Halsbury, L. C., holds, p. 398, that one authorized "to interfere with a public highway" (in a way unlawful unless so authorized) "is bound, whether they do the work themselves or by a contractor, to take care that the public lawfully using the highway are protected against any act of negligence by a person acting for them in the execution of the works."

plaintiff upon the head, injuring his brain, incapacitating him from pursuing his vocation, and necessitating medical treatment.

After the second falling of the berth, the brace or arm supporting it was found to be broken.

The evidence introduced by the plaintiff tended also to show that the Pennsylvania Company provided cars in which passengers having railroad tickets could ride without purchasing a sleeping-car ticket; that Roy had much experience in travelling, and would have gone into one of those cars had he not purchased a sleeping-car ticket; that at the time he purchased it he did not know what company ran the sleepers, but upon taking the train he ascertained it was a Pullman car; that the Pullman Palace Car Company was engaged in furnishing cars to be run in the trains of railroad companies; that, besides the general conductor of the train, there was a conductor, in uniform, and a porter, whose duty it was to make up the berths and attend to the wants of passengers occupying the sleeping-car.

Upon the trial the plaintiff introduced a time and distance card of the defendant corporation, issued, published, and circulated by that company during the year 1876, prior to the date of his injuries. That card, referring to the "Fort Wayne and Pennsylvania R. R. line," stated that three express trains left Chicago daily, one *"with popular vestibule sleeping-car,"* one "with drawing-room and hotel car," and one *"with drawing-room sleeping-car."* It gave notice that "passage, excursion, and sleeping-car tickets" could be purchased at the defendant company's office in Chicago. Referring to the "Fort Wayne and Pennsylvania line," the same card announced that "no road offers equal facilities in the number of through trains, *equipped with Pullman palace sleeping-cars."* It states, among the advantages of the "Pittsburg, Fort Wayne, and Pennsylvania through line," that the latter was the "only line running three through trains, *with Pullman palace-cars,"* and "the only line *running sleeping-cars* from Chicago and intermediate stations to Philadelphia without change." The same card gave the rates charged for berths and sections in Pullman sleeping-cars from Chicago to points east of that city.

The defendant, to maintain the issues on its part, offered to prove—

1. That the sleeping-car in which the accident occurred, and all the sleeping-cars then and theretofore on the defendant's line, since the 27th of January, 1870, were owned by the Pullman Palace Car Company, a corporation of the State of Illinois, and not by the defendant; that said sleeping-cars were run in the same trains with the defendant's cars; that holders of railroad tickets were entitled to ride in said sleeping-cars, provided they also held sleeping-car tickets.

2. That the Pullman Palace Car Company, and it only, issued tickets for sale, entitling passengers to ride in said sleeping-cars; that such tickets were plainly distinguishable from railroad tickets, and were sold at offices established by said company, and indi-

cated as places for the sale of such tickets; that the plaintiff purchased the sleeping-car ticket of the same person of whom he bought the railroad ticket; that the office where purchased indicated by plain lettering upon its door that it was a place for the sale of Pullman Palace Car Company tickets, as well as railroad tickets.

3. That the Pullman Palace Car Company employed persons to take charge of its cars, and the latter, whilst in use, were in the immediate charge of a conductor and a porter employed by that company; that such conductor and porter were the only persons who had authority to manage and control the interior of said cars, and the berths and seats and the appurtenances thereto.

To this proof the plaintiff objected, and the objection was sustained, to which ruling the company excepted.

The court thereupon charged the jury that the proof tended "to show that the injury was received by reason of the negligence of the defendant's agents or servants, or by some negligence in the construction of the car in which the plaintiff was riding." To that charge the company at the time excepted, upon the ground that it was unsupported by the testimony, and because it assumed as a fact that the persons in charge of the sleeping-car were the company's agents or servants.

The court further charged the jury that "the defendant has offered in your presence to prove that the car in which the plaintiff was injured was not the car or the actual property of the defendant, but was the property of another corporation. But I instruct, as a part of the law of this case, that if the car composed a part of the train in which the plaintiff and other passengers were to be transported upon their journey, and the plaintiff was injured while in that car, without any fault of his own, and by reason either of the defective construction of the car or by some negligence on the part of those having charge of the car, then the defendant is liable."

To that charge also the defendant excepted.

We are of opinion that there was no substantial error, either in excluding the evidence offered by the defendant, or in the charge to the jury. The court only applied to a new state of facts, principles very generally recognized as fundamental in the law of passenger carriers. Those thus engaged are under an obligation, arising out of the nature of their employment, and, on grounds of public policy, vigorously enforced, to provide for the safety of passengers whom they have assumed, for hire, to carry from one place to another. In *Philadelphia & Reading Railroad Company* v. *Derby* (14 How. 468), it was said that when carriers undertake to convey persons by the powerful and dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence,—that the personal safety of passengers should not be left to the sport of chance, or the negligence of careless agents. This doctrine was expressly affirmed in *Steamboat New World* v. *King*, 16 id. 469. In *Stokes* v. *Saltonstall* (13 Pet. 181), affirming the decision of Mr. Chief Justice Taney on the circuit, we said, that although the carrier does not warrant the safety of the passengers, at

all events, yet his undertaking and liability, as to them, go to the extent that he or his agents, where he acts by agents, shall possess competent skill, and, as far as human care and foresight can go, he will transport them safely. The principles there announced were approved in *Railroad Company* v. *Pollard* (22 Wall. 341), where, speaking by the present Chief Justice, we said that we saw no necessity for reconsidering *Stokes* v. *Saltonstall.*

These and many other adjudged cases, cited with approval in elementary treatises of acknowledged authority, show that the carrier is required, as to passengers, to observe the utmost caution characteristic of very careful, prudent men. He is responsible for injuries received by passengers in the course of their transportation which might have been avoided or guarded against by the exercise upon his part of extraordinary vigilance, aided by the highest skill. And this caution and vigilance must necessarily be extended to all the agencies or means employed by the carrier in the transportation of the passenger. Among the duties resting upon him is the important one of providing cars or vehicles adequate, that is, sufficiently secure as to strength and other requisites, for the safe conveyance of passengers. That duty the law enforces with great strictness. For the slightest negligence or fault in this regard, from which injury results to the passenger, the carrier is liable in damages. These doctrines to which the courts, with few exceptions, have given a firm and steady support, and which it is neither wise nor just to disturb or question, would, however, lose much, if not all, of their practical value, if carriers are permitted to escape responsibility upon the ground that the cars or vehicles used by them, and from whose insufficiency injury has resulted to the passenger, belong to others.

The undertaking of the railroad company was to carry the defendant in error over its line in consideration of a certain sum, if he elected to ride in what is known as a first-class passenger car; with the privilege, nevertheless, expressly given in its published notices, of riding in a sleeping-car, *constituting a part of the carrier's train,* for an additional sum paid to the company owning such car.

As between the parties now before us, it is not material that the sleeping-car in question was owned by the Pullman Palace Car Company, or that such company provided at its own expense a conductor and porter for such car, to whom was committed the immediate control of its interior arrangements. The duty of the railroad company was to convey the passengers over its line. In performing that duty, it could not, consistently with the law and the obligations arising out of the nature of its business, use cars or vehicles whose inadequacy or insufficiency, for safe conveyance, was discoverable upon the most careful and thorough examination. If it chose to make no such examination, or to cause it to be made; if it elected to reserve or exercise no such control or right of inspection, from time to time, of the sleeping-cars which it used in conveying passengers, as it should exercise over its own cars,—it was chargeable with negligence or failure of duty. The law will conclusively presume that the con-

ductor and porter, assigned by the Pullman Palace Car Company to the control of the interior arrangements of the sleeping-car in which Roy was riding when injured, exercised such control with the assent of the railroad company. For the purposes of the contract under which the railroad company undertook to carry Roy over its line, and, in view of its obligation to use only cars that were adequate for safe conveyance, the sleeping-car company, its conductor and porter, were, in law, the servants and employes of the railroad company. Their negligence, or the negligence of either of them, as to any matters involving the safety or security of passengers while being conveyed, was the negligence of the railroad company. The law will not permit a railroad company, engaged in the business of carrying persons for hire, through any device or arrangement with a sleeping-car company whose cars are used by the railroad company, and constitute a part of its train, to evade the duty of providing proper means for the safe conveyance of those whom it has agreed to convey. 2 Kent. Com. 600, 12th ed.; 2 Parsons, Contracts, 218, 219, 6th ed.; Story, Bailments, sects. 601, 601 *a*, 602; Cooley, Torts, 642; Wharton, Negligence (2d ed.), sect. 627 *et seq.*; Chitty, Carriers, 256 *et seq.*, and cases cited by the authors.

It is also an immaterial circumstance that Roy, when injured, was not sitting in the particular sleeping-car to which he had been originally assigned. His right, for a time, to occupy a seat in the car in which his friend was riding was not, and, under the facts disclosed, could not be questioned.

Whether the Pullman Palace Car Company is not also, and equally, liable to the defendant in error, or whether it may not be liable over to the railroad company for any damages which the latter may be required to pay on account of the injury complained of, are questions which need not be here considered. That corporation was dismissed from the case, and it is not necessary or proper that we should now determine any question between it and others.[1]

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[1] *Accord: R. R.* v. *Walrath*, 38 Ohio St. 461 (1882), passenger in sleeping car injured by fall of berth; *Kinsley* v. *R. R.*, 125 Mass. 54 (1878), passenger's baggage lost by negligence of drawing-room car porter; *Thorpe* v. *N. Y., etc., R. R.*, 76 N. Y. 406 (1879), passenger wrongfully ejected by such porter.

So a railroad company is liable to its passengers for the misconduct of every one allowed by them to take part in the operation of its trains or in the control of the tracks over which they are run, *Wabash, etc., R. R.* v. *Peyton*, 106 Ill. 534 (1883), a railroad company having the right to use the tracks of another company on condition that its trains are to be run under the direction and control of the other company is liable to a passenger injured by the negligence of a servant of such other company while directing the movements of the defendant's train, or [*Murray* v. *R. R.*, 66 Conn. (1895) 512], the movements upon the same or adjacent tracks of the trains of such other company; and a railroad company is liable to its passengers for the carelessness of a switchman employed and paid by another company to tend a switch built by it in order to make connection with the defendant's line. *McElroy* v. *R. R.*, 4 Cush. (Mass.) 400 (1849); but see *Beckham* v. *Meadville, etc., Street Ry. Co.*, 219 Pa. 26 (1907).

As to the liability of railroads or other common carriers for defects in their plant, roadbed or appliances purchased from, or constructed by, competent independent contractors; see *Grote* v. *Chester, etc., Ry. Co.*, 2 Exch. 251 (1848), bridge improperly built by experienced engineer; *P. & R. R. R.* v.

MACON & AUGUSTA R. R. *v.* MAYES.

Supreme Court of Georgia, 1873. *49 Ga.* 355.

Moses Mayes brought case against the Macon and Augusta Railroad Company for $20,000 damages alleged to have been sustained on account of the negligent conduct of the defendant in the running of its car, by which he lost one of his legs. The defendant pleaded not guilty. (The important facts sufficiently appear in the opinion of the Court except the following: The evidence as whether the road had been entirely completed and turned over by the contractors, Hull and Co., to the railroad, was conflicting. The crew of the engine was employed by the contractors, the plaintiff was a hand employed by them in laying the tracks and was ordered to take, temporarily, the place of a fireman, also in the contractors' service, upon an engine employed by them. George H. Hazlehurst was the president of the defendant company, its chief engineer, and also a member of the firm of Hull and Co.)

The jury returned a verdict for the plaintiff for $3500. The defendants moved for a new trial upon the following, among other grounds: Because the Court erred in charging the jury, "that if the defendant owned the road and permitted the Georgia Railroad Company or Hull and Company to run cars thereon, then defendants are liable for all injuries resulting from the negligence or misconduct of the employees of said company so using their road." The motion was overruled and the defendant excepted.

McCAY, Judge.

It is quite clear that the plaintiff, without fault of his own, has been badly hurt by a collision of trains on the defendant's railroad, caused by somebody's fault. It is scarcely less clear that the person most to blame for the collision was Mr. Hazlehurst himself, and that he is the president of the road. We think the verdict in this case is sustainable on several grounds. There is sufficient evidence of negligence in the speed with which the principal train was running to authorize the verdict. Over a new road, with no regular schedule, common sense indicates a speed far less than the proof shows for this train.

We think, too, the evidence that the tender and engine were making the trip under the direction of Mr. Hazlehurst, the president, justifies the jury in treating the company as the actual perpetrator of the negligence, notwithstanding it may be true that the construction company had not turned over either the engine or the road-bed to the company. But admitting all that is claimed—admitting that this engine and tender were under the control of Hull & Company—that Mr. Hazlehurst is to be looked upon in this transaction as one of the firm of Hull & Company, and not as president of the road,

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Anderson, 94 Pa. 351 (1880), defendant held liable for negligence of competent engineer employed by its lessor to construct an embankment upon the line subsequently leased to it; *Sharp* v. *Grey,* 9 Bing. 457 (1833), passenger upon stage coach injured by defect in axletree, though not discoverable after the coach was completed and turned over to defendant.

what, then, is the state of the case? An engine and tender, under the orders of Hull & Company, were running over the defendant's road. Hull & Company were exercising the franchise granted by the Legislature to the Macon and Augusta Railroad—were running a steam car and tender, and carrying passengers over the road of defendant through the country. We are of opinion that if this be so, third persons have a right to hold the railroad company responsible for any negligence of Hull & Company or their agents.

The running of cars drawn by steam through the country is a franchise, and unless granted by the Legislature, cannot legally be exercised. And if the railroad company to which the Legislature has granted this franchise permit others to use it, the company is responsible to the public for negligence of such persons. It is but a fair presumption that the Legislature, in granting such a franchise, looked to the capital of the company as a security that the franchise would not be abused. Upon any other view, the company might lease out its privileges to third persons, non-resident or not having property, so that the country would have no security against injuries done by the careless or even reckless use of the franchise.

In our judgment, if a railroad company sees fit to permit another person or corporation to run steam cars over its road, it is liable to third persons for damages caused by the negligence of such persons or corporations, just as though the company had itself been running the cars.

This is a new question here, and is to be decided rather upon principle than authority. It cannot, as it seems to us, be presumed that it was within the intent of the Legislature to grant to this corporation this extraordinary privilege of flying through the country, across the public roads, puffing and screaming and rattling so as to disturb the public quiet, and force everybody to get out of their way, with the additional privilege of turning the right over to any other person at its pleasure.

We are clear that the capital to be invested and the corporation created, are to be held responsible for the misuse of the franchise, no matter by whom it is done. The corporation cannot thus escape the obligations implied in its acceptance of the charter. The charter is a contract between the company and the public, and as it is the right of the company to demand that the Courts shall protect it against the infringement of its rights by the public, so it is the duty of the Courts to protect the public against the misuse of its franchise by the company.

In the case of *Beman* v. *Rufford*, 1 Simon (N. S.,) 550, and the case of *Winch* v. *B. and L. R. Co.*, 13 L. and E., 506, it was held that it was not within the power of a railroad company to lease out to a third party its corporate franchise of running cars, and in the case of the *York and Maryland L. Railroad* v. *Winans*, 17 Howard 39, the Supreme Court of the United States decided that a corporation cannot so turn over its franchise to another corporation as to escape an action of tort for a misuse of the franchise.[1] In that

[1] The liability of a steam or electric railroad company which leases its

case, Judge Campbell says: "Important franchises were conferred upon the corporation to enable it to provide the facilities for communication and intercourse required for the public convenience. Corporate management and control over these were prescribed, and

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franchise and road to another company for injuries caused by the negligent operations of its lessee, or resulting after the lease from the improper condition of its property, is fully discussed by Lurton, J., in *Arrowsmith* v. *R. R.*, 57 Fed. 165 (Circ. Ct., 6th Circuit, 1893), by Virgin, J., in *Nugent* v. *R. R.*, 80 Me. 62 (1888), and by Brewer, J., in *St. Louis, etc., R. R.* v. *Curl*, 28 Kans. 622 (1882).

If no authority to lease is given by its charter or by any special or general statute, the lease does not relieve the lessor from liability for the negligent operation or maintenance of the road, the lessee being treated as though the lessor's agent, *Arrowsmith* v. *R. R., supra*, p. 171; *Nelson* v. *R. R.*, 26 Vt. 717 (1854); *Van Steuben* v. *R. R.*, 178 Pa. 367 (1896); *Hanlon* v. *R. R.*, 182 Pa. 115 (1897); *Ricketts* v. *R. R.*, 33 W. Va. 433 (1889).

Where authority to lease is expressly given, the charter or statute may expressly preserve the liability of the lessor company (see *Bean* v. *R. R.*, 63 Me. [1874] 295), it may expressly relieve the lessor from further liability, or it may be silent as to the lessor's liability.

In the latter case jurisdictions differ. Some hold that only express legislative consent can release the grantor of a franchise from liability for the manner in which the powers conferred upon it are exercised; that no intention to release the grantee of a franchise from liability can be implied from the bare authority to lease, and that the lessor remains liable for all misconduct of its lessees in the construction, maintenance and operation of its road, *Singelton* v. *R. R.*, 70 Ga. 464 (1883); *Chicago, etc., R. R.* v. *Hart*, 209 Ill. 414 (1904); *Logan* v. *R. R.*, 116 N. C. 940 (1895); *Harmon* v. *R. R.*, 28 S. C. 401 (1888); and see *Braslin* v. *R. R.*, 145 Mass. 64 (1887). The weight of authority is, however, in favor of the view that: "If the injury results from negligence in the handling of trains, or in the omission of any statutory duty connected with the management of the road, matters in regard to which the lessor company could in the nature of things have no control, then the lessee will alone be responsible" (*Nugent* v. *R. R., supra; Arrowsmith* v. *R. R., supra; Pinkerton* v. *Pa. Traction Co.*, 193 Pa. 229 (1899); *Lee* v. *S. Pac. R. R.*, 116 Cal. 97 (1897); and see Elliott on Railroads, 2nd Ed., § 467); "but when the injury results from the omission of some duty which the lessor owes to the public in the first instance—something connected with the building of the road—then we think the company assuming the franchise cannot divest itself of responsibility by leasing its track to another company", Brewer, J., in *St. Louis, etc., R. R.* v. *Curl*, 28 Kans. 622 (1882).

So a railroad is liable for injuries due to the defective condition of its plant when leased, *Nugent* v. *R. R., supra; Ditchett* v. *R. R.*, 67 N. Y. 425 (1876); *Lee* v. *R. R., supra;* especially where the road when leased lacked some protection for the public required by statute, as cattle-guards, in *St. Louis, etc., R. R.* v. *Curl, supra*, or fences along the company's right of way, *Fontaine* v. *R. R.*, 54 Cal. 645 (1880); see as to the liability of a lessor for fire started by the lessee's engines under statutes making railroads liable for fires caused by sparks emitted by engines on their lines, *Bean* v. *R. R., supra; Ingersoll* v. *R. R.*, 8 Allen (Mass.), 438 (1864). It seems, however, that the lessee is alone liable for the failure to keep in repair a road which was in good and safe condition when leased, *Ackerman* v. *R. R.*, 143 Mich. 58 (1906); *Miller* v. *R. R.*, 125 N. Y. 118 (1890); unless by the terms of lessor's charter it is required not only to erect but "to maintain" the safeguard which its lessee has allowed to fall into disrepair, *Whitney* v. *R. R.*, 44 Me. 362 (1857). In *Lee* v. *R. R., supra*, Section 10, Article XII of the California Constitution, which prohibited the passage of "any law permitting the leasing or alienation of any franchise so as to release the franchise or property held thereunder from the liability of the lessor, lessee, or grantee * * * incurred in the operation * * * of such franchise" was held not to give a right of

corporate responsibility for their insufficiency provided as a remuneration for their grant. The corporation cannot absolve itself from the performance of its obligations without the consent of the Legislature." In that case, the action was by the owner of a patent against the company for infringement of the patentee's rights in the use of certain cars. The company owning the road and having the franchise was not running cars, but another company. That case is not nearly so strong as this. Here Hull & Company were using the franchise of running steam cars through the country, across the public roads and by the side of them—an act which is a nuisance unless by Legislative grant, and in the doing of this the damages came to the plaintiff. If the engine and tender were, at the time, under the orders of the president of the road, the case is clear. If under the orders of Hull & Company it was by the consent or permission of the company, and the case stands upon the rule we have discussed. We put the case, in this view, upon the ground that the use of the engine and tender for the purpose set forth in the record, to-wit: to pass over the road with steam cars, from point to point, for the purpose of carrying Mr. Hazlehurst, was a use of the franchise of operating the railroad by steam, and that the corporation is liable, no matter who did it. The case might be different if the contractors

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action against the lessor for the lessee's negligence in operation, but merely to subject the property to sale for damages recovered against the latter, and see *Little Rock, etc., R. R.* v. *Daniels*, 68 Ark. 171 (1900), where a somewhat similar act was similarly construed.

There is a conflict of authority as to whether, admitting that the lessor is liable to strangers or patrons for the negligence of its lessee in the operation of the road, it is equally liable to the latter's servants.

The liability is denied in *Hukill* v. *R. R.*, 72 Fed. 752 (C. C. A. 6th Circ., 1896); *B. & O. R. R.* v. *Paul*, 143 Ind. 23 (1895), and *East Line, etc., R. R.* v. *Culberson*, 72 Tex. 375 (1888), where there was either no allegation of legislative power to lease or a failure to prove it if alleged, and in *Banks* v. *Ga. R. R.*, 112 Ga. 655 (1901); and *Swice* v. *Maysville, etc., R. R.*, 116 Ky. 253 (1903), where the defendant had authority to lease, but where there was no express exemption from liability, the cases cited being from jurisdictions in which in such case the lessor remains liable for the lessee's subsequent negligent operation of the road. These cases are all based upon the opinion of Gaines, A. J., in *East Line R. R.* v. *Culberson*, who says, *inter alia*: "The lessor remains responsible for the discharge of its duties to the public and becomes liable for injuries resulting from the lessees' failure to perform their duties." "The lessor by accepting the charter assumes the obligation to carry passengers (and all freight offered) safely over its lines" and "to operate its line so as not to negligently damage property" and "injure persons who have the right to pass on or near its track." "But the duties owed by a railroad to its servant are not duties owed to him in common with the public, but grow out of the contract of service (voluntarily entered into, out of which) arises the reciprocal obligations from the one to the other." On the other hand, the lessor is held to be as fully liable to the servants of its lessee for the latter's negligent operations as to its passengers and shippers, the owners of property near its tracks, or the public rightfully traveling upon highways adjacent to or crossing its line, *Chicago, etc., R. R.* v. *Hart, supra; Harden* v. *R. R.*, 129 N. C. 354 (1901), and *Davis* v. *Atlanta, etc., R. R.* 63 S. C. 370 (1902).

It is held in *Nugent* v. *R. R.*, *supra*, and *Lee* v. *S. Pac. R. R.*, *supra*, that where a defect in the plant existed when the property was turned over under the lease, the lessor is liable to a servant of the lessee who is injured thereby while lawfully upon the premises by virtue of his employment.

were in the prosecution of their proper work, as moving dirt, etc., under circumstances, when they were not exercising the franchise of the company in operating the railroad by steam cars, so as to do that which, without the franchise, would be a nuisance.[3]

For these reasons we affirm the judgment.

BONNER, J., in *Cunningham* v. *International Railroad Company*, 51 Tex. 503 (1889), pp. 512-513: That Douglas, Brown, Reynolds & Co. may have used, as a means to assist in carrying out their contract to construct the road, a train belonging to the defendant company and operated by servants primarily employed by it, would not, of itself, make the company liable for their acts, unless it had the immediate control and management of the train.

To hold otherwise would virtually forbid parties to construct works of improvement, or perform many other acts, except by their own servants, unless at great peril for liability for actions of others over whom they have no immediate control.

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[3] *Accord: P. W. & B. R. R.* v. *Hahn*, 32 W. N. C. (Supreme Ct. of Pa., 32 (1887), the company contracted with an independent contractor to haul its freight cars by mules over its tracks laid on a public highway, by the negligence of the servants of such contractor the plaintiff was injured; *Tex. & Pac. R. R.* v. *Juneman*, 71 Fed. (C. C. A. 6th Circ. 1895) 939, negligence of person contracting to remove dead live stock, whereby a wounded steer was turned loose in a public place; *Boucher* v. *R. R.*, 196 Mass. 355 (1907), defendant held liable for the negligence of keeper of safety gates employed and paid by another which had leased the right to use one of its tracks. A railroad company having by contract the right to run its trains over the tracks of another company is answerable for the failure of a gate keeper employed by the latter to protect the public from injury by the defendant's trains, *Railway Co.* v. *Schneider*, 45 Ohio St. 678 (1888); *Schulte* v. *L. & N. R. R.*, C. A. Ky., March 25, '08, 108 S. W. 901.

In *Oil City & Allegheny River Ry. Co.* v. *Keighson*, 74 Pa. 316 (1873), one to whom oil cars are entrusted to be used and moved on the company's lines has held, "as to third persons," the agent of the railway company, and it is liable for his acts; so in *Rolfe* v. *R. R.*, 69 N. H. 476 (1898), it was held that a railroad permitting a shipper to maintain a fire in one of its cars was liable for a conflagration due to his carelessness, Peaslee, J., saying, p. 477, that the heating of its cars "is part of the actual operation of the road and cannot be separated from it, as far as the rights of third persons are concerned, by any contract between the railroad and the shipper;" see also *Salisbury* v. *Erie R. R.*, 66 N. J. L. 233 (1901), where a railroad was held liable to a wayfarer injured at a level crossing by the negligence of an Italian, not at the time in the defendant's service, in running a handcar, lent to him for his private purposes by the foreman of one of the company's section gangs.

Any individual or corporation empowered to operate a railway for its business purposes upon or across a public highway is as fully liable for injuries caused by the negligence of a contractor employed to operate its line as is a company incorporated for the purpose of the transportation of passengers and freight. *McWilliams* v. *Detroit Central Mills Co.*, 31 Mich. 274 (1875).

See, however, *Hanna* v. *Railway Co.*, 88 Tenn. 310 (1889), where it was held that the rule in the principal case was correct as applied to strangers or passengers, it did not apply in favor of the parties permitted to operate the road or their servants.

The principle that a railroad cannot delegate to an employé its chartered rights and privileges so as to exempt it from liability, does not extend to the use of the ordinary ways and means for the construction of the road, but to the use of such extraordinary powers only as the company itself could not exercise without having first complied with the conditions of the legislative grant of authority.[1]

TARRY *v.* ASHTON.

In the Queen's Bench Division, 1876. *L. R.* 1, *Q. B. D.* 314.

At the trial before Quain, J., at the sittings in London after Easter Term, 1875, it appeared that the plaintiff was walking along the Strand in front of the defendant's house on the afternoon of the 16th of November, 1874, when a large lamp, which was suspended from the front of the house and projected several feet across the

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[1] *Accord: Rome, etc., R. R.* v. *Chasteen*, 88 Ala. 591 (1889), similar facts; *Sanford* v. *Pawtucket Ry. Co.*, 19 R. I. 537 (1896); *Atlanta, etc., R. R.* v. *Kimberly*, 87 Ga. 161 (1891); and *Rogers* v. *Florence R. R.*, 31 S. Car. 378 (1889), injury caused by method adopted by contractor for performing the work of construction or the negligence of his workmen.

If the railroad company give permission to contractors constructing the line, whether gratuitously or as a part of the consideration given for the construction, to run trains over the line, while under construction, for the purposes of general traffic or allows such use, it is liable for the negligent operations of the trains to a passenger, *Lakin* v. *R. R.*, 13 Oregon, 436 (1886), or to a stranger, *Chattanooga R. R.* v. *Whitehead*, 89 Ga. 190 (1892), but the railroad company is not liable if trains are so run without its permission. *R. R.* v. *Chasteen, supra; Kansas Central Ry.* v. *Fitzsimmons*, 18 Kan. 34 (1877), as to whether on the facts the use was permitted compare the dissenting opinion of Brewer, J., with the opinion of the Court.

The company is liable, however, if the contractor fails to perform any duty imposed by the company's charter, or by statute, as a condition upon which the company is empowered to construct or operate their road. *Chicago, etc., R. R.* v. *McCarthy*, 20 Ill. 385 (1855), failure to replace fences; *Houston, etc., R. R.* v. *Meador*, 50 Tex. 77 (1878).

The company is directly liable for property used or appropriated by its contractor by virtue of a power conferred upon it to use the land and appropriate the materials of adjacent property owners. *Vermont Central R. R.* v. *Baxter*, 22 Vt. 365 (1850); *Lesher* v. *Wabash Nav. Co.*, 14 Ill. 85 (1852).

In Illinois it is consistently held that a company is liable for the wrongs and negligent conduct of independent contractors engaged in the construction of its line "while in the performance of acts whch they would have no right to do save under the charter of the company," Lawrence, C. J. *West* v. *R. R.*, 63 Ill. 545 (1872), p. 546. Such "acts" include the running of even construction trains (*Chicago, etc., R. R.* v. *Whipple*, 22 Ill. 105 [1859], cattle injured; *Toledo, etc., R. R.* v. *Conroy*, 39 Ill. App. 351 [1890], workman of contractor injured); blasting in a public street necessary for the laying of gas mains, (*Chicago, etc., Gas Co.* v. *Myers*, 168 Ill. [1897], 139), and the erection on the highway of an elevated railroad (*Metropolitan, etc., Ry.* v. *Dick*, 87 Ill. App. 40 [1900], heavy piece of steel dropped on traveller). But the company is not liable for the negligence of an independent contractor while doing work which any individual might lawfully cause to be done without special power conferred upon him, *West* v. *R. R., supra*, workman poisoned by preparation used to preserve boards used in building the defendant's freight house.

pavement, and weighed 40 lbs. or 50 lbs., fell upon her and injured her severely. At the time of the accident a man named Weaver, in the employ of the defendant, was engaged blowing the water out of the gas pipes; he had raised a ladder against the lamp-iron or bracket from which the lamp hung, and the afternoon being wet and windy, on Weaver mounting the ladder it slipped, and he, to save himself from falling, caught hold of the lamp-iron; this shook the lamp, and its fastenings broke, and it fell on the plaintiff. In the August previous the defendant, having lately come into occupation as tenant of the house, and knowing the lamps, &c., to be of some age, employed Chappell, an experienced gasfitter, to examine them and put them in thorough repair. But on examination of the lamp after the accident, it appeared that the breakage was caused by general decay under the cup and ball, which connected the lamp with the lamp-iron or bracket.

The jury found, that there was no negligence on the part of the defendant personally, nor on the part of Weaver; but there was negligence in Chappell, "the defendant's servant." That the lamp was out of repair through general decay, but not to the knowledge of the defendant. That the immediate cause of the fall of the lamp was the slipping of the ladder; but that if the lamp had been in good repair the slipping of the ladder would not have caused the lamp to fall. And they assessed the damages at 40*l.*

On these findings, a verdict was entered for the plaintiff for 40*l.*, with leave to move to enter a verdict for the defendant, or a nonsuit, if on the findings of the jury the judge ought to have nonsuited, or directed a verdict for the defendant.

A rule having been obtained accordingly.

BLACKBURN, J. I desire to decide nothing beyond what the circumstances of the case require; and on the facts of the case, I am of opinion that the plaintiff is entitled to keep the verdict. It appears that the defendant came into occupation of a house with a lamp projecting from it over the public thoroughfare, which would do no harm so long as it was in good repair, but would become dangerous if allowed to get out of repair. It is therefore not a nuisance of itself. But if the defendant knowingly maintained it in a dangerous state he would then be indictable for the nuisance. This much is clearly decided by *Reg.* v. *Watson* (2 Ld. Raym. 856; 1 Salk. 356), for the defendant was there held liable for not repairing his house which was on a highway and was ruinous and like to fall down, on the ground that as occupier he was bound to keep the house so as not to be a nuisance. As I have said, I do not wish to decide more than is necessary; and if there were a latent defect in the premises, or something done to them without the knowledge of the owner or occupier by a wrongdoer, such as digging out the coals underneath and so leaving a house near the highway in a dangerous condition, I doubt—at all events, I do not say—whether or not the occupier would be liable. But if he did know of the defect, and neglect to put the premises in order, he would be liable. He would be responsible to this extent, that as soon as he knew of the

danger he would be bound to put the premises in repair or pull them down. So also the occupier would be bound to know that things like this lamp will ultimately get out of order, and, as occupier, there would be a duty cast upon him from time to time to investigate the state of the lamp. If he did investigate, and there were a latent defect which he could not discover, I doubt whether he would be liable; but if he discovers the defect and does not cure it, or if he did not discover what he ought on investigation to have discovered, then I think he would clearly be answerable for the consequences.

Now in the present case there is ample evidence that in August the defendant was aware that the lamp might be getting out of repair, and, it being his duty to put it in repair, he employs Chappell to do so. We must assume, I think, that Chappell was a proper person to employ; and I may observe that he was clearly not the defendant's servant, as the jury say, but an independent contractor. But it was the defendant's duty to make the lamp reasonably safe, the contractor failed to do that; and the defendant, having the duty, has trusted the fulfilment of that duty to another who has not done it. Therefore the defendant has not done his duty, and he is liable to the plaintiff for the consequences. It was his duty to have the lamp set right; it was not set right.

The rule must be discharged.

LUSH, J. The question is, what is the duty of a person having a lamp projecting from his premises over the highway for his own purposes? Is it his duty to maintain it in a safe state of repair, or only to employ a proper person to put it in repair? Surely the mere statement is enough to shew that the duty must be in the first proposition. A person who puts up or continues a lamp in that position, puts the public safety in peril, and it is his duty to keep it in such a state as not to be dangerous; and he cannot get rid of the liability for not having so kept it by saying he employed a proper person to put it in repair.

QUAIN, J. I am of the same opinion. What is the duty of the defendant under the circumstances to the public? He is a man who puts up or maintains a lamp always projecting from his premises over the public footpath, and it is his duty to keep it in such a state as not to prejudice the public. In *Reg.* v. *Watson* "it was adjudged that the defendant, as tenant at will only, ought to repair the house, so that the public be not prejudiced by the want of repairs." So here the duty of the defendant was to keep the lamp in repair, so as not to let the public be prejudiced. It is quite clear on the facts that the plaintiff, one of the public, has been prejudiced, and the defendant, in answer to this charge of a breach of duty to the public, cannot be allowed to ride off by saying, I employed a competent person to do the repairs, and it is his fault that they were not properly done. No case in favour of such a proposition has been cited for the defendant; and it seems to me there is good reason why it cannot be found. I am clearly of opinion that the defendant was bound to maintain the lamp in a proper state of repair, so that the

public should not be prejudiced by his neglect; and he is liable to the plaintiff for the injury she has sustained owing to his breach of duty.[1]

Rule discharged.

THOMPSON *v.* LOWELL ETC., RY. Co.

Supreme Judicial Court of Massachusetts, 1898. 170 Mass. 577.

ALLEN, J.,[1] The St. of 1895, c. 316, authorizes street railway companies to acquire, hold, equip, and maintain real estate to be used for purposes of recreation and for pleasure resorts, the admission being free. By virtue of this statute, the defendant maintained

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[1] *Accord: McHarge* v. *Newcomer,* 117 Tenn. 595 (1906), awning, over public highway, negligently erected by independent contractor.

An owner is under an equal obligation to his neighbors, if he builds or maintains a wall, high chimney or other structure so near another's premises that if it falls, it must, or may probably, fall thereon, and is "bound at peril to use all known devices to make the structure safe", and this duty is one which he cannot fulfill by the employment of a competent mason to examine the chimney, and by relying upon his opinion, *Cork* v. *Blossom,* 162 Mass. 330 (1894), per Morton, J., p. 333, or by employing a competent builder to build the wall, *Gorham* v. *Gross,* 125 Mass. 232 (1878). See also *Sturges* v. *Theological Education Society,* 130 Mass. 414 (1881), where it was held that the defendant who had employed a contractor to construct a drain from their premises, which involved the piercing of a barrier set under the surface of the street to prevent the tide from flowing into the cellars of all the adjacent premises, must answer for the contractor's failure to make the barrier water-tight after laying the drain; see *Earl* v. *Reid,* 21 Ontario L. R. 545 (1910), where the defendant had leased his building for a term of twenty-five years; a clause in the lease requires the tenant to make certain alterations before going into possession, one of which was the removal of a part of a partition wall, which was to be replaced by pillars. The tenant engaged a contractor, selected and paid by him, to do the work; the contractor so executed it that the pillars, which the jury found had been placed in a defective wall, fell and the building collapsed, the outer wall falling upon an adjacent premises and injuring the plaintiff, who was an employee of the owner thereof, at work therein. It was held that the owner was liable.

A similar obligation is held to lie upon those who supply temporary structures such as scaffolds, dangerous, unless carefully constructed (see *Francis* v. *Cockrell,* and *Searle* v. *Laverock, post* p. 616, n. 3), to be used by the workmen of a contractor, employed by him to do work for him upon his premises. *Mulchey* v. *Congregation,* 125 Mass. 487 (1878); see also *Jacobs* v. *Fuller & Hutsenpiller Co.,* 67 Ohio, 70 (1902), where it was held that one, who employs a contractor to manufacture furniture for him, furnishing the tools, materials and machinery therefor, and who for that purpose furnished to an inexperienced servant of the latter a machine dangerous for use, unless the user was properly instructed, was bound at his peril to see to it that such instructions were given; see the interesting case of *Valliquette* v. *Fraser,* 9 Ont. L. R. 57 (1905), 39 Can. S. C. 1, 1907.

[1] All the important facts are stated in the opinion of the Court, except the fact that "no admission fee was charged, the defendant getting its profit from carrying the people who attended these exhibitions," and that the "manager" was paid by the company. The same liability attaches where the concessionaire on an amusement privilege charges admission. *Hollis* v. *Assn., Texas State Fair* v. *Brittain, infra,* note 2; and, of course, where the admission so charged is divided between the proprietor and the concessionaire. *Texas Fair* v. *Marti,* 30 Tex. Civ. App. 132 (1902). In *Richmond, etc., Ry.* v. *Moore's Adm., infra,* note 3, it is held to be immaterial whether the plaintiff has come to the park upon the defendant's car or in some other way.

such a place on the line of its railway, which contained a large platform or stage for exhibitions. The defendant entered into a written contract with a manager, under which the latter furnished and managed various entertainments there, and amongst them an exhibition of marksmanship by a man born without hands. The defendant paid for advertising these exhibitions, and carried posters on its cars. The plaintiff, having seen an advertisement, was a spectator at the exhibition of marksmanship, having come on one of the defendant's cars. A butt was provided to receive the bullets. All the appliances were furnished by the manager or the performer, and nobody in the defendant's employment exercised any supervision or control over the performance. Immediately after a shot had been fired, something struck the plaintiff in the eye. It is not made plain just how the accident occurred, but on the evidence the jury might find that the plaintiff was struck in the eye by a small fragment of a bullet or other metallic substance which flew from the impact when the bullet hit the butt. There was no suggestion that he was not himself in the exercise of due care, or that he was not in a place provided for spectators.

The defendant asked for an instruction to the jury that it "was not responsible unless the exhibition was in its nature such that it would necessarily bring wrongful consequences to pass, unless guarded against, and the defendant failed to exercise due care to prevent harm." The judge, instead thereof, instructed the jury that "the *defendant is not responsible unless* the exhibition was in its nature such that it would *necessarily, or probably* cause injury to some person present under the defendant's invitation, unless guarded against, and the defendant failed to exercise due care to prevent harm." The fact that the exhibition was provided and conducted by an independant contractor would not wholly relieve the defendant from responsibility, provided it was of such a kind that it would probably cause injury to a spectator, unless due precautions were taken to guard against harm. *Curtis* v. *Kiley*, 153 Mass. 123.[2] *Richmond & Manchester Railway* v. *Moore*, 94 Va. 493. *Southern Ohio Railroad* v. *Morey*, 47 Ohio St. 207. *Hawver* v. *Whalen*, 49 Ohio St. 69. *Bower* v. *Peate*, 1 Q. B. D. 321. The instruction as given was right.[3]

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[2] See note to *Bowen* v. *Peate*, *post*, p. 621.

[3] *Accord: Conradt* v. *Clauve*, 93 Ind. 476 (1883), a horse, tethered in defendant's fair grounds, struck by stray bullet from adjacent shooting gallery; *Thornton* v. *Maine State Agricultural Society*, 97 Me. 108 (1902), visitor to fair, killed in the same way, while on the railway platform at the gate of the fair; *Richmond etc. R. R.* v. *Moore's, Adm.* 94 Va. 493 (1897), the spectators at a balloon ascension were allowed to crowd around the place where the balloon was fastened to two poles loosely set in the ground, which being necessarily thrown down when the balloon ascended, struck one of them; *aliter*, if the dangerous condition is one which is created by the peculiar manner in which the contractor for his own convenience conducts the exhibition and which the defendant neither knows of nor has reason to expect, since it is not a probable incident of the exhibition, *Smith* v. *Benick*, 87 Md. 610 (1898): see *Sanford* v. *Pawtucket Ry.*, *post*, p. 630; *Sebeck* v. *Plattdeutsche Volksfest Verein*, 64 N. J. L. 624 (1900), *semble:*

But even under this rule the defendant contends that there was no evidence upon which the jury were justified in finding that the plaintiff was injured by any negligent act or omission on its part; or, in other words, that there was no evidence of any failure on its part to perform its duty in the premises. The question is suggested how far the defendant was bound to go in supervising the instruments and appliances used, and the other details of the exhibition. Should it be held to inspect the rifle and the cartridges, to see if they were safe? Without undertaking to go into unnecessary detail, *it is apparent that there was evidence tending to show that the accident happened from a cause which might have been prevented, and that it ought to have been foreseen and guarded against by somebody, either by the defendant or by the manager;* and the jury might come to the conclusion that in the general arrangements for an exhibition of this nature the butt should be so placed that fragments which might fly from the impact of the bullets could not reach the spectators, *and that due care was not taken in the arrangement of the stage with reference to possible accidents of this kind, and that the defendant itself failed in its duty in this respect.* We cannot say that this was so much a matter of transitory detail that the manager alone was responsible for an omission to pay proper attention to securing the safety of spectators from such a risk.[4] The case, therefore, was rightly submitted to the jury.

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defendants held to be liable if they had permitted their guest to come dangerously close to an exhibition of fireworks given for them by a contractor; *Hollis* v. *Kansas City Business Men's Association,* 205 Mo. 508 (1907), patron of "merry-go-round" in defendants exhibition injured by reason of defective axle of the "gondola" in which she was riding; *Texas State Fair* v. *Brittain,* 118 Fed. 713 (C. C. A. 5th Cir. 1902), and *Texas State Fair* v. *Marti,* 30 Tex. Civ. App. 132 (1902), visitors at a fair injured by collapse of a temporary stand negligently constructed by a concessionaire of an amusement privilege. See, however, *contra, Knottnerus* v. *Ry. Co.,* 93 Mich. 348 (1892); *semble.*

Nor can one who offers the use of his premises to the public for hire, relieve himself from liability for the safe condition of temporary structures, erected thereon for their accomodation, by contracting with a competent builder for their construction; *Francis* v. *Cockrell,* L. R. 5 Q. B. 184, 501 (1870), stewards of race meeting held liable for collapse of grand-stand built for them by a reputable firm of builders; *Dunn* v. *Brown County Ag. Soc.,* 46 Ohio St., 93 (1883), *accord semble.* So one, who leases his premises, upon which such structures have been erected by a contractor for the purpose of enabling the lessee to invite the public to resort thereto upon payment of an admission fee, is liable for the fall of such structure due to negligent construction; *Fox* v. *Buffalo Park,* 21 N. Y. App. Div. 321 (1897). This does not apply, however, to permanent and substantial buildings bought or leased by the defendant or built for him by a contractor, which he offers to the public for hire as a place of resort or of deposit for their goods; *Searle* v. *Laverick,* L. R. 9 Q. B. 122 (1874), livery stable keeper held not liable for injury to a carriage left with him, due to the fall of a shed which had been built for him by a competent builder; *Walden* v. *Finch,* 70 Pa. 460 (1872), owner of storage warehouse not liable to owners of the goods deposited therein for its collapse, due to the negligence of the builders who had contracted to erect it.

[4] As in *Sebeck* v. *Plattdeutsche Volkfest Verein,* 64 N. J. L. 624 (1900), an association giving a festival or picnic, held not liable to a guest injured by the negligent manner in which fireworks are set off by a contractor

Nor can it be held that the plaintiff assumed the risk. He might well rely on those who provided the exhibition and invited him to attend, to take due care to make it safe from such an injury as he received.

Exceptions overruled.

BOWER *v.* PEATE.

In the Court of Queen's Bench Division, 1876. L. R. 1 Q. B. D. 321.

COCKBURN, C. J. The facts of this case, which involves a point of considerable importance were as follows:—

The plaintiff and defendant were the owners and occupiers of two adjoining houses, and it appeared that, prior to the rebuilding of the defendant's house, as hereinafter mentioned, the walls and foundations of the plaintiff's house went to a lower level than those of the defendant's. The defendant, having determined to pull down his old house and build another on the same site, proposed to carry the foundations and walls of his new house to a lower depth than those of the plaintiff; for which purpose it would be necessary to excavate and remove the soil which before the alteration was adjacent to the plaintiff's house and land, and by which it had been supported. In order to do this without injury to the plaintiff's house the well-known practice of underpinning, or some other safe mode of supporting or shoring the plaintiff's soil and walls during the operations, would, as was well known, have to be resorted to.

For the purpose of this rebuilding the house and executing the other necessary works, the defendant entered into a contract with a builder named Rae, by which Rae contracted to do all the necessary works. The contract contained the following clause:—"And the said Thomas Rae further agrees to take upon himself the risk and responsibility of shoring and supporting, as far as may be necessary, the adjoining buildings affected by this alteration during the progress of the works, and to make good any damage which may be sustained by the said buildings during the progress or in consequence of the said works hereby contracted for, and to satisfy any claims for compensation arising therefrom which may be substantiated."

After the execution of this contract Rae, the contractor, pulled down the defendant's house, and excavated the soil to a lower depth than the foundation of the walls of the plaintiff's house, and rebuilt the defendant's house. But owing to defective underpinning, or want of other support to the plaintiff's soil and walls, in the course of these operations, injuries occurred to the plaintiff's house which gave rise to the present action

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employed to give an exhibition of them; *Deyo* v. *Kingston*, 88 N. Y. Suppl. 487 (1904), similar facts; see also *Knottnerus* v. *Ry. Co.*, 93 Mich. 348 (1892), where a car upon a "switch-back" was thrown off the track by a chip, recently dropped on the rails by some carpenters who were doing work nearby, the negligence alleged being the failure to remove the chip before running the car, and compare *Corrigan* v. *Elsinger*, 81 Minn. 42 (1900), note to *Covington, etc., Bridge Co.* v. *Steinbrock et al., post* p. 627.

No question was made on the argument as to the right of the plaintiff to the support of the adjacent soil of the defendant for his house; nor was it doubted that the injuries to the house of which the plaintiff complained had been occasioned by the removal of such soil in the execution of the defendant's works. But it was contended that the defendant, having committed the execution of the work to a contractor, both as regarded the taking down and rebuilding his house, and the measures necessary for the protection of the adjoining house, the contractor, and not the defendant, became liable for any injury arising from want of due care in shoring or otherwise supporting the plaintiff's house. The argument, as put on behalf of the defendant, may be shortly stated thus: According to the doctrine in *Bonomi* v. *Backhouse* (9 H. L. C. 503; 34 L. J. [Q. B.] 181); the taking away the soil, to the support of which an adjoining owner is entitled, is not *in se* wrongful. It only becomes so when followed by injurious consequences to the neighbor. And if, therefore, such injurious consequences can be averted by efficient means, as by the substitution of artificial for the natural support previously afforded by the soil, the removal of the soil is in no respect wrongful. Here, the defendant, in one and the same contract, employed the contractor to execute the work he desired to have done, and to take the necessary measures for protecting the plaintiff's premises. He authorized him to do the former only on condition of his preventing it from causing injury to the plaintiff, and only so far as it could be done consistently with the safety of the premises of the latter. If, therefore, the work which the contractor was employed to do had been carried out in conformity with the instructions of the defendant, the work would have been perfectly lawful, and would have been attended with no injurious consequences. *The injuries complained of have arisen from the negligence of the contractor alone.* The defendant is, therefore, entitled to the benefit of the general rule, that when a person employs a contractor to do a work, lawful in itself, and involving no injurious consequences to others, and damage arises to another party from the negligence of the contractor or his servants, the contractor and not the employer is liable.

It appears to us that upon a correct view of the facts, this reasoning cannot prevail. In the first place, because the assumption on which it is founded altogether fails. The contractor was not employed to give support to the plaintiff's house as part of the work he was to do for the defendant. It was not included in the specification, and formed no part of the work he contracted to do, except so far as was necessary to satisfy his obligation to provide the necessary support of the plaintiff's house. In addition to which the defendant stipulates that the contractor shall "take upon himself the risk and responsibility of shoring and supporting the adjoining buildings affected by the alterations." and shall "make good any damage which may be sustained by the said buildings in consequence of the works," and shall "satisfy any claims for compensation arising therefrom." The effect of this is, not that the defendant orders, or stipulates for, any specific work necessary for the support of the adjoining buildings, but that he leaves the recourse to such work entirely at the discretion

of the contractor, stipulating only that the latter shall bear him harmless in the event of any damage taking place. In other words, he directs an act to be done from which injurious consequences will result unless means are taken to prevent them in the shape of additional work, but omits to direct the latter to be done as part of the work to be executed, contenting himself with securing to himself a pecuniary indemnity in the event of any claim arising from damage to the adjoining property. He is, therefore, not in the position of a man who has simply authorized and contracted for the execution of a work from which, if executed with due care, no injury can arise, and who is therefore not to be held responsible if, while the work is going on, injury arises from the negligence of the contractor or his servants.

The answer to the defendant's contention may, however, as it appears to us, be placed on a broader ground, namely, that a man who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbour must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing some one else—whether it be the contractor employed to do the work from which the danger arises or some independent person—to do what is necessary to prevent the act he has ordered to be done from becoming wrongful. There is an obvious difference between committing work to a contractor to be executed *from which, if properly done, no injurious consequences can arise,* and handing over to him *work to be done from which mischievous consequences will arise unless preventive measures are adopted.* While it may be just to hold the party authorizing the work in the former case exempt from liability for injury, resulting from negligence which he had no reason to anticipate, there is, on the other hand, good ground for holding him liable for injury caused by an act certain to be attended with injurious consequences if such consequences are not in fact prevented, no matter through whose default the omission to take the necessary measures for such prevention may arise.

It is true, that according to the doctrine in *Bonomi* v. *Backhouse* (9 H. L. C. 503; 34 L. J. [Q. B.] 181), the removal of the soil, to the support of which an adjacent building or land may be entitled, is not in itself wrongful, and become so only when damage to the adjoining property results; whence it follows that if by artificial means of support the damage can be prevented, no cause of action arises. But it is equally clear that if effectual means of prevention fail to be applied, and damage once results, the act of removal becomes wrongful, and an action can be at once maintained.

In the present instance preventive measures adequate to the occasion having failed to be provided, the removal of the soil was followed by actual damage to the plaintiff's house, and the act of removal was therefore wrongful as causing a wrong done to the plaintiff. But the act of removal was an act done by the order and authority of the defendant—in other words, was the act of the defendant;

and no man can get rid of liability for injury occasioned to another by a wrongful act by seeking to throw the responsibility on an agent whom he has employed to do the act. The agent may no doubt be responsible, but the responsibility of the principal is none the less.

The cases of *Pickard* v. *Smith* (10 C. B. [N. S.] 470) and *Gray* v. *Pullen* (5 B. & S. 970, 981; 32 L. J. [Q. B.] 169; 34 L. J. [Q. B.] 265) are in point to the present question. *Pickard* v. *Smith* (10 C. B. [N. S.] 470) the defendant, having employed a coal merchant to put coals into his cellar, was held liable for injury suffered by the plaintiff from his falling through the cellar opening which had been left open by the negligence of the coal merchant's servants. The law is well stated by Williams, J., in delivering the judgment of the Court. "Unquestionably no one can be made liable for an act or breach of duty unless it be traceable to himself or his servant or servants in the course of his or their employment. Consequently, if an independent contractor is employed to do a lawful act, and in the course of the work he or his servants commit some casual act of wrong or negligence, the employer is not answerable.[1] To this effect are many authorities, which were referred to in the argument. That rule is, however, inapplicable to cases in which the act which occasions the injury is one which the contractor was employed to do; nor, by a parity of reasoning, to cases in which the contractor is intrusted with the performance of a duty incumbent upon his employer, and neglects its fulfilment, whereby an injury is occasioned. Now, in the present case, the defendant employed the coal merchant to open the trap in order to put in the coals; and he trusted him to guard it whilst open, and to close it when the coals were all put in. The act of opening it was the act of the employer, though done through the agency of the coal merchant; and the defendant, having thereby caused danger, was bound to take reasonable means to prevent mischief. The performance of this duty he omitted; and the fact of his having intrusted it to a person who also neglected it, furnishes no excuse either in good sense or law."[2]

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[1] "If the plaintiff had been injured by any negligent act of the contractor in unloading the coal, the defendant (his employer) could not be held liable for the resulting damages". Macfarlane, J. *Benjamin* v. *Metropolitan Street Ry*, 133 Mo. 274 (1895), p. 284.

[2] *Accord: Benjamin* v. *Ry*, *supra*, contractors, employed to supply the defendant's power house with coal, after putting in the coal left the scuttles open and unguarded; *cf*, *Blessington* v. *Boston*, 153 Mass. 409; *Storrs* v. *Utica*, n. 1, *ante*, p. 598: *contra*, *Frassi* v. *McDonald*, 122 Cal. 400 (1878), opening momentarily made in a temporary sidewalk, the making of the opening being necessary to accomplish the work contracted for. So wherever a defendant employs an independant contractor to do work which necessarily involves the creation of a condition in a highway, or other place over which the public have a right to pass, which will be dangerous to them unless further steps are taken, by removing the condition itself, or by erecting railings, etc., around it or by giving notice of its existence, the defendant is liable for the contractors failure to take such further precautions. *Chicago* v. *Robbins*. 2 Black U. S., 418 (1802), 4 Wall. 467; *Water Co.* v. *Ware*, 16 Wall. U. S. 568 (1872); *Railroad Co.* v. *Morey*, 47 Ohio St. 207 (1890); *McCarrier* v. *Hollister*, 15 S. D. 366 (1902); *Cameron Mill Co.* v. *Anderson*, 34 Tex. Civ. App. 105 (1903), 98 Tex. 156 (1904); *Congreve*

In *Gray* v. *Pullen* (5 B. & S. 970; 981; 32 L. J. [Q. B.] 169; 34 L. J. [Q. B.] 265) the Court of Exchequer Chamber carried this principle still further. An act of Parliament having authorized the cutting a trench across a highway for the purpose of making a drain, but having attached to the exercise of the right the condition of filling up the trench after the drain had been completed, the defendant had employed a contractor to do the whole work. Owing to the negligence of the latter in filling up the trench, the plaintiff's wife had sustained personal injury. It was contended that the contractor alone was liable, and it was so held in this Court, but the Court of Exchequer Chamber held otherwise, and reversed our judgment.[8] It is true that in that case the obligation to make good the

v. *Smith*, 18 N. Y. 79 (1858), where, however, it appeared that the vault was built without any municipal authority; *Spence* v. *Schultz*, 103 Cal. 208 (1894), but see *Frassi* v. *McDonald*, *supra* note 2. *Mullins* v. *Siegel-Cooper Company*, 183 N. Y. 129 (1905), and *Woodman* v. *Metropolitan R. R.*, 149 Mass. 335 (1889), appear to carry the employer's liability even further; in the first case the dangerous condition of the sidewalk was due to the constant passage of heavy wagons of the contractor and in the second the rails, which the contractor was employed to lay, were so piled that part of them extended beyond the barriers which he had erected; see *Penny* v. *Wimbledon Council*, L. R. 1898, 2 Q. B. 212, per Bruce, J., p. 217, where the Council was held liable for the negligence of a contractor, employed by it to repair a street, in leaving thereon at night piles of soil and grass unguarded and unlighted.

In *Curtis* v. *Kiley*, 153 Mass. 123 (1891), it is held that an owner, who, while work is being done upon his premises by an independent contractor, invites others to come upon it, is liable for the contractor's neglect to properly guard or light excavations, or other dangerous conditions, necessarily incident to the work contracted for; as to liability of landlord to his tenant under similar circumstances see *Wilber* v. *Follansfer*, 97 Wis. 577 (1897); *Sulzbacker* v. *Dickie*, 6 Daly N. Y. 469 (1876). In *De Palma* v. *Weinman*, 15 N. Mex. 68 (1909), it was held that a landlord, who allows a third person to rebuild a party wall, knowing that such rebuilding, unless very carefully done, may undermine the tenant's wall, is liable to the tenant if the wall falls.

Contra: Pfau v. *Williamson*, 63 Ill. 16 (1872); *Kipperly* v. *Ramsden*, 83 Ill. 354 (1879); *Smith* v. *Simmons*, 103 Pa. 32 (1883), defendant, licensed to dig a ditch in the street to lay his water pipe, let the work to a contractor, who failed to properly guard and light it; see also *Richmond* v. *Sitterling*, 101 Va. 354 (1903), *semble:* but note that in *Emmerson* v. *Fay*, 94 Va. 60 (1896), cited as authority for the dictum, the defendant was held not to be liable because the excavation was seven feet from the street line. The employer is, however, liable unless he can show that he has shifted his responsibility to protect the public to some one else, as by binding the independent contractor to take adequate precautions or by turning over to him the entire work and the exclusive control of the premises in which it is to be done, *Homan* v. *Stanley*, 66 Pa. 464 (1870), an owner, who had merely let out the work upon different parts of a building to different contractors, held to have retained control and power to protect the public and answerable for a failure to do so, and see *Allen* v. *Willard*, 57 Pa. 374 (1868).

[8] *Accord: Hole* v. *Sittingbourne, etc., R. R.*, 6 H. & N. 488 (1861), drawbridge so carelessly built that the draw will not open to afford unimpeded use of stream as required by statute authorizing its construction; *Wilson and Bro.* v. *White*, 71 Ga. 506 (1883); contractor disobeyed ordinance requiring the owners of all material piled in street to place lights thereon; *Jolliffe* v. *Woodhouse*, 10 Times, L. R. 553 (1894), defendant having statutory right to tear down party wall, liable for contractor's delay in replacing it. When the statute imposed the duty upon "the contractor" doing the work or on the "owner or contractor" the owner is generally held not liable, *Koch* v. *Fox*, 71 N. Y. App. Div. 288 (1902), and in *Chartiers Valley Gas Co.* v. *Lynch*, 118 Pa. 362 (1888), the company was held not to be liable for the negligence of a

road was one imposed by statute; but it can make no difference in point of principle whether the obligation was imposed by statute or existed at law; and the case is therefore an authority for saying that where a work is being executed from which danger may arise to others, and it thereby becomes incumbent on the party doing or ordering it to be done to take measures to prevent damage resulting to others, he cannot divest himself of liability by transferring the duty to a contractor.[4]

In the recent case of *Tarry* v. *Ashton*, not yet reported (Since reported, *ante*, p. 314), where the defendant had become occupier of premises, from which a large lamp was suspended over the highway, and the lamp before he became occupier had become worn out,—and the defendant having notice of this was therefore under an obligation, if he continued to maintain the lamp, to take care that it was not a nuisance to the highway,—and the lamp had fallen down and injured a person passing, this Court, on a like principle, held the defendant liable, though he had employed a contractor to attend to the condition of his lamps.

Both in authority and principle, therefore, we are of opinion that our judgment should be for the plaintiff; and, that, consequently this rule to enter the verdict for the defendant should be discharged.

Rule discharged.

COVINGTON BRIDGE CO. *v.* STEINBROCK & PATRICK.

Supreme Court of Ohio, 1899. 61 *Ohio St.* 215.

MINSHALL, J. This case was argued and submitted with the case of the *Bridge Co.* v. *Proctor D. Patrick*, the injury in each case, and for which the action was brought, having been caused by the falling of the wall, attributed to the negligence of the defendant; Patrick, therefrom, having received an injury to his person, and he and his partner, Steinbrock, an injury to their property. In the case of Patrick and his partner, the case was taken from the jury at the close of the plaintiff's evidence, on the ground that there was no evi-

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contractor under a statute which, in giving gas companies the right to lay pipe lines, made them liable for "all damages occasioned by reason of the negligence of said company."

[4] *Accord:* Upon very similar facts, *Angus* v. *Dalton*, L. R. 6 A. C. 740 (1881); *Bonaparte* v. *Wiseman*, 89 Md. 12 (1899), in which it was said that the defendant, by giving timely notice to his neighbor, and so enabling him to protect his own property, might relieve himself from further liability; *Davis* v. *Summerfield*, 133 N. C. 325 (1903), but see *Robinson* v. *Webb*, 11 Bush, Ky. 464 (1875). So where a contractor in building upon defendant's land damages his neighbor's party wall by reason of a failure to prop or shore it up. *Fowler* v. *Saks*, 18 Dist. of Columbia, 570 (1888); *Hughes* v. *Percival*, L. R. 8 A. C. 443 (1883), though under the facts the case appears to be decided upon the principle announced in *Covington, etc.*, v. *Steinbrock, et al.*, *post* p. 622.

So where the defendant under statutory powers constructs a sewer in a highway, it is liable for the failure of its contractor to properly support the gas mains therein, whereby a leak occurs causing an explosion in the plaintiff's adjacent house; *Hardacker* v. *Idle District Council*, L. R. 1896, 1 Q. B. D. 325; *contra: Chartiers Valley Gas Co.* v. *Waters*, 123 Pa. 220 (1888).

dence to support the case. The judgment was reversed, on error, by the general term and cause remanded (4 N. P., 229); and error is prosecuted here to reverse the General Term. In the case of Patrick alone for an injury to his person, a verdict was rendered for the plaintiff, under the charge of the court, to which exceptions were reserved; and the judgment was affirmed by the General Term (5 N. P., 374). A bill of exceptions, taken and made a part of the record, in each case, contains all the evidence, and, also, in the last case, the charge of the court and certain instructions that were refused. Both cases, however, turn upon the question, whether the defendant below was relieved from liability on the ground of having employed an independent contractor to do the work, the negligent doing of which caused the injury complained of in each case.

In August, 1895, a large brick warehouse, some five stories high, was in a measure destroyed by fire, the walls of which, at least the east one, were left standing in such a ruined condition as to be dangerous to the public, and were required by the Inspector of Buildings to be taken down. The east wall extended south along an alley from its intersection with Second street some ninety or a hundred feet; and opposite to this wall, on the east side of the alley, was the property of the plaintiffs. After the notice by the Inspector of Buildings, the Bridge Company made a contract with one Hasler to take down the walls of the building for a consideration agreed on by the parties, the company retaining no express control of the work; but stipulating that Hasler, the contractor, should save it harmless in case of accident to person or property during the work. While engaged in taking down the east wall, a part of it fell and caused the injury sued for in each case. It was, from the time of the fire, a mere ruin, "bulged out," as the witness termed it, toward the east, and manifestly dangerous to the public, of which the plaintiffs below, were part. It could, however, as shown by the testimony, by the exercise of great care, have been taken down without probable injury to others; and the falling of the wall, or a part of it, was caused by the negligence and want of skill on the part of the contractor in the mode adopted for taking it down. This is not controverted by the plaintiff in error. An attempt was made, after having weakened the wall on a line below the "bulge" to pull it in upon the premises by a rope, attached to it; but by reason of the "bulge," that part fell outward over the alley and on the property of the plaintiffs, their property being lower than the wall. This, as the evidence shows, might have been readily anticipated by a person of skill and experience in such business. Patrick was at the time in the part of his property on which the wall fell, and was injured, as was also the property of himself and partner. No fault is imputed to him, nor his partner.

The doctrine of independent contractor, whereby one who lets work to be done by another, reserving no control over the performance of the work, is not liable to third persons for injuries resulting from negligence of the contractor or his servants, is subject to several important exceptions. One of these, applicable as we think to this case, is where the employer is, from the nature and character of

the work, under a duty to others to see that it is carefully performed. It cannot be better stated than in the language used by Cockburn, C. J., in *Bower* v. *Peate* (1 L. R. Q. B. Div., 321, 326), a leading and well considered case. It is, "That a man who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbor must be expected to arise, unless means are adopted by which such consequences may be averted, is bound to see to the doing of that which is necessary to prevent mischief, and cannot relieve himself of his responsibility by employing some one else—whether it be the contractor employed to do the work from which the danger arises or some independent person—to do what is necessary to prevent the act he has ordered done from becoming unlawful." This does not abrogate the law as to independent contractor. It still leaves abundant room for its proper application. "There is," as stated by Cockburn, "an obvious difference between committing work to a contractor to be executed, from which, if properly done, no injurious consequences can arise, and handing over to him work to be done from which mischievous consequences will arise unless precautionary measures are adopted."

The weight of reason and authority is to the effect that, where a party is under a duty to the public, or third person, to see that work he is about to do, or have done, is carefully performed so as to avoid injury to others, he cannot by letting it to a contractor, avoid his liability, in case it is negligently done to the injury of another.

The duty need not be imposed by statute, though such is frequently the case. If it be a duty imposed by law, the principle is the same as if required by statute. Cockburn, C. J., *Bower* v. *Peate, supra,* at 328. It arises at law in all cases where more or less danger to others is necessarily incident to the performance of the work let to contract. It is the danger to others incident to the performance of the work let to contract, that raises the duty, and which the employer cannot shift from himself to another, so as to avoid liability, should injury result to another from negligence in doing the work. In *Halliday* v. *Telephone Company, supra,* the defendant employed a contractor to put in conduit tubes for it under a highway, and the joints of the tubing were to be soldered together with melted lead. By the negligence of the servants of the contractor in doing the work, melted lead, by an explosion, was splashed over the plaintiff on the public sidewalk, and the company was held liable. It is there said that, from the authorities, "it is very difficult for a person who is engaged in the execution of dangerous work near a highway to avoid liability by saying that he has employed an independent contractor, because, it is the duty of a person who is causing such work to be executed to see that they are carefully carried out, so as not to occasion any damage to persons passing by on the highway. I do not agree that this was a case of mere casual and collateral negligence within the meaning of that term, for it was negligence in the very act which Higmore was engaged to perform."

So, in *Railroad Co.* v. *Morey,* 47 Ohio St., 207, the defendant

employed a contractor to do for it certain plumbing which involved the opening of the public highway for the purpose of laying a drain therein. The plaintiff in the night time fell into the ditch by reason of the negligence of the contractor in not properly protecting it. The defendant was held liable on the ground stated in the syllabus, which is as follows: "One who causes work to be done is not liable, ordinarily, for injuries that result from carelessness in its performance by the employes of an independent contractor to whom he has let the work, without reserving to himself any control over the execution of it. But this principle has no application where a resulting injury, instead of being collateral and flowing from the negligent act of the employe alone, is one that might have been anticipated as a direct or probable consequence of the performance of the work contracted for, if reasonable care is omitted in the course of its performance. In such case the person causing the work to be done will be liable, though the negligence is that of an independent contractor."[1] It is claimed that this proposition of the syllabus in *Railroad Co.* v. *Morey* should be modified. We see no reason for doing so. It is supported by reason and authority and many well considered cases. In so far as *Clark* v. *Fry*, 8 Ohio St., 358, may be construed as supporting a different doctrine, it is not law. It has been properly distinguished in *Railroad Co.* v. *Morey*. It should be confined to the cases where from the nature of the work or the circumstances under which it is to be performed, no particular duty is imposed on the party procuring the work to be done, to see that it is carefully done.

It is urged as unreasonable that one who has work to perform, that he himself cannot perform, from want of knowledge or skill, should be held liable for the negligence of one whom he employed

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[1] So in *Joliet* v. *Harwood*, 86 Ill. 110 (1877), Dickey, J., p. 111, after citing *Dillon on Municipal Corporations*, § 792, to the effect that the general rule, where public work is done by an independent contractor the doctrine of *respondeat superior* does not apply, itself "does not apply when the contractor requires the performance of work intrinsically dangerous," says; "In this case the work which the contractor was employed to do was intrinsically dangerous however carefully or skillfully done. The right to recovery does not rest upon a charge of negligence on the part of the contractor; it rests upon the fact that the city caused work to be done which was intrinsically dangerous—the natural (though not the necessary) consequence of which was injury to the plaintiff's property". Compare the language of Schmucker, J., in *P. B. & W. R. R.* v. *Mitchell*, 107 Md. 600 (1908) p. 606: the employer of an independent contractor will be liable "if it (the injury sustained by the plaintiff) be such as might have been anticipated by him as a probable consequence of the work let out to the contractor" (which, he says, is a question of fact for the jury), "and he took no precaution to prevent it"; see also A. L. Smith, L. J., in *Halliday* v. *National Telephone Co.*, L. R. 1899, 1 Q. B. 392, p. 400: "It is very difficult for a person who is engaged in the execution of dangerous works near a highway to avoid liability by saying that he has employed an independent contractor; because it is the duty of a person who is causing such works to be executed to see that they are properly carried out so as not to occasion any damage to persons passing by on the highway. I do not agree that this (the explosion of a benzoline lamp with a defective safety valve) was a case of mere casual or collateral negligence within the meaning of that term, for it was negligence in the very act (laying telephone wires in a highway) which Highmore (the contractor) was engaged to perform."

to do it, since, if he did reserve control, it would avail nothing from his own want of knowledge and skill. There is a seeming force in this, but only so. It is not agreeable to the principles of distributive justice. For it is equally a hardship that one should suffer loss by the negligent performance of work which another procured to be done for his own benefit, and which he in no way promoted and over which he had no control. Hence where work is to be done that may endanger others, there is no real hardship in holding the party, for whom it is done, responsible for neglect in doing it. Though he may not be able to do it himself, or intelligently supervise it, he will nevertheless, be the more careful in selecting an agent to act for him. This is a duty which arises in all cases where an agent is employed; and no harm can come from stimulating its exercise in the employment of an independent contractor, where the rights of others are concerned.

Applying the principles discussed to the case under review, and there seems little room for doubt as to how it should be decided. The duty, as observed, was imposed by law upon the Bridge Company to take down the walls left standing by the fire, because they were a menace to the public and the property of persons in the vicinity. The doing of the work necessarily involved danger to others unless great care was used; and the injury resulted from negligence in doing the work. It was not collateral to the employment, as would have been the case, had a servant of the contractor, while at work, negligently let fall a brick upon a person in passing by (*Pickard* v. *Smith, supra*); on the contrary it resulted from the negligent manner in which the work let to be done was done, and should have been anticipated by the employer as a probable consequence, unless care was observed. It is the duty to observe such care, enjoined on a party by law, that cannot be delegated to another so as to avoid liability for its neglect.[2]

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[2] *Accord: P. B. & W. R. R.* v. *Mitchell,* 107 Md. 600 (1908), where it was held that a railroad which employed an independent contractor to erect an iron bridge over a highway, in the building of which, owing largely to the short time allowed for its completion, rivets and tools were often dropped, was liable to a traveler in the highway injured by a hammer, allowed to fall by one of the workmen. So one employing a contractor to do work, which requires blasting to be done in a public highway or upon his own premises in close proximity to a highway, or to the adjoining property of others, is held in many jurisdictions to be liable for the injuries caused by the negligence of the contractor or his servants therein, *Joliet* v. *Harwood,* 86 Ill. 110 (1877); *Chicago* v. *Murdock,* 212 Ill. 9 (1904); *James* v. *McMinimy,* 93 Ky. 471 (1892); *Vetherbee* v. *Partridge,* 175 Mass. 185 (1900); *Norwalk Gas Co.* v. *Norwalk,* 63 Conn. 495 (1893); *Stone* v. *Cheshire, R. R.* 10 N. H. 427 (1849), but see *Wright* v. *Halbrook,* 52 N. H. 120 (1872). In Indiana, the employer is said to be liable in *Fallender* v. *Blackwall,* 39 Ind. App. 121 (1906), but his liability is denied in a *dictum* in *Schnurr* v. *Huntindon County,* 22 Ind. App. 188 (1908), while in *The City of Logansport* v. *Dick,* 70 Ind. 65 (1880), it was held that a city if it holds its highways open for traffic, while a contractor is blasting thereon, is bound to prevent "dangerous and unnecessary blasting" and "if the blasting was necessary, and though dangerous, the danger could be averted by the use of proper precautions, the city's plain duty was to require its contractor to use such precautions", per Howk, J., p. 80. In *Wetherbee* v. *Partridge, supra,* Holmes, C. J., says: "In

ENGEL *v.* EUREKA CLUB.

Court of Appeals of New York, 1893, 137 N. Y. 100.

ANDREWS, Ch. J. We are of opinion that the motion for a new trial should have been denied.

The defendant had purchased the premises in March, 1892, for it uses as a social club. It made a contract with a competent builder to alter the building thereon in accordance with a plan adopted. The builder was to furnish the new materials necessary and to do the work for a fixed price. The improvement contemplated the taking down of a brick wall, sixteen feet high, on the north line of the premises, adjoining premises owned by one Ihrig, occupied in part by plaintiff as a tenant. The wall formed one side of a driveway on defendant's premises and was roofed over. The roof was formed by rafters extending from the main building to the brick wall and fastened to and resting upon a plate on the top of the wall, secured by bolts, and was covered with boards and shingled. The wall had been erected 30 or 40 years, and was 8 inches thick and rested on a stone foundation. It had been worn away next to the driveway by contact with wagons, and the bricks had been broken along the line of contact to the depth of 3 or 4 inches. The wall on the Ihrig side was also in places decayed and the mortar had fallen out. The defendant had never occupied the premises, and when the contract for repairs was made the keys of the house were given to the contractor. The contractor commenced the work of taking down the wall by removing the roof which covered it, and taking down the rafters, which left the wall wholly unsupported, and the day after the roof was removed the wall fell over towards the Ihrig lot, and the wife of the plaintiff, with her child, who were in the yard near the wall were killed.

The evidence tends to show culpable negligence in the manner of taking down the wall. It was shown that in consequence of its weakened condition, by reason of age and the decay spoken of, com-

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some cases of blasting under an independent contractor we might go no further than to hold that there was a question for the jury, whether the danger was so great as to make the defendant liable. But in the case at bar the danger of blasting within nine feet of the plaintiff's house was so obnoxious that only one conclusion is possible." Conversely, blasting done in the course of clearing the way for the construction of a road through an uninhabited country is clearly not intrinsically dangerous. *Houghton* v. *Loma Preta Co.,* 152 Cal. 500 (1900), one, who stores gunpowder on his premises and allows his tenant for the latter's convenience to remove it, held liable for the negligence of the tenant's servants, *Flynn* v. *Butler,* 189 Mass. 377 (1905).

One who engages a contractor to clear his waste land by fire has been held liable for its spread, due to the latter's negligence, in *Black* v. *Christ Church Financial District,* L. R. 1894, A. C. 48, and *St. Louis etc., R. R.* v. *Madden,* 77 Kans. 80 (1908), especially where the contract requires the fire to be set in a dangerously dry season of the year, or near to highly inflammable material; *Cameron* v. *Oberlin,* 19 Ind. App. 142 (1897); *Hannan* v. *Shepperton,* 14 Australian, L. T. 83 (1892).

In *Corrigan* v. *Elsinger,* 81 Minn. 42 (1900), it was held that a store keeper, into whose store a counter was being moved, by the manufacturer who had contracted to install it, while the store was held open for customers, was liable to a customer injured by the negligence of the manufacturers' servants while engaged in carrying it into the store.

mon prudence required that precautions should have been taken to prevent its falling either by shoring it up or by removing the roof and the wall in sections. The evidence is undisputed that this was the common and usual proceeding under similar circumstances. The officers of the defendant had no actual knowledge of the condition of the wall either before or during its removal, or how the work was being done, and they did not in any way interfere or direct in respect to the manner of doing the work.

It is the general rule that a party injured by the negligence of another must seek his remedy against the person whose actual negligence it was which caused the injury, and that such person alone is liable. (*King* v. *N. Y. C., etc.*, R. R. 66 N. Y 182.) The case of master and servant is an exception, and the negligence of the latter is imputable to the master where the servant, in doing the act which occasions the injury, is acting within the scope of his employment. This exception rests upon most satisfactory reason, because the servant in the case supposed is acting in place of the master and by his appointment, and the master who selects and controls the servant makes the servant his representative in his business.

But the exigencies of affairs frequently require that persons exercising independent employments should be entrusted by owners of property with its improvement, and in various relations and under varying conditions they are employed, not as servants, but as independent contractors to execute contracts which the person who secures their services is unable to execute himself, or the execution of which he prefers to commit to another. The duty which the contractor owes is defined by the contract or implied therefrom. In such cases the maxim *qui facit per alium, facit per se* has no appropriate application, and there is no reason founded upon public policy, or the relations between the parties to the contract, which should subject one party to the contract to liability to third persons, for the negligence of the other. The principle that no liability on the part of the innocent party in such cases exists, has become the settled doctrine of our law. It leaves an adequate remedy to the party injured, against the real author of the wrong. There are well understood exceptions to this rule of exemption. Cases of statutory duty imposed upon individuals or corporations; of contracts which are unlawful, or which provide for the doing of acts which when performed will create a nuisance, are exceptions. In cases of the first mentioned class the power and duty imposed cannot be delegated so as to exempt the person who accepts the duty imposed, from responsibility, and in those of the second class exemption from liability, would be manifestly contrary to public policy, since it would shield the one who directed the commission of the wrong. (*Storrs* v. *City of Utica*, 17 N. Y. 104; *Lowell* v. *L. & B. R. Co.*, 23 Pick. 24; *Hole* v. *S. S. R. Co.*, 6 H. & N. 488; *Butler* v. *Hunter*, 7 id. 826.) There are cases of still another class where the thing contracted to be done is necessarily attended with danger, however skillfully and carefully performed, or, in the language of Judge Dillon, is "intrinsically dangerous," in which case it is held that the party who lets the contract

to do the act, cannot thereby escape from responsibility for any injury resulting from its execution, although the act to be performed may be lawful (2 Dillon on Mun. Corp § 1029, and cases cited). But if the act to be done may be safely done in the exercise of due care, although in the absence of such care injurious consequences to third persons would be likely to result, then the contractor alone is liable, provided it was his duty under contract to exercise such care. (*McCafferty* v. *L. D. & P. M. R. R. Co.*, 61 N. Y. 178; *Conners* v. *Hennessey*, 112 Mass. 96; *Butler* v. *Hunter, supra.*)

The application of these principles to this case exonerates the defendant from liability. The taking down of the wall was not intrinsically dangerous. The only danger to be apprehended was in doing it carelessly or unskillfully. It was in the manner of doing it and not in the thing itself. The danger of leaving the wall without support was obvious, and could have been easily avoided, and the usual method required that precautions should be taken. It was the duty of the contractor to take such precautions, because it was implied in his contract that he should take down the wall in a careful and proper manner[1] (Pollock C. B., *Butler* v. *Hunter, supra*). It does not change the situation of the defendant, that the wall had become weakened by age and decay. It is the general duty of the owner of premises to keep the walls of his building in a safe condition, so that they will not endanger his neighbor by falling, and if he negligently omits its performance and his neighbor is injured, the injury is actionable. (*Mullen* v. *St. John*, 57 N. Y. 567.) But the evidence is undisputed that the wall was safe and would not have fallen if it had been left as it was when the contract was made, supported by the roof. It was not a menace in its existing condition. It became dangerous only in consequence of the manner in which the contractor proceeded to take it down. It would probably have been less liable to fall, although deprived of the support of the roof, if the wall had been in perfect repair when the contractor entered upon the work. But we perceive no causal connection between the neglect to repair and the injury to the plaintiff's intestate. The sole cause in a legal sense was the negligence of the contractor in omitting to do what he was bound to do. The performance of his duty would have prevented the injury.[2] The order of the General Term should be reversed and judgment of nonsuit should be entered, with costs to defendant.

All concur.

Order reversed and judgment accordingly.

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[1] So in *Daniel* v. *Ry. Co.*, L. R. 3 C. P. 591 (1869), where the defendant had employed a contractor to build an iron bridge over its line from whose appliances a heavy girder had been allowed to fall upon one of its trains, Blackburn, J. said, p. 594: "though the defendants as reasonable persons must have known that girders if negligently handled are likely to fall, they could have no reason to suppose that the persons who were doing the work would do it so negligently as to hazard the happening of such an event."

[2] *Accord: United Gas Imp. Co.* v. *Larsen*, 182 Fed. 620 (6th Circ. C. C. A. 1910), a building collapsed during alterations made by independent contractor; *Bibb, Adm.* v. *R. R.*, 87 Va. 711 (1891), section of railroad bridge fell, through the negligence of a contractor employed to repair it while it was being used for traffic; *Daniel* v. *Ry. Co.*, L. R. 3 C. P. 216, 591

SANFORD *v.* PAWTUCKET ST. R. R. Co.

Supreme Court of Rhode Island, 1896. 19 *Rhode Island,* 537.

TILLINGHAST, J. The second count alleges that the defendant is a corporation, incorporated by the General Assembly of the State, and that in the charter it is provided that the defendant shall be liable for any loss or injury that any person shall sustain by reason of any carelessness, neglect or misconduct of its agents or servants, in the construction, management or use of its tracks, or of the streets where its tracks are laid; that the defendant entrusted the construction of its road, under a contract made by said defendant with certain con-

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(1869), L. R. 5 E. & I. App. 45 (1871), *supra,* note 1, but see *P. W. & B.* v. *Mitchell,* 107 Md. 600 (1908), note to *Covington, etc., Bridge* v. *Steinbrock, et al., ante.* So it is held in *Young* v. *Lumber Co.,* 147 N. C. 26 (1908), that one employing a contractor to fell his timber well within his own property, but near to a right of way thereon, is not liable for injuries received by one using such right of way by reason of such contractor's failure to take care to see that no one was approaching upon the way before cutting down a tree close to it; see also *Knowlton* v. *Hoit,* 67 N. H. 155 (1891), where a tree cut by a contractor fell upon the fence of a neighbor.

In *Berg* v. *Parsons,* 156 N. Y. 109 (1898), it was held that one employing a contractor to do work necessitating blasting upon his premises, was not answerable for harm resulting from such contractor's negligence therein, Martin, J., saying: "The work did not constitute a public nuisance, and there was no statute binding the defendant to efficiently perform it. The work contracted for was lawful and necessary for the improvement and use of the defendant's property. * * * If a contrary rule was established it would * * * impose upon the owners of property an improper restraint in contracting for its improvement." So persons employing contractors to do blasting have been held not to be responsible for the latter's negligence therein in *Pack* v. *Mayor of New York,* 8 N. Y. 222 (1850); *McCafferty* v. *R. R.* 61 N. Y. 178 (1874); *Tibitts* v. *R. R.* 62 M, E, 437 (1873); *Blumb* v. *City of Kansas,* 84 Mo. 112 (1884); *Edmundson* v. *R. R.,* 111 Pa. 316 (1885). In all of these cases, however, "the subject has been approached solely from the standpoint of master and servant;" Holmes, C. J., *Wetherbee* v. *Partridge,* 175 Mass. 185 (1900) p. 186. The same criticism applies to many other cases dealing with the employer's liability for the negligent conduct of independent contractors and their workmen, as in *Painter* v. *Pittsburgh,* 46 Pa. 216 (1863), note to *Storrs* v. *Utica, ante,* p. 599, and *Smith* v. *Simmons,* 103 Pa. 32 (1883), note 2 to *Bower* v. *Peate, ante,* p. 621; See also *Knowlton* v. *Hoit, supra;* but see *Hunt* v. *Vanderbilt,* 115 N. C. 559 (1891), sometimes cited as in accord with the above cases, in which it was held that upon a declaration in which the defendant "is sued for the conduct of (one doing blasting for him on his premises) as the defendant's servant and not otherwise," no recovery was possible upon proof that such person was an independent contractor, "the principles of law upon which the defendant may be liable for the conduct (of such person) in these distinct capacities being widely different."

So it is held in *Callahan* v. *R. R.,* 23 Iowa, 562 (1867), that one who employs a contractor to clear his land by burning the scrub or rubbish is not liable for the failure of the latter to take care to prevent the fire spreading; *Accord: Gillson* v. *R. R.,* 35 U. C. Q. B. 475 (1874); *Shute* v. *Princeton,* 58 Minn. 337 (1894); *Wright* v. *Holbrook,* 52 N. H. 120 (1872), but see the criticism of this case in *Thomas* v. *Harrington,* 72 N. H. 45 (1903), per Walker J., p. 48; *Ferguson* v. *Hubbell,* 97 N. Y. 507 (1884); when, however, the contractor had the option to clear the land by fire or other means, see *Sanford* v. *Pawtucket Ry. Co., post* p. 630, and cases in note thereto.

tractors not residing in the State, to said contractors, and that the latter, in the process of such construction, on to wit, the third day of December, 1891, at said Pawtucket, negligently and carelessly placed and maintained a rope or wire across said Lonsdale Avenue, in such a manner as to render said highway dangerous to travelers in carriages, whereby the plaintiff, on to wit, said third day of December, 1891, who was then and there riding in a carriage along said public highway, in the exercise of due care, was caught by said rope or wire, thrown to the ground and seriously injured, &c.

To the second count the defendant has filed a special plea in bar, setting up that the acts and deeds complained of therein were not the acts and deeds of the said defendant corporation, nor the acts and deeds of any of its servants or agents, but were the acts and deeds of an independent contractor over whom, and over whose agents and servants, said defendant corporation had no management, care or control; and also setting up that the said defendant corporation had no notice whatever of the alleged wrongful acts of said independent contractor, and that said wrongful acts did not continue for a sufficient length of time to impute notice thereof to the said defendant corporation. To this special plea in bar the plaintiff has demurred, on the grounds, (1) that the fact that the work was done by an independent contractor, as set forth in said plea, does not constitute a valid defence to the plaintiff's cause of action; (2) that the lack of notice to the defendant, as set forth in said special plea, does not constitute a valid defence to the plaintiff's cause of action; and (3) that said facts in regard to the work being performed by an independent contractor and said want of notice, as set forth in said plea, do not together constitute a valid defence to the plaintiff's cause of action.

The only question before us for decision, therefore, is as to the sufficiency of said special plea in bar. The plaintiff admits at the outset that the law, as stated by the court in *Williams* v. *Tripp*, 11 R. I. 454, is correct, viz., that "When a person has work done for him under contract, without reserving to himself any direct control of the contractor or of his men, there is no relation of principal and agent or of master and servant between him and them, and consequently no such liability for their torts and negligence as is incident to that relation." But he contends that to this well recognized rule there is one equally well recognized exception, and that is that no one can escape from the burden of an obligation imposed upon him by law by the engaging for its performance by a contractor. In view of this contention, it becomes necessary to ascertain precisely what obligation was imposed by law upon the defendant corporation regarding the construction of its road. Under the provisions of section 3 of its charter, the duties devolved upon the corporation are these, viz., that it must put the streets and highways, in which it shall lay any rails, in as good condition as they were, and keep in repair such portions of the streets as shall be occupied by its tracks; and it is made liable for any loss or injury that any person shall sustain by reason of any carelessness, neglect or misconduct of it agents and servants in the management, construction or use of said tracks or

streets. Of course the defendant cannot discharge itself from its statutory obligations by engaging for their performance by another. This is to say, it is bound, at its peril, to put the streets in which it shall lay any rails in as good condition as they were before, and to keep in repair such portions of the streets as shall be occupied by its tracks; and hence, if it should contract with a third person to do this work and this third person should fail to do it, the defendant would doubtless be liable. *Hole* v. *Sittingbourne, etc., Ry, Co.,* L. J. Exch. 81; 6 H. & N. 488. But such is not the case before us. Here the case shows, not that the defendant failed to perform its said statutory duty, but that an independent contractor, in constructing the road,—a thing which the defendant had a right to do itself, but was under no obligation to do,—was guilty of negligence. This negligence, however, cannot be imputed to the defendant, as the relation of master and servant was not created by the contract between the parties. The defendant had no control either of the work or of the workmen employed to perform it. It merely prescribed the end to be accomplished, and contracted with another to accomplish that end by such means as the latter might in his discretion employ. And hence, as to the means employed, the contractor was not a servant or agent of the defendant, but himself a master; and for any negligence in connection therewith he alone is liable. The defendant made no agreement with the contractor as to the particular manner in which the road should be constructed or the trolley wire erected. That is to say, the defendant did not authorize the contractor to place, stretch or maintain a wire or rope across the street, in the manner complained of. He was simply authorized to construct the road, thus leaving the manner of doing the same to his skill and judgment. Moreover, the work authorized to be done was not in itself a nuisance, nor was it necessarily dangerous or injurious. It was authorized by law. The manner in which it was done was the sole cause of the injury complained of. Hence, the obstruction or defect created in the street was purely collateral to the work contracted to be done, and was entirely the result of the wrongful or careless acts of the contractor or his workmen; and in such case it is well settled that the employer is not liable. *Robbins* v. *Chicago,* 4 Wall. 657. It is to be observed, also, that the defendant not only did not authorize the obstruction complained of, but had no notice thereof either express or implied.

Had the obstruction resulted directly from the act which the contractor agreed and was authorized to do, then both the defendant and the contractor would have been equally liable to the injured party. *St. Paul Water Co.* v. *Ware,* 16 Wall. 566; *Carman* v. *Steubenville, etc., R. R. Co.,* 4 Ohio St. 399. This principle is well illustrated in *Ellis* v. *Sheffield Gas Consumers' Co.,* 2 E. &. B. 767. There the defendant made a contract with Watson Bros. to open trenches along the streets of Sheffield, in order that defendant might lay gas pipes therein, and afterwards to fill up the trenches and make good the surface with flagging. Watson Bros., by their servants, opened the trenches along

one of the streets in question, and after the pipes were laid proceeded to fill up said trenches and restore the flagging. In doing so, however, they carelessly left a heap of stones and earth upon the foot way; and the plaintiff, passing along the street, fell over the same and was injured. Neither the defendant nor Watson Bros. had any legal excuse for breaking open the street in the manner described, which was a public nuisance. In a suit against the gas company to recover for the injury sustained, the court held that the cause of the accident was the very thing done in pursuance of the specific direction of the defendant contained in their contract, and not the negligence of those doing the thing, and hence the defendant was liable.

Pawlet v. *Rutland, etc., R. R. Co.*, 28 Vt. 297, is strongly in point. In that case the defendant had made a contract with Page & Eastman to build a section of its road. Page & Eastman underlet a job of building the abutments of a bridge to one Chandler who, with his own men, built the abutments; and the obstruction in the highway which caused the injury to the plaintiff was the act of Chandler's employees in drawing the stone for the abutment. The court held that, as the act contracted to be done was a lawful one and in no way involved the commission of a public nuisance, and that as it had become such purely from the neglect of the person who had contracted to do the job, the latter *alone* was liable for the damage occasioned.

To the same effect are *Pack* v. *Mayor of New York*, 4 Selden, 222; *Hole* v. *Sittingbourne, etc., Ry. Co., supra; Peachey* v. *Rowland*, 13 C. B. 182; *Hillard* v. *Richardson*, 3 Gray, 349; *Bailey* v. *Troy, etc., R. R. Co.*, 57 Vt. 252; *Storrs* v. *Utica*, 17 N. Y. 104; *Hughes* v. *Cincinnati, etc., Ry. Co.*, 39 Ohio St. 461; and numerous other cases which might be cited.[1]

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[1] *Accord: Atlanta, etc., R. R.* v. *Kimberly*, 87 Ga. 161 (1891), railroad company held not liable for nuisance caused by contractor's improper location of his "convict camp" and horse lot; *Carter* v. *Berlin Mills Co.*, 52 N. H. 52 (1876), defendant not liable for flowage of plaintiff's land through improper management of its dams by a contractor, who was allowed to use them for the purpose of carrying out his contract to cut and "drive" the defendants logs; *Harrison* v. *Collins*, 86 Pa. 153 (1878), owner of factory not liable for the act of a "rigger" employed to, install a heavy boiler, who for his own convenience and to simplify his work, removed the cover of a coal hole in the sidewalk of defendant's premises; compare *Pickard* v. *Smith*, 10 C. B. N. S. 470 (1861); *Fulton Street Ry. Co.* v. *McConnell*, 87 Ga. 756 (1891), tracks, taken from the gutter, when they had been delivered and placed, loosely in position in the street, long in advance of the time, when they could be properly and finally laid, held to be an obstruction not inherent in the nature of the work contracted for but, on the contrary, one unnecessarily created by the method of doing the work adopted by the contractor for his own convenience; but compare with this case *Woodman* v. *R. R.*, 149 Mass. 335 (1889), and *Mullins* v. *Siegel-Cooper*, 183 N. Y. 129 (1905).

So in *Overton* v. *Freeman*, 11 C. B. 867 (1852), the defendant, who, having contracted to pave a certain district in the parish of St. Pancras, had employed a sub-contractor to lay the kerb-stone in a certain street, was held not liable for injuries which the plaintiff received through falling over stones negligently placed in the pathway by the sub-contractor; *accord, Hilliard* v. *Richardson*, 3 Gray, 349 (1855), owner not answerable for the consequence of the piling

CITY & SUBURBAN RY. CO. *v.* MOORES.

Court of Appeals of Maryland, 1895, 80 Md. 348.

BOYD, J.: This suit was instituted by Minnie Moores and her husband against the City and Suburban Railway Company for injuries sustained by her through the alleged negligence of the defendant's agents. Whilst she was driving along the Baltimore and Yorktown Turnpike Road her horse was frightened at a steam engine, which was being used for hauling cars containing ballast to be put on the tracks of the Railway Company. The defendant introduced in evidence two contracts between the President, Managers and Company of the Baltimore and Yorktown Turnpike Road and one James B. White, by which the latter contracted to do certain work for the Turnpike Company, including the delivery of broken stone to be used in ballasting and back-filling the railway tracks constructed on the pike, and also in macadamizing the pike, and claims that the work was being done under these contracts by White as an independent contractor.

The defendant offered two prayers, which were refused by the Court below, which raise the only questions presented for our consideration. The first prayer asked that the jury be instructed, that if they found there was a contract between the Turnpike Company and White for doing certain work upon and adjacent to the bed of said turnpike offered in evidence; that said White conducted the work under the terms of said contract, without any interference on the part of the Turnpike Company or the defendant in mode or manner of doing the work; and that the injury complained of resulted from the running of an engine engaged in the prosecution of the work, which belonged and was under the control of said White, then the plaintiff could not recover.

The second asked the Court to instruct the jury, that if they found that the Turnpike Company and White entered into the agreements offered in evidence to do certain work therein set out; that in the prosecution of the work White used approved and ordinary machinery, and employed competent and skillful workmen in the management and conduct of said machinery; that the work was

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in the highway, by the servant of a carpenter employed to repair his house, of material for use in the repairs; *City of Independence* v. *Slack*, 134 Mo. 66 (1895), similar facts; *Richmond* v. *Sitterling*, 101 Va. 354 (1903), plank, laid by builder, over sidewalk as pathway for hod carriers from a mortar bed to the building; *City of Moline* v. *McKimmie*, 30 Ill. App. 419 (1888): *contra Bush* v. *Steinman*, 1 B. & P. 404 (1799), an owner held answerable for the overturning of plaintiff's carriage by a pile of lime placed in the highway by a builder employed to repair his house; the court did not discuss whether this obstruction was not necessarily inherent in the performance of the work contracted for, but based the defendant's liability upon the broad ground that one employing a contractor to do work for his benefit (at least upon his own premises) must answer for the manner in which the work is done, a position later abandoned in England: *Overton* v. *Freeman*, *supra*, and *Rudie* v. *Ry.*, 4 Exch. 254 (1840), and one which after a brief acceptance (*Lowell* v. *R. R.*, 23 Pick. 24 [1839], and *Stone* v. *R. R.*, 19 N. H. [1849], 426) was repudiated in America (*Hilliard* v. *Richardson*, *supra*; *Wright* v. *Holbrook*, 52 N. H. [1872], 120).

superintended with the usual and ordinary care incident to the same; that the injury complained of was done during the prosecution of the work in the manner testified to by plaintiff's witnesses; that the employees in, on and about said engine were selected and employed by White and were under his exclusive control, then the plaintiff could not recover, although the jury may believe the whistle was blown on the engine as testified to by plaintiff's witnesses.

(The Court then discusses the relations between White, the Turnpike Co. and the defendant; says that nothing in the record shows just what those relations are, and suggests various ways in which the defendant might be connected with the contract between the Turnpike Company and White.)

But, however this may be, if the jury believed the work was being done by White under these contracts, we must assume, in order to enable the plaintiff to recover at all, that it was being done for the defendant, and must connect it with the contract. If that be not done, then clearly the defendant is not liable to the plaintiffs, and their only remedy would be against White or the Turnpike Company, if it is not relieved on the ground that White was an independent contractor.

We must, therefore, treat the defendant as a party to the contracts, at least as a party having work done for it under them, in disposing of the prayers.

The evidence of Kinsley, the superintendent in charge for White, shows that "the machinery used in and about the work was of the ordinary kind used for such purposes;" and contract No. 2 requires the contractor "to make all necessary connections with present track to run cars to crusher." We think, therefore, that the Turnpike Company had reason to believe a steam engine would be used in the execution of the work. But the use of the steam engine on that road was not a nuisance *per se*, and there was no such obligation on the Turnpike Company to the plaintiff or to the public as to prohibit it from using or permitting it to be used for hauling material for repairs or improvements. There was, therefore, no reason why that company could not make these contracts with White, although it knew he was going to use a steam engine such as this. In *Ware's case*, 16 Wall. 566, although the plaintiff's horse was frightened by the alleged negligent use of a steam drill, yet the injury sustained was really caused by the material, dirt, &c., which had been left in the street, and which came within the duty of the defendant to persons travelling on the streets to see that they were kept safe. So in *O'Donnell's case*, 53 Md. 110. If Mrs. Moores had been injured by piles of stone or other material negligently left in the road by the contractor, then a different question might arise. But the evidence shows that the injury was sustained by the negligent use of the engine in not stopping it and in blowing the whistle as she approached.[1]

It would be carrying the obligation of the Turnpike Company beyond that required or authorized by the authorities to hold that

[1] See Hammond, J., in *Boomer* v. *Wilbur*, 176 Mass. 482 (1900), p. 485: The work to be done (the repair of chimneys) "did not involve throwing the

its duty to the public required it to see that the servants of White were not thus negligent, although the use of the steam engine was not a nuisance *per se* and could be operated so as not likely to do any injury to any one using the road. It would be requiring too much of it to make it take such precautions against accidents when letting out lawful work to an independent contractor. It must be admitted that the work to be done was lawful and the company had the right to assume that there would not be such negligence as that complained of, which was entirely collateral to and not a probable consequence of the work contracted for.[2] To hold the company to such a strict liability would practically forbid it from having such work done by contractors as it would have to keep its own agents on engines to see that there was no negligence on the part of the contractors or their servants.

As there was no such duty resting on the Turnpike Company, it follows *a fortiori* that there was none such on the appellant. As we have determined that White should be treated as an independent contractor with the Turnpike Company, and that the Railway Company must be regarded as a party to the contracts, if the jury found that the work was being done under them, we think the second prayer should have been granted. The first is perhaps too general, although intended to raise the same question, but as there was error in refusing the second, we must therefore reverse the judgment.

Judgment reversed and new trial awarded.[3]

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brick into the street, or causing or allowing them to fall so as to endanger persons travelling therein. It is plain that unless there was negligence in the actual handling of the brick there could be no injury to the passing traveller * * * The negligence, if any, was in a merely detail of the work."

[2] See Blackburne, J., in *Daniel* v. *Ry. Co.*, L. R. 3 C. P., p. 594; *Engel* v. *Eureka Club*, note 1, *ante*, p. 629.

[3] *Accord: Wabash, etc., R. R.* v. *Farver*, 111 Ind. 195 (1887), and *Bailey* v. *R. R.*, 57 Vermont, 252 (1884), somewhat similar facts; *Burbank* v. *Bethel Mill Co.*, 75 Me. 373 (1883), fire started by negligence of contractor in his maintenance and management, of a stationary engine used in performing the work contracted for; *Leavitt* v. *R. R.*, 89 Me. 509 (1897), fire started by negligence of servants of contractor in charge of cooking car of a work train on defendant's siding; *Strauss* v. *Louisville, et al.*, 108 Ky. 155 (1900), plaintiff injured by splashing of lime into her eye due to the carelessness of the servant of the builder, an independent contractor, who was engaged in filling a mortar bed placed in the highway; *Wood* v. *Independence School District*, 44 Iowa, 30 (1876), drilling machine left by contractor in school-house yard, unlocked and ungua-ded.

When an owner of premises abutting upon a highway or adjacent to the property of another, employs a competent contractor to do building or repair work thereon it is usually held that he is not liable for the fall of tools, materials or other objects carelessly handled by the workmen. *Reedie* v. *Ry. Co.*, 4 Exch. 244 (1849); *Pearson* v. *Cox*, L. R. 2 C. P. D. 369 (1877); *Fitzpatrick* v. *R. R.*, 31 Ill. App. 649; *Boomer* v. *Wilbur*, 176 Mass. 462 (1900), brick carelessly knocked from chimney by servants of contractor employed to repair it; *Fitzpatrick* v. *R. R.*, 31 Ill. App. 649 (1888); *Long* v. *Moon*, 107 Mo. 334 (1891); *Wolf* v. *American Tract Society*, 25 App. Div. (N. Y.) 98 (1898); *Strauss* v. *Louisville, et al.*, 108 Ky. 155 (1900); so one who employs a contractor to erect a building upon his premises liable to his neighbor only for the dust and rubbish necessarily cast upon his premises and not liable for what came there through the carelessness of the workmen; *Faxon* v. *Pye*, 156 Mass. 471 (1892); but see *P. B. & W. R. R.* v. *Mitchell*, notes 1 and 2 to *Covington* v. *Steinbrock*.

Part 4

Action on the Case for Statements made to the Plaintiff or Concerning him or his Property, Trade, Business or Profession.

CHAPTER I.

Fraud and Deceit.

"This writ (of deceit) lieth properly where one man doth anything in the name of another, by which the other person is damnified and deceived, then he who is so damnified shall have this writ."[1] Fitzherbert de Nova Natura Brevium (1643), London Ed. 1780.

PASLEY *v.* FREEMAN.

29 George III. 3 Term Reports (Durnford & East), 51.

This was an action in the nature of a writ of deceit, to which the defendant pleaded the general issue. And after a verdict for the plaintiffs on the third count, a motion was made in arrest of judgment.

The third count was as follows: "And whereas, also, the said Joseph Freeman afterwards, to wit, on the twenty-first day of February, in the year of our Lord 1787, at London aforesaid, in the parish and ward aforesaid, further intending to deceive and defraud the said John Pasley and Edward, did wrongfully and deceitfully encourage and persuade the said John Pasley and Edward to sell and deliver to the said John Christopher Falch divers other goods, wares, and merchandises, to wit, sixteen other bags of cochineal of great value, to wit, of the value of £2,634 16s. 1d. upon trust and credit, and did for that purpose then and there falsely, deceitfully, and fraudulently assert and affirm to the said John Pasley and Edward that the said John Christopher then and there was a person

[1] The instances given are where a man purchases a writ in the name of another, whereby such other becomes liable for a fine in the chancery; where one purchases a *quare impedit* and causeth the writ to abate, etc., so that the right of action is lost; and other cases where the defendant has done in the name of the plaintiff some legal act which binds such plaintiff, together with cases where an attorney has, in the name of the plaintiff, by collusion with the adverse party or otherwise, acted injuriously to the plaintiff's interests.

safely to be trusted and given credit to in that respect, and did thereby falsely, fraudulently, and deceitfully cause and procure the said John Pasley and Edward to sell and deliver the said last-mentioned goods, wares and merchandises upon trust and credit to the said John Christopher; and, in fact, they the said John Pasley and Edward, confiding in, and giving credit to, the said last-mentioned assertion and affirmation of the said Joseph, and believing the same to be true, and not knowing the contrary thereof, did afterwards, to wit, on the 28th day of February, in the year of our Lord 1787, at London aforesaid, in the parish and the ward aforesaid, sell and deliver the said last-mentioned goods, wares and merchandises upon trust and credit to the said John Christopher; whereas in truth and fact, at the time of the said Joseph's making his said last-mentioned assertion and affirmation, the said John Christopher was not then and there a person safely to be trusted and given credit to in that respect, and the said Joseph well knew the same, to wit, at London aforesaid, in the parish and ward aforesaid. And the said John Pasley and Edward further say, that the said John Christopher hath not, nor hath any other person on his behalf, paid to the said John Pasley and Edward, or either of them, the said sum of £2,634 16s. 1d. last mentioned, or any part thereof, to the said John and Edward, to wit, at London aforesaid, in the parish and ward aforesaid.

Application was first made for a new trial, which after argument was refused, and then this motion in arrest of judgment. Wood argued for the plaintiffs, and Russell for the defendant, in the last term; but as the court went so fully into this subject in giving their opinions, it is unnecessary to give the arguments at the bar.

The court took time to consider of this matter, and now delivered their opinions *seriatim*.

Grose, J. Upon the face of this count in the declaration no privity of contract is stated between the parties. No consideration arises to the defendant; and he is in no situation in which the law considers him in any trust, or in which it demands from him any account of the credit of Falch. He appears not to be interested in any transaction between the plaintiffs and Falch, nor to have colluded with them; but he knowingly asserted a falsehood, by saying that Falch might be safely entrusted with the goods, and given credit to, for the purpose of inducing the plaintiffs to trust him with them, by which the plaintiffs lost the value of the goods. Then this is an action against the defendant for making a false affirmation, or telling a lie, respecting the credit of a third person, with intent to deceive, by which the third person was damnified; and for the damages suffered, the plaintiffs contend that the defendant is answerable in an action upon the case. It is admitted that the action is new in point of precedent; but it is insisted that the law recognizes principles on which it may be supported. The principle upon which it is contended to lie is that, wherever deceit or falsehood is practised to the detriment of another, the law will give redress. This proposi-

tion I controvert, and shall endeavor to show that, in every case where deceit or falsehood is practised to the detriment of another, the law will not give redress; and I say that by the law, as it now stands, no action lies against any person standing in the predicament of this defendant for the false affirmation stated in the declaration. If the action can be supported, it must be upon the ground that there exists in this case what the laws deems *damnum cum injuria.* If it does, I admit that the action lies; and I admit that upon the verdict found the plaintiffs appear to have been damnified. But whether there has been *injuria,* a wrong, a tort, for which an action lies, is a matter of law. The tort complained of is the false affirmation made with intent to deceive; and it is said to be an action upon the case analogous to the old writ of deceit. When this was first argued at the bar, on the motion for a new trial, I confess I thought it reasonable that the action should lie; but, on looking into the old books for cases in which the old action of deceit has been maintained upon the false affirmation of the defendant, I have changed my opinion. The cases on this head are brought together in Bro. tit. *Deceit,* pl. 29, and in Fitz. Abr. I have likewise looked into Danvers, Kitchins, and Comyns, and I have not met with any case of an action upon a false affirmation, except against a party to a contract, and where there is a promise, either express or implied, that the fact is true, which is misrepresented; and no other case has been cited at the bar. Then if no such case has ever existed, it furnishes a strong objection against the action, which is brought for the first time for a supposed injury, which has been daily committed for centuries past. For I believe there has been no time when men have not been constantly damnified by the fraudulent misrepresentations of others; and if such an action would have lain, there certainly has been, and will be, a plentiful source of litigation, of which the public are not hitherto aware. A variety of cases may be put. Suppose a man recommends an estate to another, as knowing it to be of greater value than it is; when the purchaser has bought it he discovers the defect, and sells the estate for less than he gave; why may not an action be brought for the loss upon any principle that will support this action? And yet such an action has never been attempted. Or suppose a person present at the sale of a horse asserts that he was his horse, and that he knows him to be sound and sure-footed, when in fact the horse is neither the one nor the other; according to the principle contended for by the plaintiffs, an action lies against the person present as well as the seller, and the purchaser has two securities. And even in this very case, if the action lies, the plaintiffs will stand in a peculiarly fortunate predicament, for they will then have the responsibility both of Falch and the defendant. And they will be in a better situation than they would have been if, in the conversation that passed between them and the defendant, instead of asserting that Falch might safely be trusted, the defendant had said, "If he did not pay for the goods, I will," for then undoubtedly an action would not have lain against the defendant. Other and stronger cases may be put

of actions that must necessarily spring out of any principle upon which this can be supported, and yet which were never thought of till the present action was brought. Upon what principle is this act said to be an injury? The plaintiffs say, on the ground that, when the question was asked, the defendant was bound to tell the truth. There are cases, I admit, where a man is bound not to misrepresent, but to tell the truth; but no such case has been cited, except in the case of contracts; and all the cases of deceit for misinformation may, it seems to me, be turned into actions of assumpsit. And so far from a person being bound in a case like the present to tell the truth, the books supply me with a variety of cases, in which even the contracting party is not liable for a misrepresentation. There are cases of two sorts in which, though a man is deceived, he can maintain no action. The first class of cases (though not analogous to the present) is where the affirmation that the thing sold has not a defect which is a visible one; there the imposition, the fraudulent intent, is admitted, but it is no tort. The second head of cases is where the affirmation is (what is called in some of the books) a nude assertion, such as the party deceived may exercise his own judgment upon; as where it is a matter of opinion, where he may make inquiries into the truth of the assertion, and it becomes his own fault from laches that he is deceived. 1 Roll. Abr; Yelv. 20; 1 Sid. 146; Cro. Jac. 386; *Bayly* v. *Merrel.* In *Harvey* v. *Young,* Yelv. 20, J. S., who had a term for years, affirmed to J. D. that the term was worth £150 to be sold, upon which J. D. gave £150, and afterwards could not get more than £100 for it, and then brought his action; and it was alleged that this matter did not prove any fraud, for it was only a naked assertion that the term was worth so much, and it was the plaintiff's folly to give credit to such assertion. But if the defendant had warranted the term to be of such a value to be sold, and upon that the plaintiff had bought it, it would have been otherwise; for the warranty given by the defendant is a matter to induce confidence and trust in the plaintiff. This case, and the passage in 1 Roll. Abr. 101, are recognized in 1 Sid. 146. How, then, are the cases? None exist in which such an action as the present has been brought; none, in which any principle applicable to the present case has been laid down to prove that it will lie; not even a *dictum.* But from the cases cited some principles may be extracted to show that it cannot be sustained: 1st. That what is fraud, which will support an action, is matter of law. 2d. That in every case of a fraudulent misrepresentation, attended with damage, an action will not lie even between contracting parties. 3d. That if the assertion be a nude assertion, it is that sort of misrepresentation the truth of which does not lie merely in the knowledge of the defendant, but may be inquired into, and the plaintiff is bound so to do; and he cannot recover a damage which he has suffered by his laches. Then let us consider how far the facts of the case come within the last of these principles. The misrepresentation stated in the declaration is respecting the credit of Falch; the defendant asserted that the plaintiffs might safely give him

credit; but credit to which a man is entitled is matter of judgment and opinion, on which different men might form different opinions, and upon which the plaintiffs might form their own, to mislead which no fact to prove the good credit of Falch is falsely asserted. It seems to me, therefore, that any assertion relative to credit, especially where the party making it has no interest, nor is in any collusion with the person respecting whose credit the assertion is made, is like the case in Yelverton respecting the value of the term. But at any rate, it is not an assertion of a fact peculiarly in the knowledge of the defendant. Whether Falch deserved credit depended on the opinion of many; for credit exists on the good opinion of many. Respecting this the plaintiffs might have inquired from others who knew as much as the defendant; it was their own fault that they did not, and they have suffered damage by their own laches. It was owing to their own gross negligence that they gave credence to the assertion of the defendant, without taking pains to satisfy themselves that that assertion was founded in fact, as in the case of *Bayly* v. *Merrel.* I am, therefore, of opinion that this action is as novel in principle as it is in precedent, that it is against the principles to be collected from analogous cases, and consequently that it cannot be maintained.

Buller, J. The foundation of this action is fraud and deceit in the defendant, and damage to the plaintiffs. And a question is, whether an action thus founded can be sustained in a court of law. Fraud without damage, or damage without fraud, gives no cause of action; but where these two concur, an action lies. Per Croke, J., 3 Bulst. 95. But it is contended that this was a bare, naked lie; that, as no collusion with Falch is charged, it does not amount to a fraud; and, if there were any fraud, the nature of it is not stated. And it was supposed by the counsel, who originally made the motion, that no action could be maintained unless the defendant, who made this false assertion, had an interest in so doing. I agree that an action cannot be supported for telling a bare, naked lie; but that I define to be, saying a thing which is false, knowing or not knowing it to be so, and without any design to injure, cheat, or deceive another person. Every deceit comprehends a lie; but a deceit is more than a lie, on account of the view with which it is practised, its being coupled with some dealing, and the injury which it is calculated to occasion, and does occasion, to another person. Deceit is a very extensive head in the law; and it will be proper to take a short view of some of the cases which have existed on the subject, to see how far the courts have gone, and what are the principles upon which they have decided. I lay out of the question the case in 2 Cro. 196, and all other cases which relate to freehold interests in lands; for they go on the special reason that the seller cannot have them without title, and the buyer is at his peril to see it. But the cases cited on the part of the defendant deserving notice are Yelv. 20, Carth. 90, Salk. 210. The first of these has been fully stated by my brother Grose; but it is to be observed that the book does not affect to give the reasons on which the Court delivered their judg-

ment, but it is a case quoted by counsel at the bar, who mentions what was alleged by counsel in the other case. If the Court went on a distinction between the words "warranty" and "affirmation," the case is not law; for it was rightly held by Holt, C. J., in the subsequent cases, and has been uniformly adopted ever since, that an affirmation at the time of a sale is a warranty, provided it appear on evidence to have been so intended. But the true ground of that determination was that the assertion was of mere matter of judgment and opinion; of a matter of which the defendant had no particular knowledge, but of which many men will be of many minds, and which is often governed by whim and caprice. Judgment, or opinion, in such case implies no knowledge. And here this case differs materially from that in Yelverton; my brother Grose considers this assertion as mere matter of opinion only, but I differ from him in that respect. For it is stated on this record that the defendant knew that the fact was false. The case in Yelverton admits that, if there had been fraud, it would have been otherwise. The case of *Crosse* v. *Gardner,* Carth. 90, was upon an affirmation that oxen which the defendant had in his possession and sold to the plaintiff were his, when in truth they belonged to another person. The objection against the action was that the declaration neither stated that the defendant deceitfully sold them, or that he knew them to be the property of another person; and a man may be mistaken in his property and right to a thing without any fraud or ill intent. *Ex concessis* therefore if there were fraud or deceit, the action would lie; and knowledge of the falsehood of the thing asserted is fraud and deceit. But, notwithstanding these objections, the Court held that the action lay, because the plaintiff had no means of knowing to whom the property belonged but only by the possession. And in Cro. Jac. 474, it was held that affirming them to be his, knowing them to be a stranger's, is the offence and cause of action. The case of *Medina* v. *Stoughton,* Salk. 210, in the point of decision, is the same as *Crosse* v. *Gardner,* but there is an *obiter dictum* of Holt, C. J., that where the seller of a personal thing is out of possession, it is otherwise; for there may be room to question the seller's title, and *caveat emptor* in such case to have an express warranty or a good title. This distinction by Holt is not mentioned by Lord Raym. 593, who reports the same case; and if an affirmation at the time of sale be a warranty, I cannot feel a distinction between the vendor's being in or out of possession. The thing is bought of him, and in consequence of his assertion, and if there be any difference, it seems to me that the case is strongest against the vendor when he is out of possession, because then the vendee has nothing but the warranty to rely on. These cases, then, are so far from being authorities against the present action, that they show that if there be fraud or deceit, the action will lie; and that knowledge of the falsehood of the thing asserted is fraud and deceit. Collusion, then, is not necessary to constitute fraud. In the case of a conspiracy, there must be a collusion between two or more to support an indictment; but if one man alone be guilty of an offence

which, if practised by two, would be the subject of an indictment for a conspiracy, he is civilly liable in an action for reparation of damages at the suit of the person injured. That knowledge of the falsehood of the thing asserted constitutes fraud, though there be no collusion, is further proved by the case of *Risney* v. *Selby,* Salk. 211, where, upon a treaty for the purchase of a house, the defendant fraudulently affirmed that the rent was £30 per annum, when it was only £20 per annum, and the plaintiff had his judgment; for the value of the rent is a matter which lies in the private knowledge of the landlord and tenant; and if they affirm the rent to be more than it is, the purchaser is cheated, and ought to have a remedy for it. No collusion was there stated, nor does it appear that the tenant was ever asked a question about the rent, and yet the purchaser might have applied to him for information; but the judgment proceeded wholly upon the ground that the defendant knew what he asserted was false. And, by the words of the book, it seems that if the tenant had said the same thing he also would have been liable to an action. If so, that would be an answer to the objection that the defendant in this case had no interest in the assertion which he made. But I shall not leave this point on the *dictum* or inference which may be collected from that case. If A., by fraud and deceit, cheat B. out of £1000, it makes no difference to B. whether A. or any other person pockets that £1000. He has lost his money; and if he can fix fraud upon A., reason seems to say that he has a right to seek satisfaction against him. Authorities are not wanting on this point. 1 Roll. Abr. 91, pl. 7. If the vendor affirm that the goods are the goods of a stranger, his friend, and that he had authority from him to sell them, and upon that B. buys them, when in truth they are the goods of another, yet, if he sell them fraudulently and falsely on this pretense of authority, though he do not warrant them, and though it be not averred that he sold them knowing them to be the goods of a stranger, yet B. shall have an action for this deceit. It is not clear from this case whether the fraud consisted in having no authority from his friend, or in knowing that the goods belonged to another person; what is said at the end of the case only proves that "falsely" and "fraudulently" are equivalent to "knowingly." If the first were the fact in the case, namely, that he had no authority, the case does not apply to this point; but if he had an authority from his friend, whatever the goods were sold for his friend was entitled to, and he had no interest in them. But, however that might be, the next case admits of no doubt. For in 1 Roll. Abr. 100, pl. 1, it was held that if a man acknowledge a fine in my name, or acknowledge a judgment in an action of my land, this shall bind me forever; and therefore I may have a writ of deceit against him who acknowledged it. So if a man acknowledge a recognizance, statute-merchant or staple, there is no foundation for supposing that in that case the person acknowledging the fine or judgment was the same person to whom it was so acknowledged. If that had been necessary it would have been so stated; but if it

were not so, he who acknowledged the fine had no interest in it. Again in 1 Roll. Abr. 95, l. 25, it is said, "If my servant lease my land to another for years, reserving a rent for me, and, to persuade the lessee to accept it, he promise that he shall enjoy the land without incumbrances, if the land be incumbered, &c., the lessee may have an action on the case against my servant, because he made an express warranty." Here, then is a case in which the party had no interest whatever. The same case is reported in Cro. Jac. 425; but no notice is taken of this point, probably because the reporter thought it immaterial whether the warranty be by the master or servant. And if the warranty be made at the time of the sale, or before the sale, and the sale is upon the faith of the warranty, I can see no distinction between the cases. The gist of the action is fraud and deceit; and if that fraud and deceit can be fixed by evidence on one who had no interest in his iniquity, it proves his malice to be the greater. But it was objected to this declaration that if there were any fraud, the nature of it is not stated. To this the declaration itself is so direct an answer that the case admits of no other. The fraud is that the defendant procured the plaintiffs to sell goods on credit to one whom they would not otherwise have trusted, by asserting that which he knew to be false. Here, then, is the fraud and the means by which it was committed; and it was done with a view to enrich Falch by impoverishing the plaintiffs out of their goods. The cases which I have stated, and Sid. 146, and 1 Keb. 522, prove that the declaration states more than is necessary; for *fraudulenter* without *sciens,* or *sciens* without *fraudulenter,* would be sufficient to support the action. But, as Mr. J. Twisden said in that case, the fraud must be proved. The assertion alone will not maintain the action; but the plaintiff must go on to prove that it was false, and that the defendant knew it to be so; by what means that proof is to be made out in evidence need not be stated in the declaration. Some general arguments were urged at the bar to show that mischiefs and inconveniences would arise if this action were sustained; for if a man who is asked a question respecting another's responsibility hesitate or is silent, he blasts the character of the tradesman; and if he say that he is insolvent, he may not be able to prove it. But let us see what is contended for: it is nothing less than that a man may assert that which he knows to be false, and thereby do an everlasting injury to his neighbor, and yet not be answerable for it. This is as repugnant to law as it is to morality. Then it is said that the plaintiffs had no right to ask the question of the defendant. But I do not agree in that; for the plaintiffs had an interest in knowing what the credit of Falch was. It was not the inquiry of idle curiosity, but it was to govern a very extensive concern. The defendant undoubtedly had his option to give an answer to the question or not; but if he gave none, or said he did not know, it is impossible for any court of justice to adopt the possible inferences of a suspicious mind as a ground for grave judgment. All that is required of a person in the defendant's situation

is that he shall give no answer, or that, if he do, he shall answer according to the truth as far as he knows. The reasoning in the case of *Coggs* v. *Bernard,* which was cited by the plaintiff's counsel, is, I think, very applicable to this part of the case. If the answer impart insolvency, it is not necessary that the defendant should be able to prove that insolvency to a jury; for the law protects a man in giving that answer, if he does it in confidence and without malice. No action can be maintained against him for giving such an answer, unless express malice can be proved. From the circumstance of the law giving that protection, it seems to follow as a necessary consequence, that the law not only gives sanction to the question, but requires that, if it be answered at all, it shall be answered honestly. There is a case in the books which, though not much to be relied on, yet serves to show that this kind of conduct has never been thought innocent in Westminster Hall. In *R.* v. *Gunston,* 1 Str. 589, the defendant was indicted for pretending that a person of no reputation was Sir J. Thornycraft, whereby the prosecutor was induced to trust him, and the Court refused to grant a *certiorari,* unless a special ground were laid for it. If the assertion in that case had been wholly innocent the Court would not have hesitated a moment. How, indeed, an indictment is that it was merely a private injury; but that is no answer to an action. And if a man will wickedly assert that which he knows to be false, and thereby draws his neighbor into a heavy loss, even though it be under the specious pretence of serving his friend, I say *ausis talibus istis non jura subserviunt.*

Ashhurst, J. The objection in this case, which is to the third count in the declaration, is that it contains only a bare assertion, and does not state that the defendant had any interest, or that he colluded with the other party who had. But I am of opinion that the action lies notwithstanding this objection. It seems to me that the rule laid down by Croke, J., in *Bayly* v. *Merrel,* 3 Bulstr. 95, is a sound and solid principle, namely, that fraud without damage, or damage without fraud, will not found an action; but where both concur an action will lie. The principle is not denied by the other judges, but only the application of it, because the party injured there, who was the carrier, had the means of attaining certain knowledge in his own power, namely, by weighing the goods; and therefore it was a foolish credulity, against which the law will not relieve. But that is not the case here, for it is expressly charged that the defendant knew the falsity of the allegation, and which the jury have found to be true; but *non constat* that the plaintiffs knew it, or had any means of knowing it, but trusted to the veracity of the defendant. And many reasons may occur why the defendant might know that fact better than the plaintiffs; as if there had before this event subsisted a partnership between him and Falch which had been dissolved; but at any rate it is stated as a fact that he knew it. It is admitted that a fraudulent affirmation, when the party making it has an interest, is a ground of action, as in *Risney* v.

Selby, which was a false affirmation made to a purchaser as to the rent of a farm which the defendant was in treaty to sell to him.

LORD KENYON, C. J. I am not desirous of entering very fully into the discussion of this subject, as the argument comes to me quite exhausted by what has been said by my brothers. But still I will say a few words as to the grounds upon which my opinion is formed. All law stands on the best and broadest basis which go to enforce moral and social duties. Though, indeed, it is not every moral and social duty the neglect of which is a ground of an action. For there are, which are called in the civil law, duties of imperfect obligation, for the enforcing of which no action lies. There are many cases where the pure effusion of a good mind may induce the performance of particular duties, which yet cannot be enforced by municipal laws. But there are certain duties, the non-performance of which the jurisprudence of which this country has made the subject of a civil action. And I find it laid down by the Lord Ch. B. Comyns (Com. Dig. tit. *Action upon the Case for a Deceit,* A. 1), that, "an action upon the case for a deceit lies when a man does any deceit to the damage of another." He has not, indeed, cited any authority for his opinion; but his opinion alone is of great authority, since he was considered by his contemporaries as the most able lawyer in Westminster Hall. Let us, however, consider whether that proposition is not supported by the invariable principle in all the cases on this subject. In 3 Bulstr. 95, it was held by Croke, J., "that fraud without damage, or damage without fraud, gives no cause of action; but where these two do concur, there an action lieth." It is true, as has already been observed, that the judges were of opinion in that case that the action did not lie on other grounds. But consider what those grounds were. Dodderidge, J., said: "if we shall give way to this, then every carrier would have an action upon the case; but he shall not have any action for this, because it is merely his own default that he did not weigh it." Undoubtedly, where the common prudence and caution of man are sufficient to guard him, the law will not protect him in his negligence. And in that case, as reported in Cro. Jac. 386, the negligence of the plaintiff himself was the cause for which the Court held that the action was not maintainable. Then, how does the principle of that case apply to the present? There are many situations in life, and particularly in the commercial world, where a man cannot by any diligence inform himself of the degree of credit which ought to be given to the persons with whom he deals; in which cases he must apply to those whose sources of intelligence enable them to give the information. The law of prudence leads him to apply to them; and the law of morality ought to induce him to give the information required. In the case of Bulstrode, the carrier might have weighed the goods himself; but in this case the plaintiffs had no means of knowing the state of Falch's credit but by an application to his neighbors. The same observation may be made to the cases cited by the defendant's counsel respecting titles to real property. For

a person does not have recourse to common conversation to know the title of an estate he is about to purchase; but he may inspect the title deeds; and he does not use common prudence if he rely on any other security. In the case of Bulstrode, the Court seemed to consider that *damnum* and *injuria* are the grounds of this action; and they all admitted that, if they had existed in that case, the action would have lain there; for the rest of the judges did not controvert the opinion of Croke, J., but denied the application of it to that particular case. Then it was contended here that the action cannot be maintained for telling a naked lie; but that proposition is to be taken *sub modo*. If, indeed, no injury is occasioned by the lie, it is not actionable; but if it be attended with a damage, it then becomes the subject of an action. As calling a woman a whore, if she sustain no damage by it, is not actionable; but if she lose her marriage by it, then she may recover satisfaction in damages. But in this case the two grounds of the action concur; here are both the *damnum et injuria*. The plaintiffs applied to the defendant, telling him that they were going to deal with Falch, and desiring to be informed of his credit, when the defendant fraudulently, and knowing it to be otherwise, and with a design to deceive the plaintiffs, made the false assertion which is stated on the record, by which they sustained a considerable damage. Then, can a doubt be entertained for a moment but that this is injurious to the plaintiffs? If this be not an injury, I do not know how to define the word. Then, as to the loss; this is stated in the declaration, and found by the verdict. Several of the words stated in this declaration, and particularly *fraudulenter,* did not occur in several of the cases cited. It is admitted that the defendant's conduct was highly immoral and detrimental to society. And I am of opinion that the action is maintainable on the grounds of deceit in the defendant, and the injury and loss to the plaintiffs.

Rule for arresting the judgment discharged.

Until this decision the editor has found no case where an action of deceit was maintained except against a party to the contract induced thereby. Indeed it may be said that no such action had theretofore been maintained except against a vendor. *Baily* v. *Merrell,* 3 Bulstrode 94 (1615), an action of deceit brought by a carrier against the owner of goods carried for falsely stating their weight, whereby, his cart being overweighted, two of his horses were killed, went against the plaintiff because he could readily have discovered the falsity of the statement, and, while Croke, J., said that where fraud and damage concur an action lies, Haughton, J., is of the opinion that the deceit must be "parcel of the bargain."

No action lay even on a simple warranty against any one but a vendor. If any other, even a servant, gave a warranty under seal an action of covenant lay, but otherwise the vendee had no remedy. XI Edw. IV 6 pl. 10 (1471).

As late as *Roswell* v. *Vaughan,* Cro. Jac. 196 (1607), the warranty, or affirmance of title by one in possession, must be given or made at the time of the sale and be part of it and not prior to it though operating as an inducement thereto; "in an action of deceit in the case of a bargain with a warranty, if the vendor traverses the bargain, this affects the whole matter," II Edw. IV pl. 6 (1471). Until *Leakins* v. *Clissel,* 1 Siderfin 146 (1654), no action of deceit seems to have lain except upon a warranty expressed or implied in the sale of goods by one in possession thereof (42 Ass. pl. 8. Hearnes Pleader

224), or where the vendor by statute was required, as were vintners and victuallers, to sell only sound goods, 7 Hen. IV 14 pl. 19 (1406), 9 Hen. VI 53 pl. 37 (1430), XI Edw. IV 6 pl. 10 (1471).

In 9 Hen. VI pl. 53, counsel for the plaintiff cites a case then lately decided in the King's Bench, "where one sold a piece of woolen cloth, knowing it to be raw and not well pulled; and this was adjudged good without warranty," but it was at once pointed out "that the writ was *warrantizando*, etc."

SECTION 1.

Falsity of Statement.

ATWOOD *v.* CHAPMAN.

Supreme Judicial Court of Maine, 1877. 68 *Me.* 38.

DANFORTH, J. This is an action to recover damages for an alleged deceit in relation to the title to certain lands conveyed by quitclaim deed from the defendant to the plaintiff. It is before us upon exceptions to the exclusion of certain testimony offered, and to the order of a nonsuit upon the testimony.

(After discussing the first count which alleged that the defendant had falsely stated that he had a good title.) The second count is more full, and though the cause of action may not be stated with entire accuracy, it is, perhaps, sufficiently so to enable us rightly to understand the "person and case" as presented by the testimony.

In this count the cause of complaint is that the defendant falsely stated his title to be good, and fraudulently concealed a material fact connected with it, which rendered it defeasible and subsequently defeated it, whereby the plaintiff took nothing by his deed. The direct representation of the title is the same as in the first count, and standing alone, the same suggestions will apply. But taken in connection with the alleged concealment, another and a very different question is presented. It may also be true that the concealment alleged, by itself alone, might not be a cause of action. The rule of caveat emptor applies as well to real as to personal property. But this rule does not authorize deception in what is said or unsaid. If a person makes representations as to quality or title he is to speak the truth, or if he is placed or places himself in a position where his silence will convey a false impression, his suppression of the truth will be as much a fraud as a false statement. Hence, whether the withholding of a fact is fraudulent must depend upon the accompanying circumstances.

The testimony shows that the defendant's title to the land sold depended upon a judgment of this court, upon which an execution issued and was levied upon one parcel, while the other as an equity of redemption was sold on the same execution. Within a year from the recovery of the judgment a petition for a review of the action was commenced, and was pending in court at the time of the convey-

ance in question. Of this petition the defendant had knowledge, as he appeared as counsel for the respondent. The final result of this petition was the entire reversal of the judgment. To one parcel of land the defendant had a deed from the officer, to the other a deed from the judgment creditor. The fact concealed from the plaintiff was the pendency of this petition for review. Was it the duty of the defendant to make it known? We think this question must be answered in the affirmative.

The testimony shows that the defendant had this knowledge while the plaintiff had not, and such was its nature and the profession of the two men, that it may with propriety be said to have been exclusively with the defendant; and, for the same reasons, as well as from other testimony, the jury would have been fully justified in the conclusion that the purchaser relied upon the seller to communicate all such facts.

But the testimony goes further than this. The defendant put himself in the position that by withholding the fact he must almost necessarily have conveyed a false impression. He not only stated that his title was good but he gave its origin and history, producing the papers to confirm it.

If he gives any fact he must give all the qualifications of that fact, otherwise he fails to give a true statement. When he says his title is good, and withholds an important fact which tends to impair it, he states more than the truth will authorize. When he produces a judgment from a court of competent jurisdiction with no apparent defect in it, as the foundation of his title, the plaintiff certainly had a right to understand him as asserting that, at least so far as he knew, there was no infirmity connected with that judgment, no existing fact growing out of it, which might destroy it as a muniment of title.

Exceptions sustained.[1]

Appleton, C. J., Walton, Dickerson, Barrows, and Peters, JJ., concurred.

[1] Mere non-disclosure of material facts, however morally censurable, however that non-disclosure might be a ground in a proper proceeding at a proper time for setting aside an allotment or a purchase of shares, would in my opinion form no ground for an action in the nature of an action for misrepresentation. There must, in my opinion, be some active misstatement of fact, or, at all events, such a partial and fragmentary statement of fact, as that the withholding of that which is not stated makes that which is stated absolutely false." Cairns, L. C., in *Peek* v. *Gurney*, L. R. 6 H. L. 377.

Accord: Burns v. *Dockray*, 156 Mass. 135 (1892), defendant asserted that his title was good without disclosing the fact known to him that one of the prior grantors was reputed to be insane. *Newell* v. *Randall*, 32 Minn. 171 (1884), a merchant who in order to obtain credit stated that he had assets to the amount of $3,000, without stating that against this he owed $2,100, was guilty of active misrepresentation, not mere passive non-disclosure; *Allen* v. *Addington*, 7 Wend. 9 (N. Y. 1831), defendant in an effort to enable his debtor to obtain credit, stated facts tending to show him to be worthy thereof, suppressing facts to the contrary known by him; *Boyd Exrs.* v. *Browne*, 6 Pa. 310 (1847); *Kidney* v. *Stoddard*, 7 Metc. 252 (Mass. 1843), defendant in giving a letter of recommendation to his son, who desired to purchase goods of the plaintiff, failed to state that the lad was under twenty-one years of

age; *Lobdell* v. *Baker,* 1 Metc. 193 (Mass. 1840), the defendant put in circulation a note known by him to be endorsed by a minor, without disclosing the fact of the endorser's minority. In *Rheem* v. *Naugatuck Wheel Co.,* 33 Pa. 356 (1859), it was held that a statement that the defendant had endorsed for a person seeking credit from the plaintiff and would do so again without disclosing that when he did endorse for $800, he required a conveyance of half that person's property and a judgment of $1,000 as security, was actionable only if he did not when he made the statement believe such person worthy of credit, which was a matter for the jury; but see Lord Kenyon in *Burton* v. *Loyd,* 3 Esp. 207 (1802), to the effect that when a character was asked of any man in trade, to whom the party inquiring was about to give credit, all the circumstances within the person's knowledge ought to be stated and the party left to judge for himself, whether he would give credit or not.

But see *Potts* v. *Chapin,* 133 Mass. 276 (1882), in which it was held that statements that A had always paid his notes at maturity, were not fraudulent though their maker knew that A's methods of business were highly irregular and that his notes had been met by extensions.

It is fraud to take advantage of a misconstruction known to have been put in one's statements, even if plain and unambiguous, *Busch* v. *Wilcox,* 82 Mich. 315 (1890), p. 333. In *Degman* v. *Mason County,* 15 Ky. L. 876 (1894), a president of a turnpike road, who had as such demanded and received payment from the county for building its road, based on what he knew to be an erroneous estimate made by the County Commissioners of the work done, was held personally liable therefor.

"One who has made a statement, true, or honestly believed to be so when made, is bound to communicate any change of condition which falsifies it or, upon discovery of its original falsity, is bound to correct it, unless the person to whom it is made has already acted in reliance upon it or by lapse of time or change of circumstances has no longer any right to so act"; Lord Blackburn in *Brownlie* v. *Campbell,* L. R. 5 A. C. 925 (1880), p. 950; *Atlas Shoe Co.* v. *Bechard,* 102 Maine 197 (1906); but see *Reid, Murdoch & Co.* v. *Kempe,* 74 Minn. 474 (1898), denying the existence of any duty on the part of a merchant to communicate to a commercial agency any change in his financial condition which falsified a rating, correct when originally given by it.

A false representation can be made as well by actions as by words, *People* v. *Clark,* 10 Mich. 310 (1862); *Croyle* v. *Moses,* 90 Pa. 250 (1879), a horse, known by vendor to be a "crib biter," short hitched so as to prevent this fault from exhibiting itself.

SMITH *v.* CHADWICK.

House of Lords. L. R. 9 App. Cas. 187.

LORD BLACKBURN. I may say, though it is not necessary for the decision of the case, that I think, as a matter of law, the motive of the person saying that which he knows not to be true to another with the intention to lead him to act on the faith of the statement is immaterial. The defendants might honestly believe that the shares were a capital investment, and that they were doing the plaintiff a kindness by tricking him into buying them. I do not say this is proved, but if it were, if they did trick him into doing so, they are civilly responsible as for a deceit. And if with intent to lead the plaintiff to act upon it, they put forth a statement which they know may bear two meanings, one of which is false to their knowledge, and thereby the plaintiff putting that meaning on it is misled, I do not think they can escape by saying he ought to have put the other. If they palter with him in a double sense, it may be that they lie

like truth; but I think they lie, and it is a fraud. Indeed, as a question of casuistry, I am inclined to think the fraud is aggravated by a shabby attempt to get the benefit of a fraud, without incurring the responsibility. But I do not think there is any case made out against the defendants of that sort.

SECTION 2.

Defendant's Intent and Motive.

FOSTER *v.* CHARLES.

Court of Common Pleas, 1830. 6 *Bingh.* 396; 7 *Bingh.* 105.

At the trial before Tindall, C. J., London sittings after Michaelmas term, it appeared that in November or December, 1824, the defendant, a soap manufacturer, called in the plaintiffs, wholesale tea dealers, with whom he was on terms of intimacy, and after asking them if they did business in Manchester, said "he had a young friend for whom he was anxious to procure a commission in the tea trade at Manchester: a nice young man; who had an excellent connection there, and would be a great acquisition to any person who wanted to do business there: the defendant being on such terms with the plaintiffs, he had offered it to them before he proposed it to Smith & Co., a respectable house in the same line of business; that Smith & Co. would jump at the offer; that his friend was so excellent a young man, that he would rather trust him without security than most men with; that this young man had been doing business at Manchester for a London tea house, who could no longer execute his extensive orders; that he had an uncle at Manchester a clergyman of the Scotch Church, who could afford him great facilities in the way of business, and knew all the Scotch travellers in the trade; that defendant would like him to sell soap for defendant and his partner, but feared his other connections would not allow him time."

The plaintiffs said they had an objection to giving commissions, but the very strong recommendation the defendant had given his friend would induce them to think of it.

Accordingly, in the beginning of 1825, the plaintiffs employed James Jacque, the defendant's young friend, to do business for them on commission at Manchester. But by the middle of 1827, after repeatedly sending incorrect statements of the amount of his receipts on their behalf, he contrived to be a defaulter to them to the extent of £900 and upwards, and to involve them in bad debts to a much greater amount.

He then took the benefit of the insolvent debtors' act.

Instead of having been employed in the Manchester commission

tea trade in the year 1824, as the defendant had stated to the plaintiffs, it appeared that he had, at the recommendation of the defendant, been taken into partnership without any capital by Mr. R. C. Stewart, a warehouseman in London, in July, 1823; but great losses having been incurred in that concern, aggravated by a robbery to some amount, Mr. Stewart closed the concern and dissolved the partnership in October, 1824.

Jacque was then indebted to Stewart in the sum of £800, which he undertook by deed, dated November 13th, 1824, to pay by instalments, in two, three, and four years; but nothing was ever paid.

All this was known to the defendant, who had acted throughout for Jacque, and had negotiated the terms of the dissolution of partnership.

Letters were also put in, written by the defendant to Jacque, after the exposure of the Manchester transactions, in which the defendant exhorted Jacque to write various falsehoods to the plaintiffs with a view to the exculpation of the defendant, and to conceal from the plaintiffs his knowledge of some of the transactions at Manchester.

Tindal, C. J., told the jury to consider whether the representation complained of by the plaintiffs had ever been made, whether it was false within the knowledge of the defendant; for unless it were false within his knowledge, the action did not lie.

Upon a new trial, Tindal, C. J., told the jury that if the defendant made representations concerning Jacque, the tendency of which was to occasion loss to the plaintiffs, knowing such representations to be false, and intending thereby to benefit himself, he was guilty of fraud in the common acceptation of the term; if he had made such representations, knowing them to be false, without proposing thereby any advantage to himself, but proposing, perhaps, to benefit a third person, he was guilty of fraud in the legal acceptation of the term, and responsible to the plaintiffs for any injury resulting from such representations.

The jury, thereupon, found for the plaintiffs, damages £800; but added, "We consider there was no actual fraud on the part of the defendant, and that he had no fraudulent intention, although what he has done constituted a fraud in the legal acceptation of the term."

JONES, Serjt. Now contended that this amounted to a verdict for the defendant; and therefore moved that the verdict might be entered for him, instead of the plaintiff.

TINDAL, C. J. No sufficient ground has been laid to induce us to disturb the verdict which has been found for the plaintiff. The application arises on a misconception of what the jury have found. They first deliver a verdict for the plaintiff with damages, and then add, that in point of fact they consider the defendant had no fraudulent intention, although he had been guilty of fraud in the legal acceptation of the term.

Their attention had been drawn by me to two classes of motives

possible on the part of the defendant; first, a desire to benefit himself by making a statement which he knew to be false; secondly, a desire to benefit some third person; and I stated that, although there might be no intention on his part to obtain an advantage for himself, it would still be a fraud, for which he was responsible in law, if he made representations productive of loss to another, knowing such representations to be false.

The jury in finding that he had no intention to defraud mean only that he was not actuated by the baser motive of obtaining an advantage for himself, but that he was guilty of fraud in law by stating that which he knew to be false, and which was the cause of loss to the plaintiff.

The question, therefore, is, whether, if a party makes representations which he knows to be false, and occasions injury thereby, he is not liable for the consequences of his falsehood?

It would be most dangerous to hold that he is not.

The confusion seems to have arisen from not distinguishing what is fraud in law and the motives for actual fraud. It is fraud in law if a party makes representations which he knows to be false, and injury ensues, although the motive from which the representations proceeded may not have been bad: The person who makes such representations is responsible for the consequences; and the verdict, therefore, in this case ought not to be disturbed.

GASELEE, J. When this verdict is taken in connection with the direction of the Chief Justice, there is an end of all doubt as to the meaning of the jury, and the finding is a perfect finding. What the jury meant by actual fraud was a sordid regard to self-interest; but the legal fraud, which is sufficient to sustain the action, was complete when the intention to mislead was followed by actual injury. (The concurring opinions of Park and Bosanquet, JJ., are omitted.) Rule refused.

Accord: Leonard v. *Springer,* 197 Ill. 532 (1902); *Hanson* v. *Kline,* 136 Iowa 101 (1907); *Bean* v. *Herrick,* 12 Maine 262 (1835): *Fisher* v. *Mellen,* 103 Mass. 503 (1870); *Weber* v. *Weber,* 47 Mich. 569 (1882); *Busterud* v. *Farrington,* 36 Minn. 320 (1887).

POLHILL *v.* WALTER.

Court of King's Bench, 1832. 3 *Barnewall & Adolphus* 114.

LORD TENTERDEN, C. J., (p. 120).

In this case, in which the defendant obtained a verdict on the trial before me at the sittings after Hilary term, a rule nisi was obtained to enter a verdict for the plaintiff, and cause was shewn during the last term. The declaration contained two counts: the first stated, that a foreign bill of exchange was drawn on a person of the name of Hancorne, and that the defendant falsely, fraudulently, and deceitfully did represent and pretend that he was duly author-

ized to accept the bill by procuration, and on behalf of Hancorne, and did falsely and fraudulently pretend to accept the same by the procuration of Hancorne. It then proceeded to allege several endorsements of the bill, and that the plaintiff, relying on the pretended acceptance, and believing that the defendant had authority from Hancorne to accept, received the bill from the last endorsee in discharge of a debt; that the bill was dishonoured, and that the plaintiff brought an unsuccessful action against Hancorne. The second count contained a similar statement of the false representation by the defendant, and that he accepted the bill in writing under pretense of the procuration from Hancorne and then proceeded to describe the endorsements to the plaintiff, and the dishonour of the bill, and alleged, that thereupon it became and was the duty of the defendant to pay the bill as the acceptor thereof, but that he had not done so.

On the trial it appeared, that when the bill was presented for acceptance by a person named Armfield, who was one of the payees of the bill, Hancorne was absent; and that the defendant, who lived in the same house with him, was induced to write on the bill an acceptance as by the procuration of Hancorne, Armfield assuring him that the bill was perfectly regular, and the defendant fully believing that the acceptance would be sanctioned, and the bill paid at maturity, by the drawee. It was afterwards passed into the plaintiff's hands, and being dishonoured when due, an action was brought against Hancorne; the defendant was called as a witness on the trial of that action, and he negativing any authority from Hancorne, the plaintiff was nonsuited. I left to the jury the question of deceit and fraud in the defendant, as a question of fact on the evidence, and the jury having negatived all fraud, the defendant had a verdict, liberty being reserved to the plaintiff to move to enter a verdict, if the court should think the action maintainable notwithstanding that finding.

On the argument, two points were made by the plaintiff's counsel. It was contended, in the first place, that although the defendant was not guilty of any fraud or deceit, he might be made liable as acceptor of the bill; that the second count was applicable to that view of the case; and that, after rejecting the allegations of fraud and falsehood in that count, it contained a sufficient statement of a cause of action against him, as acceptor. But we are clearly of opinion that the defendant cannot be made responsible in that character. It is enough to say that no one can be liable as acceptor but the person to whom the bill was addressed, unless he be an acceptor for honour, which the defendant was certainly not.

This distinguishes the present case from that of a pretended agent, making a promissory note, (referred to in Mr. Roscoe's Digest of the Law of Bills of Exchange, note 9. p. 47.) or purchasing goods in the name of a supposed principal. And, indeed, it may be well doubted if the defendant, by writing this acceptance, entered into any contract or warranty at all, that he had authority to do so; and if he did, it would be an insuperable objection to an action as

on a contract by this plaintiff, that at all events there was no contract with, or warranty to, him.

It was in the next place contended that the allegation of falsehood and fraud in the first count was supported by the evidence; and that, in order to maintain this species of action, it is not necessary to prove that the false representation was made from a corrupt motive of gain to the defendant, or a wicked motive of injury to the plaintiff: it was said to be enough if a representation is made which the party making it knows to be untrue, and which is intended by him, or which, from the mode in which it is made, is calculated, to induce another to act on the faith of it, in such a way that he may incur damage, and that damage is actually incurred. A wilful falsehood of such a nature was contended to be, in the legal sense of the word, a fraud; and for this position was cited the case of *Foster* v. *Charles,* 6 Bing. 396, which was twice under the consideration of the Court of Common Pleas, and to which may be added the recent case of *Corbet* v. *Brown,* 8 Bing. 33. The principle of these cases appears to us to be well founded, and to apply to the present.

It is true that there the representation was made immediately to the plaintiff, and was intended by the defendant to induce the plaintiff to do the act which caused him damage. Here the representation is made to all to whom the bill may be offered in the course of circulation, and is, in fact, intended to be made to all, and the plaintiff is one of those; and the defendant must be taken to have intended, that all such persons should give credit to the acceptance, and thereby act upon the faith of that representation, because that, in the ordinary course of business, is its natural and necessary result.

If, then, the defendant, when he wrote the acceptance, and, thereby, in substance, represented that he had authority from the drawee to make it, knew that he had no such authority, (and upon the evidence there can be no doubt that he did,) the representation was untrue to his knowledge, and we think that an action will lie against him by the plaintiff for the damage sustained in consequence.

If the defendant had had good reason to believe his representation to be true, as, for instance, if he had acted upon a power of attorney which he supposed to be genuine, but which was, in fact, a forgery, he would have incurred no liability, for he would have made no statement which he knew to be false: a case very different from the present, in which it is clear that he stated what he knew to be untrue, though with no corrupt motive.

It is of the greatest importance in all transactions, that the truth should be strictly adhered to. In the present case, the defendant no doubt believed that the acceptance would be ratified, and the bill paid when due, and if he had done no more than to make a statement of that belief, according to the strict truth, by a memorandum appended to the bill, he would have been blameless. But then the bill would never have been circulated as an accepted bill, and it was only in consquence of the false statement of the defendant that he actually had authority to accept, that the bill gained

its credit, and the plaintiff sustained a loss. For these reasons we are of the opinion that the rule should be made absolute to enter a verdict for the plaintiff.

Rule Absolute.[1]

[1] See, however, *Tackey* v. *McBain*, L. R. 1912, A. C. 186 (Privy Council), where the defendant, secretary of a Sumatra Company, resident at Shanghai, had sold stock thereof short. He received a cable that oil had been found in large quantities. He then directed his broker to cover his short contract and buy additional stock. The broker having covered the short contract but not yet having bought additional stock, another broker came to the defendant and plied him with questions which the defendant evaded, in order, as he said, to avoid making public confidential information. Finally driven into the corner, he told the broker that " the company had received no news, good, bad or indifferent." This having been spread broadcast by the broker, the plaintiff sold his stock. It was held that an instruction was correct which left to the jury as decisive the question whether he made the statement to induce holders to sell their stock or because "he may have thought it necessary to keep this matter close for the interests of the company."

SECTION 3.

Promises and Statements of Intention.

ANONYMOUS.

Y. B. XI. Edw. IV. 6.

BRIAN, J. If a man sells me seed and warrants to me that it is good and it prove bad, or that it be seed of a certain country and it be not so, I shall have an action of deceit, because I could not know but he who sold it might well know it, but if he should warrant to me that the seed should grow, such warranty is void for it is not in him to warrant that but it is in God. CHOKE, J. If I sell a horse and warrant that he shall carry thirty leagues in a day, if he cannot do it, the warranty is void, because the warranty must be of a thing existing at the time of the warranty, for one cannot warrant a thing which will happen in the future.

SAWYER *v.* PRICKETT AND WIFE.

Supreme Court of the United States, 1875. 86 *U. S.* (18 *Wallace*) 146.

Appeal from the Circuit Court for the Northern District of Illinois.

Ephraim Sawyer filed a bill in the court below against Henry Prickett and wife, to foreclose a mortgage given by them, on the 1st of September, 1857, to the Fox River Valley Railroad Company, to secure the payment of a note for $2,000 at ten years from its date, and by the company assigned to him, the complainant. The answer

set up as a defence, that at the date mentioned Prickett gave the note as described to secure the payment of a subscription to the stock of the railroad company mentioned, and that this subscription was obtained by fraud and deceit; and so that the note and the mortgage were void.

The court below dismissed the bill for foreclosure, and the complainant brought the case here.

Mr. Justice Hunt delivered the opinion of the court.

The law gives a different effect to a representation of existing facts, from that given to a representation of facts to come into existence. To make a false representation the subject of an indictment, or of an action, two things are generally necessary, viz., that it should be a statement likely to impose upon one exercising common prudence and caution, and that it should be the statement of an existing fact. A promissory statement is not, ordinarily, the subject either of an indictment or of an action. The law also gives a different effect to those promissory statements based upon general knowledge, information, and judgment, and those representations which, from knowledge peculiarly his own, a party may certainly know, will prove to be true or false.[1] It becomes necessary to classify, to some extent, the representations alleged to have been made in the present case.

(The alleged representations of existing facts are then set forth. These in a later portion of the opinion are held to have been either truthful or not proven to have been made, or if made, to have been made by any one who was an agent of the company, or to have been relied upon by the plaintiff.)

2nd. The promissory representations, as might be expected, cover a larger space. Thus it is said to have been represented, that the farms and lands of the contributors would be greatly enhanced in value; that the wheat market of Milwaukee was a better market than that of Chicago, and that they would be able to command five cents more per bushel for their wheat after the road should be built; also that the road should be constructed and equipped within one year; also that the company would pay large dividends upon its capital stock; that where farmers and others became subscribers for stock, and gave their mortgages for the same on long time, drawing eight per cent. interest, that the company, from its dividends, would pay the interest on such notes, and that the balance of the dividends, after paying the interest, would be sufficient to pay the principal of said notes when the same should become payable; and the defendant testifies that it was represented to his wife that it would be an everlasting benefit to her to sign the mortgage; that the railroad would

[1] Even a prophecy as to future events, if made by one having peculiar knowledge of fact making its fulfilment impossible, is actionable, *French* v. *Ryan*, 104 Mich. 625 (1895); statements of probable earnings so made held actionable; *Murray* v. *Tolman*, 162 Ill. 417 (1896); *Hedin* v. *Minneapolis Medical Institute*, 62 Minn. 146 (1895), statements that an obviously incurable disease could be cured made to induce plaintiff to undergo an expensive treatment, held actionable.

probably make thirty per cent., and that it would give her and her family six hundred dollars a year always.

It is scarcely credible that Prickett should have believed that the persons making representations like these, intended to bind themselves to their fulfilment. That Prickett may have believed the prophecies, is possible; that he may have understood the makers to believe them is possible, as it is possible the makers did believe them. But that Prickett believed the makers to have undertaken for the accomplishment of the results promised, is not to be believed. It is contradicted by all the facts of the case. A man of common intelligence, or of ordinary prudence and caution could not have so believed.

He did not ask that they should enter into such engagements. He did not stipulate that his obligation to pay his note and mortgage should depend upon the realization of the rich promises made to him. On the contrary he made his subscription, gave his note and mortgage to secure its payment, and relied upon the success of the enterprise to indemnify and to enrich him. If there were dividends to pay the interest, he would not be required to pay it. If there were dividends applicable to the payment of the principal, the principal would also be discharged. If there were no dividends, or dividends to pay a portion only of his obligation, he must have known and understood that he had pledged his farm to the payment of the residue. If his present theory is correct, instead of giving security to them, Prickett should have required a bond and mortgage from the company, as the actual responsibility for results would rest on the company alone. We are satisfied that such representations, if made, were not relied upon by Prickett; that they did not form the inducement and consideration of his subscription.

It is alleged that the representation was made that the road should be constructed and equipped, and in full operation, within one year from the date of the giving of the note and mortgage. Such a promise by parties having the means of knowledge of its falsity, from their position as managers and directors of a railroad, might in law stand upon a different basis. We do not examine this point, as there is no evidence of such statement by any one professing to have knowledge, or that there was knowledge of its falsity, if made. Prickett testifies that Conover stated that the rolling stock would be on in eighteen months. His allegation in his answer and his evidence do not agree. It is not proved that Conover was authorized to make the statement, or that he did not believe it to be true.

It is difficult to see how an action or a defense can be based upon promissory representations of the character we have considered, and we are of the opinion that they were the expressions of hopes, expectations, and beliefs, and that neither party understood, or had the right to understand, that they were to be received as statements of facts which any one was bound to make good, or upon which the validity of the subscription should depend.[2]

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[2] *Pedrick* v. *Porter*, 5 Allen 324 (Mass. 1862), statements as to probable profits; *Taylor* v. *Commercial Bank*, 174 N. Y. 181 (1903), p. 184; defendant

EDGINGTON *v.* FITZMAURICE.

1882. *Law Reports, 29 Chancery Division,* 459.

This action was brought by Edgington against Fitzmaurice et als., directors; Hunt the secretary and Hanley the manager of the Army and Navy Provision Market (Limited), asking for the repayment by them of £1,500, advanced by the plaintiff on the debentures of the Company on the grounds that he was induced to advance the money by the fraudulent misrepresentations of the defendants. The plaintiff was a shareholder in the Company and received a prospectus or circular issued by the order of the Board of Directors inviting subscriptions for debenture bonds, which contained the statement that the Society purchased a valuable property known as "Newman's Yard," and had expended on the property £20,679, and in fittings £2,943. The objects for which the issue of debentures was made were stated to be:

(1) To enable the society to complete the present alterations and additions to the buildings and to purchase their own horses and vans, whereby a large saving will be effected in the cost of transport.

(2) To further develop the arrangements at present existing for the direct supply of cheap fish from the coast, which are still in their infancy.

The prospectus also made certain statements in respect to a mortgage of £21,500 but was silent as to a second mortgage of £5,000.

The plaintiff took the debenture bonds to the amount of £1,500 and testified that he understood the prospectus as holding that the debentures would be a charge upon the property, and that he would not have taken them unless he had understood they were such a charge. He also said that he relied on the fact that the Company wanted the money for the objects stated in the prospectus.[1] At the hearing before Denman, J., plaintiff offered evidence tending to show that the Company was in difficulties and that the real

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alleged to have induced plaintiff to sell goods to a third person by statements that the United States government would pay such person a certain sum claimed to be due under a contract with it; *McComb* v. *C. R. Brewer Lumber Co.*, 184 Mass. 276 (1903).

Mere statements of intention though not carried out, are not fraudulent, *Richter* v. *Irwin*, 28 Ind. 26 (1867); nor do they work an estoppel, *Jordan* v. *Money*, 5 H. L. C. 185 (1854), pp. 214-215.

See as to such statements as foundation for criminal charge of obtaining goods under false pretenses, *Ranney* v. *People*, 22 N. Y. 413 (1860); *Glackan* v. *Commonwealth*, 3 Metc. 232 (Ky. 1860); *State* v. *Magee*, 11 Ind. 154 (1858).

[1] That the plaintiff may testify to the effect of the defendant's statements upon his mind and conduct is expressly decided in *Pease* v. *Brown*, 104 Mass. 291 (1870); *Weaver* v. *Cone*, 174 Pa. 104 (1896).

object of the Directors in issuing the debentures was to pay off pressing liabilities, including a second mortgage of £5,000 not mentioned in the prospectus.

Sir F. Herschell, S. G., Rigby, Q. C., and Willis Bund, for plaintiff.

Davey, Q. C., W. W. Karslake, Q. C., and J. Kaye, for Fitzmaurice.

There was no misrepresentation of any fact, and the Directors merely stated their intention as to the money, which of course they might alter. There is every difference between the two: *Maddison v. Alderson,* 8 App. Cases 467. Unless it amounts to a contract, a mere statement that you will do something is of no effect: *Jordan* v. *Money,* 5 H. L. C. 185, and if it was a contract then it was with the Company, and the Directors cannot be sued: *Ferguson* v. *Wilson,* L. R. 2 Chan. 77.

Crossley, Q. C., J. Cutler, S. Hall, A. Young, S. Brice, and F. A. Lewin for other defendants.

Sir F. Herschell, in reply. An allegation of intention may be fraudulent: *Ex parte Whittaker,* L. R. 10 Chan. 446.

Denman, J., gave judgment for the plaintiff against Fitzmaurice, et als. Directors of the Company, but dismissed the action against Hunt and Hanley, secretary and manager. He found that the statements in regard to the mortgage of £21,500 were false and fraudulent, and that the plaintiff was thereby materially induced to purchase the debentures. He also found that the defendants did not intend to apply any substantial part of the sum raised by the sale of the debentures to the alteration of their property and the improvement of their facilities but intended to apply it to the liquidation of their pressing liabilities.

From this judgment, the defendants, Fitzmaurice, et als. and the other Directors of the Company appealed.

Davey, Q. C., Crossley, Q. C., and *A. Young* for the defendants.

Sir F. Herschell, S. G., Rigby, Q. C., and *Willis Bund* for the plaintiff.

It is contended that the objects for which the money was required are immaterial. This is a fallacy. Whether the plaintiff expected to have the charge or not, it made a great difference whether the Company was in a position to expend the money raised in improving its premises and developing its business, or would have to spend the greatest part in paying off pressing liabilities. In fact as the Directors well knew, the Company was in financial difficulties and the money was needed to relieve them from pressing liabilities.

Cotton, L. J., after holding that there was nothing in the prospectus justifying the plaintiff in believing that the debentures were a charge upon the property discusses the statement as to the mortgage for £21,500 and the omission to state the existence of the other mortgage of £5,000. "As regards the first mortgage the defendants say that they had reasonable grounds for making the statement which they made, and as to the second mortgage they say that they did not mean to imply that there was no other mortgage affecting the

company's property. But it is not necessary to give any decision respecting these statements because, giving credit to the defendants for having made them fairly, there are other statements which follow, which, in my opinion, cannot be justified. I allude to statements respecting the objects for which the loan was effected:—(His Lordship read the passage from the prospectus in which the objects of the issue of the debentures were stated, and proceeded:—) It was argued that this was only the statement of an intention, and that the mere fact that an intention was not carried into effect could not make the defendants liable to the plaintiff. I agree that it was a statement of intention, but it is nevertheless a statement of fact, and if it could not be fairly said that the objects of the issue of the debentures were those which were stated in the prospectus the defendants were stating a fact which was not true; and if they knew that it was not true, or made it recklessly, not caring whether it was true or not, they would be liable. Did the defendants know or believe that the company was in a flourishing condition? I think they must have thought that it would turn out well and that the loan could be paid back, for they had shewn their confidence in the company by advancing money of their own. But the question is whether they did not make a statement of a fact which was not correct, and which they knew to be not correct when they stated the objects for which the loan was asked. I do not say that it was necessary to shew that they intended that all the money raised should be applied in carrying out those particular objects, but certainly they ought to shew that it was to be spent in improving the property and business of the company. What is the fact? The financial state of the company was openly discussed at the board meetings, at which the defendants were all present, and it is clear that they were in great financial difficulties at the time. Although I should not, as I have said, have held the defendants liable merely for not referring to the second mortgage in the prospectus, yet the existence of that mortgage was strong evidence of their financial difficulties; and, considering all the other evidence, and the admissions of the defendants in their cross-examination, I cannot doubt that the real object of the issue of the debentures was to meet the pressing liabilities of the company and not to improve the property or develop the business of the company. I cannot but come to the conclusion that however hopeful the directors may have been of the ultimate success of the company, this statement was such as ought not to have been made. It was said, How could those who advanced the money have relied on this statement as material? I think it was material. A man who lends money reasonably wishes to know for what purpose it is borrowed, and he is more willing to advance it if he knows it is not wanted to pay off liabilities already incurred.

A part of the opinion of Cotton, L. J., and the concurring opinion of Fry, L. J., is omitted.

Bowen, J. (After discussing two statements in regard to the mortgages and expressing his opinion that it does not appear clear to him that these statements were fraudulently made.) "But when

we come to the third alleged misstatement I feel that the plaintiff's case is made out. I mean the statement of the objects for which the money was to be raised. These were stated to be to complete the alterations and additions to the buildings, to purchase horses and vans, and to develop the supply of fish. A mere suggestion of possible purposes to which a portion of the money might be applied would not have formed a basis for an action of deceit. There must be a misstatement of an existing fact: but the state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else. A misrepresentation as to the state of a man's mind is, therefore, a misstatement of fact.[2] Having applied as careful consideration to the evidence as I could, I have reluctantly come to the conclusion that the true objects of the defendants in raising the money were not those stated in the circular. I will not go through the evidence, but looking only to the cross-examination of the defendants, I am satisfied that the objects for which the loan was wanted were misstated by the defendants, I will not say knowingly, but so recklessly as to be fraudulent in the eye of the law.

Then the question remains—Did this misstatement contribute to induce the plaintiff to advance his money? Mr. Davey's argument has not convinced me that they did not. He contended that the plaintiff admits that he would not have taken the debentures unless he had thought they would give him a charge on the property, and therefore he was induced to take them by his own mistake, and the misstatement in the circular was not material. But such misstatement was material if it was actively present to his mind when he decided to advance his money. The real question is, what was the

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[2] *Accord: Jones* v. *Crawford,* 107 Ga. 318 (1899); statement made to married woman in order to induce her to sign promissory note, that the defendant, the payee, "did not intend to use it, so as to make her liable," held actionable, payee having transferred note to innocent purchaser for value; *Bowe* v. *Gage,* 127 Wis. 245 (1906); statement by an owner of land, that he had decided to withdraw it from sale, whereby he induced an agent who had its sale in charge, to accept a small sum for his past services and forego his right to commissions, held actionable; *Sweet* v. *Kimball,* 166 Mass. 332 (1896); defendant, who induced plaintiff, his insolvent debtor, to come from Providence to Boston by promising to agree to a compromise and to induce other creditors to do the same, and instead, caused his arrest, held liable in an action of deceit for the amount paid by plaintiff to secure his release; *Lynch* v. *Hall,* 41 Conn. 238 (1874), defendant, who had induced the plaintiff to pay money to him by the false statement that he would pay it over to a third party, held liable in deceit; *Adams* v. *Anderson,* 4 H. & J. (Md.) 558 (1819); *Price* v. *Read,* 2 H. & G. 291 (Ky. 1846); and *Oldham and Kerr* v. *Bentley,* 6 B. Mon. (Ky.) 428 (1846); all cases where the plaintiff was induced to sell his slaves on the defendant's assurance that they would not be resold outside the state. And see *Wolter's Exrs.* v. *Fidelity Trust Company,* 73 N. J. L. 57 (1905), and *contra, Dickinson* v. *Atkins,* 100 Ill. App. 401 (1902), statements inducing plaintiff to sign a note by representations that the proceeds would be used to pay off overdue taxes and interest on his property, held not actionable; *President of Hartsville University* v. *Hamilton,* 34 Ind. 506 (1870); and see the curious case of *Bennett* v. *McIntire,* 121 Ind. 231 (1889).

state of the plaintiff's mind, and if his mind was disturbed by the misstatements of the defendants, and such disturbance was in part the cause of what he did, the mere fact of his also making a mistake himself could make no difference.[8] It resolves itself into a mere question of fact. I have felt some difficulty about the pleadings, because in the statement of claim this point is not clearly put forward, and I had some doubt whether this contention as to the third misstatement was not an afterthought. But the balance of my judgment is weighed down by the probability of the case. What is the first question which a man asks when he advances money? It is, what is it wanted for? Therefore I think that the statement is material, and that the plaintiff would be unlike the rest of his race if he was not influenced by the statement of the objects for which the loan was required. The learned Judge in the Court below came to the conclusion that the misstatement did influence him, and I think he came to the right conclusion.

The opinion of Fry, L. J., is omitted.

Appeal Dismissed.

GALLAGER AND MASON *v.* BRUNEL.

Supreme Court of New York, 1826. 6 *Cowen*, 346.

CURIA, per WOODWORTH, J. The ground of complaint is, that the defendant fraudulently and deceitfully represented and held out to the plaintiffs, that the defendant was willing to, and would endorse the note of Castro & Henriques, in case the plaintiffs should sell and deliver the cotton; but that in fact he was not willing, and did not intend, nor has he endorsed the note, whereby the plaintiffs are injured. The second count alleges that Castro & Henriques were, at the time of the purchase, in bad credit, which the defendant knew; that intending to defraud the plaintiffs, and enable Castro & Henriques to obtain possession of the cotton, he represented, that if the plaintiffs would sell and deliver, he would become answerable by endorsing for the purchasers; that the plaintiffs did sell and deliver the cotton; that the defendant did not intend, nor has he made himself answerable, or paid; nor has any other person paid and satisfied the plaintiffs, whereby they were deceived, and have sustained damage.

The attempt here, is to sustain the action, not on a contract, which, if in writing, might perhaps be obligatory; but on a deceitful representation. If the promise was in writing, I perceive no objection to its validity, inasmuch as a good consideration is stated, viz., that if the plaintiffs would sell and deliver the defendant would endorse. If, then, there is a binding contract existing between the parties, and on which the defendant is liable, I apprehend it is not competent for the plaintiffs to say they have an election to turn this

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[8] See *Addington* v. *Allen*, post., and cases cited in the note thereto.

into an action for deceit, and recover in that form, unless the case is such as to render the party liable, not only on the contract; but, in addition, contains facts sufficient to sustain an action for deceit. For example, suppose A. represents B. to be solvent, knowing it to be false, whereby B. obtains credit; but notwithstanding this representation, the seller takes from A. his written stipulation to guarantee the payment. In this case, I perceive no object to a creditor's election of the remedy. The fraudulent representation of solvency would sustain the action for deceit. The written guaranty would support an action on the contract. It seems, therefore, immaterial here, whether the plaintiffs have or have not a demand which may be enforced in a different form. The question is, will the facts stated sustain an action for deceit?

After attentive consideration, I am inclined to think the plaintiffs are not entitled to recover. However reprehensible the conduct of the defendant may appear in a moral point of view, we cannot deny to him the protection of the common law; which does not reach cases of imperfect obligation. If this be an attempt on the part of the plaintiffs, to get rid of the statute of frauds, I can only say, the occasion justified the experiment, and calls for a patient and critical examination.

If this case is stripped of the general allegations in the declaration, of fraud and deceit, it appears to me that the gravamen is nothing more than that the defendant encouraged the plaintiffs to sell to Castro and Henriques; and, as surety, promised to endorse their notes. The intention of the party not to fulfil, has not, I believe, ever been considered among the fraudulent acts, which, in judgment of law, render a party liable. The maker of a promissory note may not, at the time, intend to make payment. On this note, the plaintiff may declare that the defendant intended to deceive and defraud; but it is mere matter of form, sanctioned by precedent in pleading. The maker may go farther, and on the strength of assurances to pay punctually, never intended to be performed, induce the lender to part with his money, and accept the borrower's note. All this is immoral. Still the remedy is on the contract. The law has not recognized it as the substantive ground of fraud. That no cases are to be met with in the books going the length contended for, is good evidence that the doctrine is novel, and has never been acted upon.

The general ground of liability seems to rest on the affirmation of a fact as true, which, at the time, is known to be false; and by means whereof, credit is obtained. The seller, in most cases, has not the means of ascertaining the truth at the moment. He must repose on the representation, or refuse the credit. Not so here. There was no necessity of relying on the defendant's representations, or his promise. Caution required the plaintiffs to pursue a different course; to insist that the note be drawn and endorsed pari passu with the delivery of the goods. By dispensing with this, they omitted the prudence and care which the law presumes every man will exercise in conducting his affairs. If the plaintiffs suffer, it is owing to

their negligence and misplaced confidence; for which, the law has not provided a remedy.

The general principles which govern this species of action, were ably examined in *Pasley* v. *Freeman,* (3 T. R. 51.) In that case, the defendant encouraged the plaintiff to sell goods, and fraudulently affirmed that the purchaser was a person safely to be trusted. The gravamen was the false affirmation of an existing fact; not a promise to do a future act, at the time not intended to be performed. Buller, J. observed, "the foundation of the action is fraud and deceit in the defendant, and damage to the plaintiffs. Every deceit comprehends a lie; but a deceit is more than a lie, on account of the view with which it is practiced, its being coupled with some dealing, and the injury which it is calculated to occasion to another person." It is evident what must be the species of fraud, for which the law gives redress; falsehood as to an existing fact. If, as Buller, J., observes, every deceit includes a lie, it follows that the representation, and promise of defendant are not comprised within the legal acceptation of that term. The test of a lie is, that the fact asserted is not true at the time; which cannot be predicated of the facts in this case; for, although the defendant promised with the intent not to perform, it was not then false, nor could it be. It referred to an act to be done in future. Until the defendant had refused to endorse, it could not be said he had violated his purpose.

The case of *Thompson* v. *Bond,* (1 Campb. 4), was this: the plaintiff attempted to recover in assumpsit, for services rendered to a third person. It was not denied that the defendant had solicited the plaintiff; and promised to see him paid; but it was a collateral undertaking, and not in writing. It was held, that the action could not be sustained on this ground. But, as the defendant had made a representation to the plaintiff, that he had authority from Mr. Sheridan's committee, which turned out to be false, Lord Ellenborough observed that an action might be brought for the deceitful representation. This remark proceeded on the same ground as *Pasley* v. *Freeman;* that there was a false representation of a fact.

The case of *Eyre* v. *Dunsford,* (1 East, 318,) cited by the plaintiff's counsel, was decided on the same ground. There was a material suppression of the truth; for which the defendant was held liable. The case of *Haycroft* v. *Creasy,* (2 East, 92,) turned on the ground that the representation was made bona fide, and with the belief of its truth. It has no bearing on this cause. In *Clifford* v. *Brooke,* (13 Ves. 131,) the lord chancellor puts the right to recover for a deceit, expressly on the falsehood of the fact alleged. He observes, "there must be knowledge at the time. That is sound principle; that the defendant knowing the person to be dishonest, insolvent and unworthy of trust, made the representation; and that is the subject of an action, or of a bill in equity." In the case of *Upton* v. *Vail,* (6 John. 181,) there was also a recommendation of a person, as good, when the defendant knew he was insolvent. The doctrine of *Pasley* v. *Freeman* was approved, without a sug-

gestion that the action could be maintained, when there was not the knowledge of the falsehood at the time. The cases in 13 John. 224, 325, 395, hold the same doctrine.

I am of the opinion that the defendant is entitled to judgment.

Judgment for the defendant.[1]

SWIFT *v.* ROUNDS.

Supreme Court of Rhode Island, 1896. 19 *R. I.* 527.

Trespass on the case for deceit. Certified from the Common Pleas Division on demurrer to the declaration.

July 6th, 1896. TILLINGHAST, J. This is a trespass on the case for deceit. The first count in the declaration alleges that the defendant, intending to deceive and defraud the plaintiffs, did buy of them on credit certain goods and chattels of the value of $400, the said defendant not then and there intending to pay for the same, but intending wickedly and fraudulently to cheat the plaintiffs out of the value of said goods and chattels, which said sum of $400 the defendant refuses to pay, to the plaintiffs' damage, &c. The second count, after setting out the fraudulent conduct aforesaid, alleges that the defendant thereby then and there represented that he intended to pay for said goods, but that he did not then and there intend to pay for the same, but wickedly and fraudulently intended to cheat the plaintiffs out of the value of said goods and chattels, &c.

To this declaration the defendant has demurred, and for grounds of demurrer to the first count thereof, he says, (1) that the

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[1] *Accord: Long* v. *Woodman,* 58 Maine 49 (1870), property conveyed in reliance upon promise to reconvey upon repayment of money loaned; *Union Pacific R. R.* v. *Barnes,* 64 Fed. 80 (C. C. A. 8th Circ. 1894), money paid upon promise to make good title, in neither of which was it alleged that the defendant did not intend to keep his promise when he made it, *Farrington* v. *Bullard,* 40 Barb. 512-516 (N. Y. 1863), plaintiff promised to pay debt if suit discontinued, defendant despite promise to do so pressed suit to execution; *Lexow* v. *Julian,* 21 Hun 577 (N. Y. 1880), defendant induced plaintiff to settle a dispute by promising not to dispose of his stock exchange seat without providing for payment of his debt to the plaintiff; *People* v. *Healey,* 128 Ill. 9 (1889), and *Kitson* v. *Farwell,* 132 Ill. 327 (1890), in which the defendant's intention not to keep his promise is alleged or proved; and see *Wolter's Ex.* v. *Fidelity Trust Company,* 73 N. J. L. 57 (1905), and *Smith* v. *Parker,* 148 Ind. 127 (1897). In all of these cases the plaintiff was endeavoring to recover in deceit for the loss sustained by the non-performance of a contract itself directly unenforcible; in the principal case, and in *Long* v. *Woodman,* 58 Maine 49 (1870), because not in writing as required by the statute of frauds, in *Union Pacific R. R.* v. *Barnes,* 64 Fed. 80 (C. C. A. 1894), because a parol warranty of title of land conveyed by a deed containing no such warranty, in *Julian* v. *Lexow,* because a parol promise made during negotiations leading to the execution of a written contract and in *Farrington* v. *Bullard,* 40 Barb. 512-516 (N. Y. 1863), because not based on a valid consideration being given in return for the plaintiff's promise to pay a debt which he was already bound to pay—or is trying to obtain a procedural advantage by suing in tort rather than contract, *People* v. *Healy,* 128 Ill. 9 (1889), when plaintiff was seeking to gain the right to arrest the person of defendant.

plaintiffs do not allege any false representation by the defendant; (2) that the plaintiffs do not allege that they have acted upon any false representation of the defendant; and (3) that the plaintiffs do not allege any damage suffered by them in acting upon any false representation of the defendant.

The grounds of demurrer to the second count are, (1) that the plaintiffs do not allege any false representation by the defendant as to any fact present or past, but only as to something that would happen in the future, which, if in the future it proved not to be true, would not be the subject-matter of a false representation, but simply a promise broken, and therefore not a ground of an action of deceit; (2) that the plaintiffs do not allege that they acted upon any false representation made by the defendant; and (3) that the plaintiffs do not allege that they suffered any damage by acting upon any false representation made by the defendant to the plaintiffs.

We are inclined to the opinion, after some hesitation, that the declaration states a case of deceit. Any fraudulent misrepresentation or device whereby one person deceives another, who has no means of detecting the fraud, to his injury and damage, is a sufficient ground for an action of deceit. Deceit is a species of fraud, and consists of any false representation or contrivance whereby one person overreaches and misleads another, to his hurt. And, while the fraudulent misrepresentation relied upon usually consists of statements made as to material facts, either verbally or in writing, yet it may be made by conduct as well.

In the case at bar, the declaration alleges that the defendant bought the goods in question upon credit, fraudulently intending not to pay for them but to cheat the plaintiffs out of the value thereof. By the act of buying the goods of the plaintiffs the defendant impliedly promised to pay for the same, which promise was equally as strong and binding as though it had been made in words, or even in writing. The plaintiffs had the right to rely on this promise, and to presume that it was made in good faith. It turns out, however, according to the allegations aforesaid, that it was not made in good faith, but, on the contrary, was made for the purpose of deceiving the plaintiffs into the act of parting with their goods, the defendant intending by the transaction to cheat them out of the value thereof. The fraud, then, consisted in making of the promise, in the manner aforesaid, with intent not to perform it. By the act of purchasing the goods on credit, the defendant impliedly represented that he intended to pay for them. The plaintiffs relied on this representation, which was material and fraudulent, and were damaged thereby. All the necessary elements of fraud or deceit therefore were present in the transaction. See *Upton* v. *Vail,* 6 Johns. 181; *Bartholomew* v. *Bentley,* 15 Ohio 666; Bishop Non-Contract Law, pp. 314-318; *Burrill* v. *Stevens,* 73 Maine 400; *Barney* v. *Dewey,* 13 Johns. 226; *Hubbel* v. *Meigs,* 50 N. Y. 491.

We have hesitated somewhat in arriving at the conclusion that an action of deceit will lie, upon the facts set out in the declaration, for the reason that, amongst the numerous cases of fraud and de-

ceit to be found in the books, we have not been referred to any, nor have we been able to find any, where the action of deceit was based simply on the act of buying goods on credit, intending not to pay for them. In *Lyons* v. *Briggs*, 14 R. I. 224, which was an action of deceit, Durfee, C. J., intimates, however, that deceit would lie in a case like the one before us, by the use of the following language: "It is not alleged that the buyer did not intend to pay when he bought, but only that he falsely and fraudulently asserted that he could be safely trusted." But the authorities are overwhelming to the effect that it is fraud to purchase goods intending not to pay for them, and that the vendor, upon discovering the fraud, may repudiate the sale and reclaim the property, or may sue in trover, or in some other action of tort, for the damages sustained by the fraud.[1] And this being so, we fail to see why an action of deceit, which is an action of tort, based on fraud, may not lie as well.[2] For to obtain goods on credit, intending not to pay for them, is as much a trick or device as it would be falsely to represent in words any material fact whereby the vendor should be induced to part therewith.

But the defendant's counsel contends that the alleged representation was not as to any fact present or past, but merely as to what the defendant would do in the future with reference to paying for the goods, and that to say what one intends to do is identical to saying what one will do in the future, which amounts simply to a promise; and, furthermore, that a representation of what will happen in the future, even if not realized, is not such a representation as will support this action. We do not assent to this method of reasoning. The state of a man's mind at a given time is as much a fact as is the state of his digestion. Intention is a fact; *Clift* v. *White*, 12 N. Y. 538; hence a witness may be asked with what intent he did a given act. *Seymour* v. *Wilson*, 14 N. Y. 567. A man who buys and obtains possession of goods on credit, intending not to pay for them, is then and there guilty of fraud. The wrong is fully completed and no longer exists in intention merely, and a cause of action instantly accrues thereon in favor of the vendor to recover

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[1] *Burrill* v. *Stevens*, 73 Maine 395 (1882); *Syracuse Knitting Co.* v. *Blanchard*, 69 N. H. 447 (1898)—and cases cited therein.

Contra: Smith v. *Smith, Murphy & Co.*, 21 Pa. St. 367 (1853); but in *Bughman* v. *Central Bank*, 159 Pa. St. 94 (1893), it is held even the slightest additional circumstances which tend to show artifice or false representation is sufficient to take the case out of the rule.

See the curious case of *Bennett* v. *McIntire*, 121 Ind. 231 (1889), in which it is held that misstatement of object of plaintiff's visit to defendant's premises did not avoid a license to enter.

[2] See, however, Devens, J., in *Dawe* v. *Morris*, 149 Mass. 188 (1889), p. 193. "There is an obvious difference between the case where a contract is rescinded, and thus ceases to exist, and one in which the injury results from the non-performance of that which it is the duty of the defendant to perform, and where there is no other wrong than such non-performance. *To term this a "tort" would be to confound a cause of action in contract with one in tort, and would violate the policy of the statute of frauds by relieving a party from the necessity of observing those statutory formalities which are necessary to the validity of certain executory contracts.*"

for the wrong and injury sustained. It is true the purchaser may afterwards repent of the wrong and pay for the goods, and the vendor may never know of the wrongful intent. But this does not alter the case at all as to the original wrong and the liability incurred thereby. Of course a mere intention to commit a crime or to do a wrong is no offense. But when the intention is coupled with the doing or accomplishment of the act intended, that moment the wrong is perpetrated and the corresponding liability incurred. See *Oswego Starch Factory* v. *Lendrum*, 57 Iowa 573.

Demurrer overruled, and case remitted to the Common Pleas Division for further proceedings.[3]

BENTON *v.* J. & W. PRATT.

Supreme Court of Judicature of New York, 1829. 2 *Wend.* 385.

This was an action on the case.

In August, 1824, Seagraves and Wilson, of Allentown, in the state of Pennsylvania, by a verbal arrangement, agreed to purchase of the plaintiff 200 hogs and pay him the market price, provided he delivered them within three or four weeks and they had not been previously supplied. About the time for the delivery of the hogs, the plaintiff was proceeding with a drove of upwards of 500 to Allentown, and was overtaken on the road about 70 miles from Allentown by W. Pratt, one of the defendants, who also had a drove of

[3] *Accord: McCready* v. *Phillips*, 56 Nebr. 446 (1898); *Cerny* v. *Paxton & Gallagher Co.*, 78 Nebr. 134 (1907), in which it was, however, held that "if the promise be unenforcible under the statute of frauds, it will not sustain an action of fraud and deceit" even if the promisor intends not to perform it. If this rule applies to promises unenforcible as contracts, Sir Frederick Pollock is clearly right in saying, "Whether in such case (when the promisor intends not to perform his promise) an action of deceit will lie is a merely speculative question, as if rescission is impossible and the fraudulent vendor is worth suing, the obviously better course is to sue on the contract for the price." Pollock on Torts, 8th Ed., p. 284, note o.

See also, *Butler* v. *Watkins*, 13 Wall. 456 (1871), in which it was held that negotiations for the purchase of patent rights carried on with no intention of buying but merely for the purpose of keeping the plaintiff's competing product out of the market constituted actionable fraud, and *Rogers* v. *Virginia-Carolina Chemical Co.*, 149 Fed. 1 (C. C. A. 3rd Circ. 1906), where a declaration in deceit was held good which set forth that the plaintiffs had options on valuable phosphate lands and that the defendants induced them to enter into the contract, giving it an exclusive right to purchase the options having no intention of purchasing but solely for the purpose of preventing their sale so that they might lapse and the defendant might buy the land from the original owner. At first glance these cases appear to support the principal case, but in neither is the plaintiff seeking to enforce the contract nor to recover damages for its breach.

hogs, about 200 in number. Pratt said he was going to Easton, and learnt from the plaintiff that he was taking his hogs to Allentown. By an arrangement between the parties, Pratt was permitted by the plaintiff to start with his drove from a place where they had both stopped for the night, and instead of going to Easton, drove his hogs to Allentown and offered them for sale to Seagraves and Wilson, who at first declined to purchase on account of their contract with the plaintiff; but on being told by a person who attended Pratt's drove, in the presence of Pratt, that the plaintiff was going to Easton with his hogs to fulfil some contract, and after making some further inquiries, and not learning the plaintiff's approach to Allentown, they purchased Pratt's drove. On the next day the plaintiff arrived with his drove, and Seagraves and Wilson declined to purchase having then as large a supply as they wanted. Seagraves and Wilson purchased of Pratt under the impression that what they had been told of the plaintiff's going to Easton was true. Had they known that the plaintiff was coming to Allentown, they would not have purchased of Pratt at any rate until the plaintiff's arrival; and if the plaintiff had arrived previous to their purchase of Pratt, and had offered his hogs at the same price, they would have purchased of him. It was proved that J. Pratt, the other defendant, had directed W. Pratt to hurry on to Allentown if he killed half his drove, and fulfil the plaintiff's contract; and after the sale, boasted of the advantageous sale he had made, and that he was now even with the plaintiff for buying a lot of hogs which he had bargained for. In consequence of losing the sale to Seagraves and Wilson, the plaintiff was obliged to go further to procure a market, spent much time, and incurred considerable expense.

The defendants pleaded the general issue. The jury found a verdict to the plaintiff for $316 damages.

SUTHERLAND, J. If the allegations in either of the counts in the declaration are true,[1] the plaintiff has clearly sustained an essential injury from the act of the defendants, which he alleges was done fraudulently and with intent to injure him; and, upon principle, the law ought to afford him redress.

In *Gallagar and Mason* v. *Brunel* (6 Cowen, 346), all the cases applicable to this subject are considered, and the principles established in *Parley* v. *Freeman* are fully recognized. The action in

[1] The declaration which contained four counts set forth substantially the facts as they appeared at the trial, except that in all but the third count it averred that the defendant had asserted that the plaintiff had given up his contract to the defendants to fulfil and take the benefit of; that the first and second counts averred that the defendants had promised not to interfere with the plaintiff's contract with Seagraves and Wilson and had thereby induced the plaintiff to allow the defendants' drove of hogs to pass his; and that in each count it was alleged that the defendants had expressly declared and asserted to Seagraves and Wilson that the plaintiff had abandoned the idea and intention of fulfilling his contract.

that case was held not to lie, because the false representation which was alleged to have been made did not amount to an assertion of a fact or facts as existing at the time. The declaration alleged that the defendant, intending to injure and defraud the plaintiffs, and to induce them to sell certain goods to C. & H., falsely represented that he was willing to endorse the note of C. & H. It was held that the gravamen of this case was nothing more than that the defendant encouraged the plaintiffs to sell their goods to C. & H., and, as surety promised to endorse their notes, and that the intention of the defendant not to fulfil his engagement was not among the fraudulent acts which will render a party liable to an action; that it was an attempt to make him responsible as for a tort, upon a promise which was void by the statute of frauds. In the case at bar there are no such difficulties; there is the assertion, on the part of the defendant, of an unqualified falsehood, with a fraudulent intent as to a present or existing fact, and a direct, positive and material injury resulting therefrom to the plaintiff. This is sufficient to sustain the action.

It is not material whether the contract of the plaintiff with Seagraves and Wilson was binding upon them or not; the evidence established beyond all question that they would have fulfilled but for the false and fraudulent representations of the defendants.

As to the fact of the defendants having made the false representations alleged in the declaration, it was for the jury to determine upon the evidence given. We must intend that they were properly instructed upon that point by the court; and I think the verdict is fully warranted.

Motion in arrest and for new trial denied.

SECTION 4.

Defendant's Want of Belief in the Tort of the Fact Asserted.

PEEK *v.* DERRY.

House of Lords, 1889. 14 *Appeal Cases*, 337.

This action on the case was brought by Sir Henry William Peek against William Derry, chairman, and Messrs. Wakefield, Moore, Pethick and Wilde, four directors of the Plymouth, Devonport and District Tramways Company, for the fraudulent misrepresentations of the defendant; whereby the plaintiff was induced to take shares in the company.[1]

[1] The statement of facts is somewhat abridged, the effect of the elaborate opinion of Stirling, J., is briefly stated; the opinions of Cotton, Hannen and Lopes, L. L. J., in the Court of Appeal (L. R. 37 Ch. Div. 541) and of Lords

The company was incorporated under a special Act of Parliament in the year 1882; by this Act (45 & 46 Vict. c. clix.) the company was authorized to make and maintain tramways in Plymouth, Devonport and Stonehouse.

By Section 34 of the Tramways Act, 1870, which section was incorporated in the special Act, "all carriages used on any tramway shall be moved by the power prescribed by the special Act, and where no such power is prescribed, by animal power only."

By Section 35, of the special Act the carriages used on the tramways might be moved by animal power and, with the consent of the Board of Trade, by steam or any mechanical power for a period of seven years, and with like consent during further periods not exceeding seven years, subject to the regulations set forth in Schedule A, and to any regulations thereafter added or substituted by any order of the Board of Trade, provided also that the company shall not use steam or any other mechanical power unless and until they have obtained the previous consent in writing of the corporations of Plymouth and Devonport, and then under such terms only, subject to such conditions as the company may from time to time prescribe.

By Section 64 of the special Act it was also provided that the company should not open any of the tramways for traffic without the consent of the corporations.

The company issued two prospectuses. In the first, issued in October, 1882, and which it did not appear the plaintiff had ever seen, the directors stated that the act gave them the power to use either animal, steam or mechanical means of locomotion, and that they would use that means of power which experience should demonstrate to be at once the most economical and effective. The second prospectus was issued the first of February, 1883. The heading, which was in large type, was as follows: "Incorporated by special Act of Parliament authorizing the use of steam or mechanical motive power." It also contained the following paragraph: "One great feature of this undertaking to which considerable importance should be attached, is, that by the special Act of Parliament obtained, the company has the right to use steam or mechanical motive power, instead of horses, and it is fully expected that by means of this a considerable saving will result in the working expenses of the line as compared with other tramways worked by horses," and there were other paragraphs further setting forth the advantages to be derived from steam as compared with horse power.

Soon after the issuing of the prospectus, a copy of which the plaintiff received, he applied for and was allotted shares in the company relying, as he alleged, upon the representations of this paragraph, believing the company had an absolute right to use steam and other mechanical power.

The company proceeded to construct its tramways, but the

Bramwell and Halsbury, L. C., in the House of Lords, are omitted, as is the greater part of the opinion of Lord Fitzgerald and a portion of the opinion of Lord Herschell.

Board of Trade refused to consent to the use of steam or mechanical power except on certain portions of the tramway, and the corporation of Devonport refused their consent to the company opening the completed part of their lines until the remainder was ready for use. In consequence the company was wound up, and immediately thereafter the plaintiff brought this action against the defendants.

The action came on for hearing before Mr. Justice Stirling, and both parties appeared and testified.

The defendants pleaded that statements complained of, if untrue, were made in good faith, and that they had reasonable grounds for believing them to be true.

The evidence given by them showed that four months after the prospectus was issued, they had in fact obtained the consent of the corporation of Devonport for the use of steam-power for the part of the line within that corporation.

Mr. Wilde, one of the defendants, testified that while he was aware that the consent of the Board of Trade was necessary, he thought that such consent had practically been given; that before obtaining the Act the plans had been laid, pursuant to standing orders, before the Board of Trade with the statement that it was intended to use mechanical as well as horse-power, and no objection having been raised by the Board of Trade, and the bill having been obtained, he took it for granted that no objections would be raised afterwards, provided the works were properly carried out.

The testimony of Mr. Pethick, another defendant, was substantially the same; he thought that the Board of Trade had no more right to refuse their consent than they would in the case of a railway. It never entered his thoughts that after the Board had passed their plans, with the knowledge that it was proposed to use steam, they would refuse their consent.

Mr. Moore testified that he understood from the statements of the solicitor of the Board of Trade that the consent had already been obtained and the company had the right to use steam.

The testimony of the other two defendants was substantially that the company having got the Act of Parliament, they thought that the consent of the Board of Trade would follow as a matter of course.

STIRLING, Justice, dismissed the action, having come to the conclusion that the directors all believed that the company had the rights stated in the prospectus and that their belief was not unreasonable, nor was their conduct so reckless or careless that they ought to be held liable in an action of deceit.

On appeal by the plaintiff to the Court of Appeals the judgment of Stirling, J., was reversed by Cotton, Hannen and Lopes, L. JJ., on the ground that while the defendants honestly believed that the statements in the prospectus were true, the statements were made without any reasonable grounds for believing them. The defendants appealed from the decision of the Court of Appeals to the House of Lords. The House of Lords unanimously reversed the decision of the Court below and unanimously restored the opinion of Stirling, J.

LORD FITZGERALD:—"The action for deceit at common law is founded on fraud. It is essential to the action that moral fraud should be established, and since the case of *Collins* v. *Evans*, 5 Q. B. 804, 820, in the Exchequer Chamber, it has never been doubted that fraud must concur with the false statement to maintain the action. It would not be sufficient to shew that a false representation had been made. It must further be established that the defendant knew at the time of making it that the representation was untrue, or, to adopt the language of the learned editors of the Leading Cases, that 'the defendant must be shewn to have been actually and fraudulently cognisant of the falsehood of his representation or to have made it fraudulently without belief that it was true.'"

(The opinions of Lords Halsbury, L. C., and Bramwell are omitted.)

LORD HERSCHELL:—"My Lords, in the statement of claim in this action the respondent, who is the plaintiff, alleges that the appellants made in a prospectus issued by them certain statements which were untrue, that they well knew that the facts were not as stated in the prospectus, and made the representations fraudulently, and with the view to induce the plaintiff to take shares in the company.

"This action is one which is commonly called an action of deceit, a mere common law action." This is the description of it given by Cotton L. J. in delivering judgment. I think it important that it should be borne in mind that such an action differs essentially from one brought to obtain rescission of a contract on the ground of misrepresentation of a material fact. The principles which govern the two actions differ widely. Where rescission is claimed it is only necessary to prove that there was misrepresentation; then, however honestly it may have been made, however free from blame the person who made it, the contract, having been obtained by misrepresentation, cannot stand. In an action of deceit, on the contrary, it is not enough to establish misrepresentation alone; it is conceded on all hands that something more must be proved to cast liability upon the defendant, though it has been a matter of controversy what additional elements are requisite. I lay stress upon this because observations made by learned judges in actions for rescission have been cited and much relied upon at the bar by counsel for the respondent. Care must obviously be observed in applying the language used in relation to such actions to an action of deceit. Even if the scope of the language used extends beyond the particular action which was dealt with, it must be remembered that the learned judges were not engaged in determining what is necessary to support an action of deceit, or in discriminating with nicety the elements which enter into it.

There is another class of actions which I must refer to also for the purpose of putting it aside. I mean those cases where a person within whose special province it lay to know a particular fact, has given an erroneous answer to an inquiry made with regard to it by a person desirous of ascertaining the fact for the purpose of deter-

mining his course accordingly, and has been held bound to make good the assurances he has given. *Burrowes* v. *Lock,* 10 Ves. 470, may be cited as an example, where a trustee has been asked by an intended lender, upon the security of a trust fund, whether notice of any prior incumbrance upon the fund had been given to him. In cases like this it has been said that the circumstance that the answer was honestly made in the belief that it was true affords no defense to the action. Lord Selborne pointed out in *Brownlie* v. *Campbell,* 5 App. Cas. p. 935, that these cases were in an altogether different category from actions to recover damages for false representation, such as we are now dealing with.

One other observation I have to make before proceeding to consider the law which has been laid down by the learned judges in the Court of Appeals in the case before your Lordships. 'An action of deceit is a common law action, and must be decided on the same principles, whether it be brought in the Chancery Division or any of the Common Law Divisions, there being, in my opinion, no such thing as an equitable action for deceit.' This was the language of Cotton, L. J. in *Arkwright* v. *Newbould,* 17 Ch. D. 320. It was adopted by Lord Blackburn in *Smith* v. *Chadwick,* 9 App. Cas. 193, and is not, I think, open to dispute.

In the Court below Cotton, L. J., said: 'What in my opinion is a correct statement of the law is this, that where a man makes a statement to be acted upon by others which is false, and which is known by him to be false, or is made by him recklessly, or without care whether it is true or false, that is, without any reasonable ground for believing it to be true, he is liable in an action of deceit at the suit of any one to whom it was addressed or any one of the class to whom it was addressed and who was materially induced by the misstatement to do an act to his prejudice.' About much that is here stated there cannot, I think, be two opinions. But when the learned Lord Justice speaks of a statement made recklessly or without care whether it is true or false, *that is* without any reasonable ground for believing it to be true, I find myself, with all respect, unable to agree that these are convertible expressions. To make a statement careless whether it be true or false, and therefore without any real belief in its truth, appears to me to be an essentially different thing from making, through want of care, a false statement, which is nevertheless honestly believed to be true. And it is surely conceivable that a man may believe that what he states is the fact, though he has been so wanting in care that the Court may think that there was no sufficient grounds to warrant his belief. I shall have to consider hereafter whether the want of reasonable ground for believing the statement made is sufficient to support an action of deceit. I am only concerned for the moment to point out that it does not follow that it is so, because there is authority for saying that a statement made recklessly, without caring whether it be true or false, affords sufficient foundation for such an action.

That the learned Lord Justice thought that if a false statement were made without reasonable ground for believing it to be true an

action of deceit would lie, is clear from a subsequent passage in his judgment. He says that when statements are made in a prospectus like the present, to be circulated amongst persons in order to influence them to take shares, 'there is a duty cast upon the director or other person who makes those statements to take care that there are no expressions in them which in fact are false; to take care that he has reasonable ground for the material statements which are contained in that document which he prepares and circulates for the very purpose of its being acted upon by others.'"

Sir James Hannen says: "I take the law to be that if a man takes upon himself to assert a thing to be true which he does not know to be true, and has no reasonable ground to believe to be true, in order to induce another to act upon the assertion, who does so act and is thereby damnified, the person so damnified is entitled to maintain an action for deceit." Again, Lopes, L. J., states what, in his opinion, is the result of the cases. I will not trouble your Lordships with quoting the first three propositions which he lays down, although I do not feel sure that the third is distinct from, and not rather an instance of, the case dealt with by the second proposition. But he says that a person making a false statement, intended to be and in fact relied on by the person to whom it is made, may be sued by the person damaged thereby: "Fourthly, if it is untrue in fact, but believed to be true, but without any reasonable grounds for such belief."

It will thus be seen that all the learned judges concurred in thinking that it was sufficient to prove that the representations made were not in accordance with fact, and that the person making them had no reasonable ground for believing them. They did not treat the absence of such reasonable ground as evidence merely that the statements were made recklessly, careless whether they were true or false, and without belief that they were true, but they adopted as the test of liability, not the existence of the belief in the truth of the assertions made, but whether the belief in them was founded upon any reasonable grounds. It will be seen, further, that the Court did not purport to be establishing any new doctrine. They deemed that they were only following the cases already decided, and that the proposition which they concurred in laying down was established by prior authorities. Indeed, Lopes, L. J., expressly states the law in this respect to be well settled. This renders a close and critical examination of the earlier authorities necessary.

(He then discusses the cases of *Pasley* v. *Freeman*, 2 Smith's L. C. 74; *Crosse* v. *Gardiner*, Carth. 90; *Risney* v. *Selby*, 1 Salk. 211; *Haycraft* v. *Creasy*, 2 East, 92; *Foster* v. *Charles*, 7 Bing. 105; *Corbett* v. *Brown*, 8 Bing. 33; *Polhill* v. *Walter*, 3 B. & Ad. 114; *Crawshay* v. *Thompson*, 4 M. & Gr. 357; *Moens* v. *Heyworth*, 10 M. & W. at p. 157; *Taylor* v. *Ashton*, 11 M. & W. 401; and *Collins* v. *Evans*, 5 Q. B. 804, 820; in all of which he points out that knowledge of the falsehood of the thing asserted is regarded as essential to actionable fraud.)

In *Evans* v. *Edmonds*, 13 C. B. 777; Maule J. expressed an im-

portant opinion, often quoted, which has been thought to carry the law further than the previous authorities, though I do not think it really does so. He said: "if a man having no knowledge whatever on the subject takes upon himself to represent a certain state of facts to exist he does so at his peril, and if it be done either with a view to secure some benefit to himself or to deceive a third person he is in law guilty of a fraud, for he takes upon himself to warrant his own belief of the truth of that which he so asserts. Although the person making the representation may have no knowledge of its falsehood the representation may still have been fraudulently made." The foundation of this proposition manifestly is, that a person making a statement which he intends another to act upon must be taken to warrant his belief in its truth. Any person making such a statement must always be aware that the person to whom it is made will understand, if not that he who makes it knows, yet at least that he believes it to be true. And if he has no such belief he is as much guilty of fraud as if he had made any other representation which he knew to be false, or did not believe to be true.[2]

I now arrive at the earliest case in which I find the suggestion that an untrue statement made without reasonable ground for believing it will support an action for deceit. In *Western Bank of Scotland* v. *Addie,* Law Rep. 1 H. L., Sc. 145, 162, the Lord President told the jury "that if a case should occur of directors taking upon themselves to put forth in their report statements of importance in regard to the affairs of the bank false in themselves and which they did not believe, or had no reasonable ground to believe to be true, that would be a misrepresentation and deceit." Exception having been taken to this direction without avail in the Court of Session, Lord Chelmsford in this House said: "I agree in the propriety of this interlocutor. In the argument upon this exception the case was put of an honest belief being entertained by the directors, of the reasonableness of which it was said the jury, upon this direction, would have to judge. But supposing a person makes an untrue statement which he asserts to be the result of a bona fide belief in its truth, how can the bona fides be tested except by considering the grounds of such belief? And if an untrue statement is made founded upon a belief which is destitute of all reasonable grounds, or which the least inquiry would immediately correct, I do not see that it is not fairly and correctly characterized as misrepresentation and deceit."

I think there is here some confusion between that which is evidence of fraud, and that which constitutes it. A consideration of the grounds of belief is no doubt an important aid in ascertaining whether the belief was really entertained.[3] A man's mere assertion

[2] "If, when a man thinks it is highly probable that a thing exists, he chooses to say he knows the thing exists, that is really asserting what is false —it is positive fraud." Lord Blackburn, *Brownlie* v. *Campbell,* L. R. 5 A. C. 925 (1880), p. 953.

[3] So in *Griswold* v. *Gebbie,* 126 Pa. 353 (1889), Mitchell, J., says, "the plaintiff had proved that the statement was made, and that in fact it was untrue." The defendant had given evidence as to her innocence of the mis-

that he believed the statement he made to be true is not accepted as conclusive proof that he did so. There may be such an absence of reasonable ground for his belief as, in spite of his assertion, to carry conviction to the mind that he had not really the belief which he alleges. If the learned Lord intended to go further, as apparently he did, and to say that though the belief was really entertained, yet if there were no reasonable grounds for it, the person making the statement was guilty of fraud in the same way as if he had known what he stated to be false, I say, with all respect, that the previous authorities afford no warrant for the view that an action of deceit would lie under such circumstances. A man who forms his belief carelessly, or is unreasonably credulous, may be blameworthy when he makes a representation on which another is to act, but he is not, in my opinion, fraudulent in the sense in which that word was used in all the cases from *Pasley* v. *Freeman,* 2 Smith's L. C. 74, down to that with which I am now dealing. Even when the expression "fraud in Law" has been employed, there has always been present, and regarded as an essential element, that the deception was wilful either because the untrue statement was known to be untrue, or because belief in it was asserted without such belief existing.

I have made these remarks with the more confidence because they appear to me to have the high sanction of Lord Cranworth. In delivering his opinion in the same case he said: "I confess that my opinion was that in what his Lordship (the Lord President) thus stated, he went beyond what principle warrants. If persons in the situation of directors of a bank make statements as to the condition of its affairs which they bona fide believe to be true, I cannot think they can be guilty of fraud because other persons think, or the Court thinks, or your Lordships think, that there was no sufficient ground to warrant the opinion which they had formed. If a little more care and caution must have led the directors to a conclusion different from that which they put forth, this may afford strong evidence to show that they did not really believe in the truth of what they stated,

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representation, but John Griswold (her agent, who sold the land and made the statements,) "had not been called to state his knowledge or belief, nor to explain his statements. In this state of the evidence the judge submitted to the jury whether Griswold had any reasonable grounds for believing his statements to be true, or, in other words, could the jury find from the circumstances, as shown by the evidence, any ground to suppose that Griswold did so believe. The language was a fair statement of so much of the general rule as applied to the evidence then before the jury. As it is well stated by the learned judge in his opinion on the rule for a new trial, 'Had John Griswold been put on the stand, to vindicate his good faith and state the grounds of his belief, or show how he came to believe in the absence of information . . . it might have been proper to instruct the jury that whether the causes which influenced his mind were or were not reasonable, or such as they could approve, still if he acted in good faith and expressed a sincere opinion, he should not be found guilty of fraud. But as the case actually stood, such an instruction would have tendered to mislead, by raising an issue for which there was no foundation in the evidence.'" Compare with this, *Watson* v. *Jones,* note to *Scholfield Gear and Pulley Co.* v. *Scholfield, post.*

and so that they were guilty of fraud. But this would be the consequence not of their having stated as true what they had not reasonable ground to believe to be true, but as their having stated as true what they did not believe to be true."

Sir James Hannen, in his judgment below, seeks to limit the application of what Lord Cranworth says to cases where the statement made is a matter of opinion only. With all deference I do not think it was extended to be or can be so limited. The direction which he was considering, and which he thought went beyond what true principle warranted, had relation to making false statements of importance in regard to the affairs of the bank. When this is borne in mind, and the words which follow these quoted by Sir James Hannen are looked at, it becomes to my mind obvious that Lord Cranworth did not use the words "the opinion which they had formed" as meaning anything different from "the belief which they entertained."

The opinions expressed by Lord Cairns in two well-known cases have been cited as though they supported the view that an action of deceit might be maintained without any fraud on the part of the person sued. I do not think they bear any such construction. In the case of *Reese Silver Mining Co.* v. *Smith,* Law Rep. 4 H. L. 64, 79, he said: "If persons take upon themselves to make assertions as to which they are ignorant whether they are true or untrue they must, in a civil point of view, be held as responsible as if they had asserted that which they knew to be untrue." This must mean that the persons referred to were conscious when making the assertion that they were ignorant whether it was true or untrue. For if not it might be said of any one who innocently makes a false statement. He must be ignorant that it is untrue, for otherwise he would not make it innocently; he must be ignorant that it is true, for by the hypothesis it is false. Construing the language of Lord Cairns in the sense I have indicated, it is no more than the adoption of the opinion expressed by Maule J. in *Evans* v. *Edmonds,* 13 C. B. 777. It is a case of the representation of a person's belief in a fact when he is conscious that he knows not whether it be true or false, and when he has therefore no such belief. When Lord Cairns speaks of it as not being fraud in the more invidious sense, he refers, I think, only to the fact that there was no intention to cheat or injure.

(He then discusses the language used by Lord Cairns in *Peek* v. *Gurney,* Law Rep. 6 H. L. 377, 409, which he holds to be but a formation of the law as laid down in *Foster* v. *Charles* and *Polhill* v. *Walker.*)

I come now to very recent cases. In *Weir* v. *Bell,* 3 Ex. D. 238, Lord Bramwell vigorously criticised the expression "legal fraud," and indicated a very decided opinion that an action founded on fraud could not be sustained except by the proof of fraud in fact. I have already given my reasons for thinking that, until recent times at all events, the judges who spoke of fraud in law did not mean to exclude the existence of fraud in fact, but only of an intention to defraud or injure.

It only remains to notice the case of *Smith* v. *Chadwick,* 20 Ch. D. 27, 44, 67. The late Master of Rolls there said, "A man may issue a prospectus or make any other statement to induce another to enter into a contract, believing that his statement is true, and not intending to deceive, but he may through carelessness have made statements which are not true, and if he does so he is liable in an action for deceit; he cannot be allowed to escape merely because he had good intentions, and did not intend to defraud." This, like everything else that fell from that learned judge, is worthy of respectful consideration. With the last sentence I quite agree, but I cannot assent to the doctrine that a false statement made through carelessness, and which ought to have been known to be untrue, of itself renders the person who makes it liable to an action for deceit. This does not seem to me by any means necessary to amount to fraud, without which the action will not, in my opinion, lie.

It must be remembered that it was not requisite for Sir George Jessel in *Smith* v. *Chadwick,* supra, to form an opinion whether a statement carelessly made, but honestly believed, could be the foundation of an action of deceit. The decision did not turn on any such point.

The case of *Smith* v. *Chadwick* was carried to your Lordships' House. Lord Selborne thus laid down the law: "I conceive that in an action of deceit it is the duty of the plaintiff to establish two things: first, actual fraud, which is to be judged of by the nature and character of the representations made, considered with reference to the object for which they were made, the knowledge or means of knowledge of the person making them, and the intention which the law justly imputes to every man to produce those consequences which are the natural result of his acts; and secondly, he must establish that this fraud was an inducing cause to the contract." It will be noticed that the noble and learned Lord regards the proof of actual fraud as essential, all the other matters to which he refers are elements to be considered in determining whether such fraud has been established. Lord Blackburn indicated that although he nearly agreed with the Master of the Rolls, that learned judge had not quite stated what he conceived to be the law. He did not point out precisely how far he differed, but it is impossible to read his judgment in this case, or in that of *Brownlie* v. *Campbell,* 5 App. Cas. 925, without seeing that in his opinion proof of actual fraud or of a wilful deception was requisite.

Having now drawn attention, I believe, to all the cases having a material bearing upon the question under consideration, I proceed to state briefly the conclusions to which I have been led. I think the authorities establish the following propositions: First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second,

for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false, has obviously no such honest belief. Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made.

I think these propositions embrace all that can be supported by decided cases from the time of *Pasley* v. *Freeman,* supra, down to *Western Bank of Scotland* v. *Addie,* supra, in 1867, when the first suggestion is to be found that belief in the truth of what he has stated will not suffice to absolve the defendant if his belief be based on no reasonable grounds. I have shown that this view was at once dissented from by Lord Cranworth, so that there was at the outset as much authority against it as for it. And I have met with no further assertion of Lord Chelmsford's view until the case of *Weir* v. *Bell,* 3 Ex. D. 238, where it seems to be involved in Lord Justice Cotton's enunciation of the law of deceit. But no reason is there given in support of the view, it is treated as established law. The dictum of the late Master of Rolls, that a false statement made through carelessness, which the person making it ought to have known to be untrue, would sustain an action of deceit, carried the matter still further. But that such an action could be maintained notwithstanding an honest belief that the statement was true, if there were no reasonable grounds for the belief, was, I think, for the first time decided in the case now under appeal.

In my opinion making a false statement through want of care falls far short of, and is a very different thing from, fraud, and the same may be said of a false representation honestly believed though on insufficient grounds. Indeed Cotton L. J. himself indicated, in the words I have already quoted, that he should not call it fraud. But the whole current of authorities, with which I have so long detained your Lordships, shews to my mind conclusively that fraud is essential to found an action of deceit, and that it cannot be maintained where the acts proved cannot properly be so termed. And the case of *Taylor* v. *Ashton,* 11 M. & W. 401, appears to be in direct conflict with the dictum of Sir George Jessel, and inconsistent with the view taken by the learned judges in the Court below. I observe that Sir Frederick Pollock, in his able work on Torts (p. 243, note), referring, I presume, to the dicta of Cotton, L. J., and Sir George Jessel, M. R., says that the actual decision in *Taylor* v. *Ashton,* supra, is not consistent with the modern cases on the duty of directors of companies. I think he is right. But for the reasons I have given I am unable to hold that anything less than fraud will render directors or any other persons liable to an action of deceit.

At the same time I desire to say distinctly that when a false statement has been made the questions whether there were reasonable grounds for believing it, and what were the means of knowledge

in the possession of the person making it, are most weighty matters for consideration. The ground upon which an alleged belief was founded is a most important test of its reality. I can conceive many cases where the fact that an alleged belief was destitute of all reasonable foundation would suffice of itself to convince the Court that it was not really entertained, and that the representation was a fraudulent one. So, too, although means of knowledge are, as was pointed out by Lord Blackburn in *Brownlie* v. *Campbell,* 5 App. Cas. at p. 592, a very different thing from knowledge, if I thought that a person making a false statement had shut his eyes to the facts, or purposely abstained from inquiring into them, I should hold that honest belief was absent, and that he was just as fraudulent as if he had knowingly stated that which was false.

I have arrived with some reluctance at the conclusion to which I have felt myself compelled, for I think those who put before the public a prospectus to induce them to embark their money in a commercial enterprise ought to be vigilant to see that it contains such representations only as are in strict accordance with fact, and I should be very unwilling to give any countenance to the contrary idea. I think there is much to be said for the view that this moral duty ought to some extent to be converted into a legal obligation, and that the want of reasonable care to see that statements, made under such circumstances, are true, should be made an actionable wrong. But this is not a matter fit for discussion on the present occasion. If it is to be done the legislature must intervene and expressly give a right of action in respect of such a departure from duty. It ought not, I think, to be done by straining the law, and holding that to be fraudulent which the tribunal feels cannot properly be so described. I think mischief is likely to result from blurring the distinction between carelessness and fraud, and equally holding a man fraudulent whether his acts can or cannot be justly so designated.

It now remains for me to apply what I believe to be the law to the facts of the present case:

"What conclusions ought to be drawn from their evidence? I think they were mistaken in supposing that the consent of the Board or Trade would follow as a matter of course because they had obtained their Act. It was absolutely in the discretion of the Board whether such consent should be given. The prospectus therefore was inaccurate. But that is not the question. If they believed that the consent of the Board of Trade was practically concluded by the passing of the Act, has the plaintiff made out, which it was for him to do, that they have been guilty of a fraudulent misrepresentation? I think not. I cannot hold it proved as to any one of them that he knowingly made a false statement, or one which he did not believe to be true, or was careless whether what he stated was true or false. In short, I think they honestly believed that what they asserted was true, and I am of opinion that the charge of fraud made against them has not been established.

It is not unworthy of note that in his report to the Board of

Trade, General Hutchinson, who was obviously aware of the provisions of the special Act, falls into the very same inaccuracy of language as is complained of in the defendants, for he says: "The Act of 1882 gives the company authority to use mechanical power over all their system."

I quite admit that the statements of witnesses as to their belief are by no means to be accepted blindfold. The probabilities must be considered. Whenever it is necessary to arrive at a conclusion as to the state of mind of another person, and to determine whether his belief under given circumstances was such as he alleges, we can only do so by applying the standard of conduct which our own experience of the ways of men has enabled us to form; by asking ourselves whether a reasonable man would be likely under the circumstances so to believe. I have applied this test, with the result that I have a strong conviction that a reasonable man situated as the defendants were, with their knowledge and means of knowledge, might well believe what they state they did believe, and consider that the representation made was substantially true.

Adopting the language of Jessel M. R. in *Smith* v. *Chadwick,* 20 Ch. D. at p. 67, I conclude by saying that on the whole I have come to the conclusion that the statement, "though in some respects inaccurate and not altogether free from imputation of carelessness, was a fair, honest and bona fide statement on the part of the defendants, and by no means exposes them to an action for deceit."

I think the judgment of the Court of Appeal should be reversed.

Order of the Court of Appeal reversed; order of Stirling J. restored; the respondent to pay to the appellants their costs below and in this House: cause remitted to the Chancery Division.[4]

Lords Journals 1st July 1889.

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[4] *Accord: Cantwell* v. *Harding,* 249 Ill. 354 (1911); *Boddy* v. *Henry,* 113 Iowa 462 (1901); *(John Gund Brewing Company* v. *Peterson,* 130 Iowa 301 (1906)), and *Riley* v. *Bell,* 120 Iowa 618 (1903); which contain language apparently *contra,* are cases where the actual falsity of statements, made as of the defendant's personal knowledge, raised a presumption of conscious ignorance or recklessness which prevailed in absence of evidence tending to show honest belief in the truth); *Cahill* v. *Applegarth,* 98 Md. 493 (1904); *Hammatt* v. *Emerson,* 27 Maine 308 (1847); but see *Braley* v. *Powers,* 92 Maine 203 (1898); *Boulden* v. *Stilwell,* 100 Md. 543 (1905); *Riggs* v. *Thorpe,* 67 Minn. 217 (1897); *People's National Bank* v. *Central Trust Co.,* 179 Mo. 648 (1904); *Cummings* v. *Cass,* 52 N. J. L. 77 (1889), *semble; Kountze* v. *Kennedy,* 147 N. Y. 124 (1895); *Hadcock* v. *Osmer,* 153 N. Y. 604 (1897); *Lamberton* v. *Dunham,* 165 Pa. 129 (1895); *Scott* v. *Heisner,* 33 Pa. Super. Ct. 286 (1907) *Northwestern S. S. Co.* v. *Dexter, Horton & Co.,* 29 Wash. 565 (1902); *Hindman* v. *First National Bank,* 112 Fed. 931 (C. C. A. 6th Circ. 1902), per Lurton, J.; *Kimber* v. *Young,* 137 Fed. 744 (C. C. A. 8th Circ. 1905), per Hook, J.; *Pittsburgh Life & Trust Co.* v. *Northern Central Ins. Co.,* 140 Fed. 888, 148 Fed. 674 (C. C. A. 1906); but see *Lehigh Zinc & Iron Co.* v. *Bamford,* 150 U. S. 665 (1893).

KIMBER *v.* YOUNG.

137 *Fed. Rep.* 744 (1905). *C. C. A. 8th Circ.*

HOOK, J. "The basis of the deceit is the actual fraud of the defendant—his moral delinquency; and therefore his knowledge of the falsity of the representation, or that which in law is equivalent thereto, must be averred and proved. There is much confusion in the authorities upon this subject, due in part to the erroneous assumption that that which is merely evidence of fraud is equivalent to the ultimate fact which it tends to prove,[1] and also to the assumption, likewise erroneous, that an untrue representation which would be sufficient to support a suit in equity for the rescission of a contract is equally as available in an action of deceit."[2]

CHATHAM FURNACE COMPANY *v.* LAWRENCE MOFFATT.

Supreme Judicial Court of Massachusetts, 1888. 147 *Mass.* 403.

C. ALLEN, J. It is well settled in this Commonwealth that the charge of fraudulent intent, in an action for deceit, may be maintained by proof of a statement made, as of the party's own knowledge, which is false, provided the thing stated is not merely a matter of opinion, estimate, or judgment, but is susceptible of actual knowl-

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[1] See McClain, J., in *Boddy* v. *Henry,* 113 Iowa 462 (1901), p. 470, "it is one thing to hold as a matter of fact that from certain evidence the court will find knowledge to have existed in a particular case, and on the other hand, to charge the jury that such facts, as a matter of law, render the defendant liable without a finding of knowledge as a fact."

[2] See Lurton, J., in *Hindman* v. *First National Bank,* 112 Fed. 931 (C. C. A. 6th Circ. 1902), p. 944: "Such an action (of deceit) differs essentially from one brought for rescission of a contract on the ground of misrepresentation. In the latter kind of suit it is immaterial whether the representation was made dishonestly or not. If the contract was obtained by misrepresentations, however honestly made, it can not stand."

This distinction is often lost sight of. In *Holcomb* v. *Noble,* 69 *Mich.* 396 (1888), it was held that the only difference between fraud in law and in equity is in the relief sought and that where the facts could justify relief by way of rescission of the contract they will support an action for money damages, for which equitable relief is refused only because the legal remedy exists and is the better. Consequently the defendant if, but only if, he has profited by the false statement though he neither knew of its falsity nor was reckless in making it, must answer in damages and the plaintiff may recover the loss which he has in fact sustained, though it is greater than the benefit which the defendant has derived from his innocent misrepresentation.

So in *Jordan & Sons* v. *Pickett,* 78 Ala. 331 (1884), it is said that "a contract may be avoided or an action for damages sustained, though the asserting party may not know that the statement is false." Here, too, this is only so if the assertor is not a party to the contract or interested in it, but is a stranger thereto acting gratuitiously; *Einstein, Hirsch & Co.* v. *Marshall & Conley.* 58 Ala. 153 (1877); and *New v. Jackson,* 95 N. E. 328 (Ind. Ct. of App. 1911); and *Cotzhausen* v. *Simon,* 47 Wis. 103 (1879). But it is not enough that the defendant has made the statements, he must benefit directly by them, as where he is a party to the contract induced thereby. So he is not

edge; and in such case it is not necessary to make any further proof of an actual intent to deceive. The fraud consists in stating that the party knows the thing to exist, when he does not know it to exist;[1] and if he does not know it to exist, he must ordinarily be deemed to know that he does not.[2] Forgetfulness of its existence after a former knowledge, or a mere belief of its existence, will not warrant or excuse a statement of actual knowledge.[3] This rule has

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liable if he is acting as an agent for the vendor, though he thereby earns commissions; *Aldrich v. Scribner,* 154 Mich. 23 (1908), but see the vigorous dissenting opinion of Montgomery, J. No distinction is drawn between statements made as of the defendant's personal knowledge and those obviously founded on information obtained from others, see as to this, *Wells* v. *Driskell,* 149 S. W. 205 (Tex. Civ. App. 1912).

[1] In *Cabot* v. *Christie,* 42 Vt. 121 (1869), it was held that while it was not enough that the quantity of land was incorrectly represented and while "the defendant must have made some representation that he did not believe to be true, * * * A representation of a fact as of a party's own knowledge, if it prove false, is, unless explained, inferred to be wilfully false and made with intent to deceive, at least with respect to the knowledge which is professed." "A party," says Steel, J., "who is aware that he has only an opinion how a fact is, and represents that opinion as knowledge, does not believe his representation to be true." The judgment of the County Court was reversed because the Court had charged the jury that the plaintiff could only recover if "the defendant represented the quantity of land different from what he knew or believed to be true," whereas there was sufficient evidence to justify the jury in finding that he represented that he know the quantity while only having a mere belief in respect thereto.

[2] The use of the word "ordinarily," like the phrase "unless explained" used in a similar connection in *Cabot* v. *Christie,* 42 Vt. 121 (1869), taken alone indicates that the falsity of fact capable of personal knowledge and asserted as of defendant's knowledge, merely raises a presumption that the defendant either knew his statement to be false or was conscious that he knew nothing of it, or, at most, that he had only a mere belief in its existence, (see Andrews, C. J., in *Kountze* v. *Kennedy,* 147 N. Y. 124 (1895), p. 130. When however, it is held, as in the principal case, that "mere forgetfulness will not warrant or excuse a statement of actual knowledge," or that "due diligence to ascertain the truth is not enough to relieve the maker of them of liability," as in *Huntress* v. *Blodgett,* 206 Mass. 318 (1910); or when it is intimated, as in *Cabot* v. *Christie,* that the only satisfactory explanation would be that the statement "could be only understood as a strong expression of opinion," it seems clear that the courts are not dealing with the evidentiary value of the actual falsity of the statement as proof of the maker's consciousness that he did not have the knowledge he professed. Mere forgetfulness is incompatible with conscious ignorance, due diligence to ascertain the truth may well lead to a mistaken belief in one's knowledge of the fact investigated. So the defendant is forbidden to show his actual belief in his knowledge of the fact asserted and such belief becomes immaterial and he is made liable whether he so believes or not. If this be a presumption at all, it is a conclusive presumption of law, which by making an arbitrary equation between two things not necessarily the same, and making the legal effect of the one—the actual falsity of the fact asserted—equivalent in legal effect to proof of the other—consciousness that the defendant does not know it—changes the substantive law while professing to deal only with the effect of evidence.

[3] It is no defense that the defendant believed or supposed that the fact was true, *Johnson* v. *Cate,* 75 Vt. 100 (1902); even though the belief is based on reasonable grounds, *Cole* v. *Cassidy,* 138 Mass. 437 (1885); or even though due diligence has been used to ascertain the truth. *Huntress* v. *Blodgett,* 206 Mass. 318 (1910); or that he has been so informed by others, *Fisher* v. *Mellen,* 103 Mass. 503 (1870). Still less can he assert that he had no knowledge at all on the subject, *Bullitt* v. *Farrar,* 42 Minn. 8 (1889).

been steadily adhered to in this Commonwealth, and rests alike on sound policy and on sound legal principles. *Cole* v. *Cassidy*, 138 Mass. 437. *Litchfield* v. *Hutchinson*, 117 Mass. 195. *Milliken* v. *Thorndike*, 103 Mass. 382. *Fisher* v. *Mellen*, 103 Mass. 503. *Stone* v. *Denny*, 4 Metc. 151. *Page* v. *Bent*, 2 Metc. 371. *Hazard* v. *Irwin*, 18 Pick. 95. And though this doctrine has not always been fully maintained elsewhere, it is supported by the following authorities, amongst others. *Cooper* v. *Schlesinger*, 111 U. S. 148. *Bower* v. *Fenn*, 90 Penn. St. 359. *Brownlie* v. *Campbell*, 5 App. Cas. 925, 953, by Lord Blackburn. *Reese River Mining Co.* v. *Smith*, L. R. 4 H. L. 64, 79, 80, by Lord Cairns. *Slim* v. *Croucher*, 1 DeG. F. & J. 518, by Lord Campbell. See also, *Peek* v. *Derry*, 59 L. T. (N. S.) 78, which has been published since this decision was announced.

In the present case, the defendant held a lease of land, in which there was iron ore. The mine had formerly been worked, but operations had ceased, and the mine had become filled with water and debris. The defendant sought to sell this lease to the plaintiff, and represented to the plaintiff, as of his own knowledge, that there was a large quantity of iron ore, from 8,000 to 10,000 tons, in his ore bed, uncovered and ready to be taken out and visible when the bed was free from water and debris. The material point was, whether this mass of iron ore, which did in truth exist under ground, was within the boundaries of the land included in the defendant's lease, and the material part of the defendant's statement was, that this was in his ore bed; and the representations were not in fact true in this, that while in a mine connecting with the defendant's shaft there was ore sufficient in quantity and location relative to drifts to satisfy these representations, if it had been in the land covered by the defendant's lease, that ore was not in the defendant's mine, but was in the adjoining mine; and the defendant's mine was in fact worked out.

During the negotiations, the defendant exhibited to the plaintiff a plan of a survey of the mine, which had been made for him, and the plaintiff took a copy of it. In making this plan, the surveyor, with the defendant's knowledge and assent, did not take the course of the first line leading from the shaft through which the mine was entered, but assumed it to be due north; and the defendant never took any means to verify the course of this line. In point of fact, this line did not run due north, but ran to the west of north. If it had run due north, the survey, which was in other respects correct, would have correctly shown the mass of iron ore in question to have been within the boundaries of the land covered by the defendant's lease; but in consequence of this erroneous assumption the survey was misleading, the iron ore being in fact outside of those boundaries. It thus appears that the defendant knew that what purported to be a survey was not in all respects an actual survey, and that the line upon which all the others depended had not been verified, but was merely assumed; and this was not disclosed to the plaintiff. The defendant took it upon himself to assert, as of his own knowledge, that this large mass of ore was in his ore bed, that

is, within his boundaries; and in support of this assertion he exhibited the plan of the survey, the first line of which had not been verified, and was erroneous. Now this statement was clearly of a thing which was susceptible of knowledge. A real survey, all the lines of which had been properly verified, would have shown with accuracy where the ore was situated. It was within the defendant's knowledge that the first line of the plan had not been verified. If under such circumstances he chose to take it upon himself to say that he knew that the mass of ore which had been discovered was in his ore bed, in reliance upon a plan which he knew was not fully verified, it might properly be found that the charge of fraudulent misrepresentation was sustained, although he believed his statement to be true.

Exceptions overruled.[4]

PALMER *v.* GOLDBERG.

Supreme Court of Wisconsin. 128 *Wis.* 103 (1906).

Marshall J. (p. 110). The jury, on evidence proper for their consideration, found all the facts in respondent's favor essential to a cause of action for damages caused by an executed conspiracy to defraud: (1) The combination to injure; (2) representations in furtherance thereof to induce respondent to part with his horses in exchange for the promissory note of Bain; (3) the falsity of such representations; (4) the reasonable reliance thereon as true in parting with the horses in exchange for the note; (5) the injury. The jury went further and found that when the representations were made they were not only untrue, but that appellant knew that fact or ought to have known it, and did not believe them himself. The latter elements were not essential. *McNaughton* v. *Conklings*, 9 Wis. 316; *Tobey* v. *McAllister*, 9 Wis. 463; *Mann* v. *Stowell*, 3 Pin. 220; *Beetle* v. *Anderson*, 95 Wis. 5, 73 N. W. 560; *Hart* v. *Moulton*, 104 Wis. 349, 80 N. W. 599; *Krause* v. *Busacker*, 105 Wis. 350, 81 N. W. 406; *Zunker* v. *Kuehn*, 113 Wis. 421, 88 N. W. 605; *Matteson* v. *Rice*, 116 Wis. 328, 92 N. W. 1109; *Kaiser* v. *Nummerdor*, 120 Wis. 234, 97 N. W. 932; *Standard Mfg. Co.* v. *Slot*, 121 Wis. 14, 98 N. W. 923.

It is often said that it is sufficient as to the element of fraud in an action for damages on the ground of fraud, that the wrong-doer

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[4] *Accord: Connell* v. *El Paso Mining Co.*, 33 Colo. 30 (1904); *Kirkpatrick* v. *Reeves*, 121 Ind. 280 (1889); *New* v. *Jackson*, 95 N. E. 328 (Ct. of App. Ind. 1911); *Cole* v. *Cassidy*, 138 Mass. 437 (1885); *Rowell* v. *Chase*, 61 N. H. 135 (1881); but see *Spead* v. *Tomlinson*, 73 N. H. 46 (1904), p. 61, and *Shackett* v. *Bickford*, 74 N. H. 57 (1906); *McCord-Collins Commerce Co.* v. *Levi*, 21 Tex. Civ. App. 109 (1899); *Cotshausen* v. *Simon*, 47 Wis. 103 (1879); *Lehigh Zinc & Iron Co.* v. *Bamford*, 150 U. S. 665 (1893); *Lynch* v. *Mercantile Trust Co.*, 18 Fed. 486 (1883). By Section 4026 of the Georgia Civil Code "a misrepresentation of a material fact, though by mistake and innocently made, if acted upon by the opposite party constitutes 'legal fraud'," *Walters* v. *Eaves*, 105 Ga. 584 (1899).

"knew or ought to have known" of the falsity of his representation. That is somewhat misleading. The element of "ought to have known" has reference merely to the idea that no one should make, in contractual negotiations, representations of fact to induce another to act so that the injury might result to him in case of the representations being untrue, unless he knows whereof he speaks. So he is in law held as an indemniter for the damages caused by his conduct, regardless of whether he knew, or in the exercise of ordinary care might have known, the truth of the matter. The duty to know in such a case is positive; nothing can excuse it.

WIMPLE *v.* PATTERSON.

Court of Civil Appeals of Texas. 117 *S. W.* 1034 (1909).

Willson, C. J. The action was for damages. The petition alleged: That appellant Kirkham was the owner of certain gin property; that one Donahoe and appellants Wimple and Ewing, as partners, were real estate agents; and that they, as such partners, authorized by appellant Kirkham to do so, and acting for him and with him, by false representations as to the condition, etc., of the property made to appellee, induced him to purchase same. The appeal is by Wimple, Ewing and Kirkham from a judgment in favor of appellee against them and said Donahoe for the sum of $700, and against the appellant Kirkham for the further sum of $231.80.

The court instructed the jury to find for appellee if they believed from the evidence that any two or more of the appellants acting together, with a design to induce appellee to purchase the property, made the representations as to its condition complained of, that such representations so made were false, and that, relying upon the truthfulness thereof, appellee was induced to make the purchase and thereby was damaged, although they might further "believe from the evidence that said representations, if any, were made in good faith, and the party making them believed that they were true." It appears from the record that the representations in question were not made by Kirkham in person, but by the real estate brokers, as his agents, for the purpose of selling the property. Generally speaking, it may be said that for material and false representations made by his agent, as fully as for such representations made by himself in person, the principal is responsible, if he authorized the agent to make them, or if they were made by the agent in the course of his employment as such. When so made by the agent, such representations are to be treated as the representations of the principal, and whether the principal, if he made such representations, or his agent, if he made them, knew them to be false, or made them innocently, believing them to be true, is of no importance in determining the liability of the former for damages actually suffered, where the representations were intended to induce, and did induce, a buyer to purchase property he otherwise would not have

purchased of the principal. In such a case, if the representations were fraudulently made, the liability of the principal need not be rested upon the tort, but may be referred to the contract for, whether made innocently or deceitfully, such representations as against the seller operate as a warranty. *Loper* v. *Robinson,* 54 Tex. 510; *Rhoda* v. *Annis,* 75 Maine 17, 46 Am. Rep. 354; 30 Am. & Eng. Ency. Law (2d Ed.) p. 136; 14 Am. & Eng. Ency. Law (2d Ed.) pp. 87, 156. They do not so operate as against the agent, when he avowedly acts, not for himself, but for one known by the purchaser to be his principal. The contract in such a case is not the contract of the agent. He does not, merely because he may have negotiated it, become liable as a party to it. He is not in the position of having warranted the truth of the representations made by him to induce, and which do not induce to his hurt, the purchaser to contract, not with him, but with his principal. If, under the circumstances stated, the agent becomes liable to the purchaser for damages suffered by him, it is by force of other principles of law than those which measure and fix the rights of parties to a contract. His liability, under such circumstances, must be measured by the law of torts. For his fraudulent acts he is responsible to the buyer. He is not liable on the contract negotiated by him for his principal, but he is liable for his own fraud and deceit practiced on the purchaser to induce him to enter into the contract. If the fraud or deceit charged consists of false representations as to material facts made to the purchaser, to show a liability on the part of the agent it must be made to appear that he made such representations knowing them to be false, or, as stated by a writer in 20 Cyc. 24, that he made them "as a positive assertion calculated to convey the impression that he had actual knowledge of their truth, when in fact he was conscious that he had no such knowledge." It follows, from the principles stated, that when the agent, so acting within the scope of his employment as to bind his principal, honestly believes representations made by him to induce the purchaser to contract with his principal to be true, he is not liable either on the contract or as for a tort. It also follows that the portion quoted of the charge complained of, in so far as it authorized a recovery against appellants Wimple and Ewing, notwithstanding they may have made the representations set out in appellee's petition in good faith, believing them to be true, and as well other portions of said charge, in so far as the distinction we have pointed out was ignored, were erroneous.

SCHOLFIELD GEAR & PULLEY CO. *v.* SCHOLFIELD.

Supreme Court of Errors, 71 *Conn.* 1 (1898).

Baldwin, J., p. 18, the defendants requested the court to instruct the jury that "fraud consists of deception intentionally practiced to induce another to part with property or to surrender some legal right, and which accomplishes the end designed."

This instruction was given, except that the word "intentionally"

was omitted. The omission was proper under the circumstances of the case. The action was for false representations made to defraud the plaintiff; and the defendant, in other requests, had admitted, and the jury accordingly were instructed, that it was enough to support it to show that they were made either knowingly or recklessly, with an intent to deceive, or under a belief of their truth, for which there was no reasonable ground, and with intent to induce the plaintiff to act upon them. Deception accomplished by false statements is not excused by a groundless belief in their truth on the part of another, from which loss naturally results.[1]

[1] *Accord: Mattingly* v. *Russell*, 15 Ky. L. R. 875 (1894); *Pieratt* v. *Young*, 20 Ky. L. 1815 (1899); *Trimble* v. *Reid*, 97 Ky. 713 (1895); *Paretti* v. *Rebenack*, 81 Mo. App. 494 (1899); but see *People's Bank* v. *Central Trust Co.*, 179 Mo. 648 (1904); *Einstein, Hirsch & Co.* v. *Marshall & Conley*, 58 Ala. 153 (1877), but only where the defendant is not the vendor or interested in the contract induced by his statements or otherwise benefited by the plaintiff's reliance thereon. The South Dakota Civil Code, pp. 1201 (2), declares "the positive assertion in a manner not warranted by the information of the party making it, of that which is not true, though he believes it to be true" to be "actual fraud," *McCabe* v. *Desnoyers*, 20 S. Dak. 581 (1906); and statutes to the same effect are in force in Oklahoma, *Garvin* v. *Harrell*, 27 Okla. 373 (1910). In *Cunningham* v. *C. R. Pease House Furnishing Co.*, 74 N. H. 435 (1908), it was held that while an action of deceit lies only upon proof of the defendant's knowledge of the falsity of his statement or of his conscious ignorance of its truth, an action on the case for negligence might be maintained for damage resulting from the plaintiff's reliance on statements which reasonable care on defendant's part would have shown him to be false; though in the latter action contributory negligence would be a defense and plaintiff must show that a reasonably careful man could not have made such statements. Here the plaintiff was injured by an explosion of stove blacking which defendant's salesman had stated to be safe to apply to a hot stove.

In *Watson* v. *Jones*, 41 Fla. 241 (1899), it was held that a mortgagor was bound to know of the existence of an encumbrance upon property upon which he had induced the plaintiff to lend money on mortgage by representing it to be free of encumbrances, Carter J., saying, p. 255, "where the defendant's situation or means of knowledge" are "such as to make it incumbent upon him to know whether the statement is true or false, the conclusion is almost irresistable that he did know that which his duty required him to know" and "the law conclusively presumes * * * that the defendant had actual knowledge, dispensing with further proof upon the subject, and admitting no proof to rebut the fact of actual knowledge, but only proof to rebut the existence of the facts from which such actual knowledge is referred."

As to the duty of the president or director of a bank to know its financial condition, see *Seale* v. *Baker*, 70 Tex. 283 (1888), holding that such is his duty; but see *Polhemus* v. *Polhemus*, 114 App. Div. (N. Y.) 781 (1906); *Cowley* v. *Smyth*, 46 N. J. L. 380 (1884); and *Bell* v. *James*, 112 N. Y. S. 750 (1908). In Kentucky a distinction is drawn between a director who is only *prima facie* presumed to know the condition of his bank and the president who is conclusively presumed to know it; *Ward* v. *Trimble*, 103 Ky. 153 (1898). See also, *Boddy* v. *Henry*, 113 Iowa 462 (1901), in which it is held that a seller owed no duty to the purchaser to know the condition of a corporation whose stock he is selling because he is a director thereof, whatever might be his duty as director to one subscribing to stock in the company or otherwise dealing with it.

COWLEY *v.* SMYTH.

Supreme Court of New Jersey, 1884. 46 *N. J. L.* 380.

This suit was brought by a depositor in the Mechanics' and Laborers' Savings Bank in Jersey City, against the defendant, a director of the bank, to recover damages for false representations made by the defendant as to the solvency and condition of the bank, whereby the plaintiff was induced to leave in the bank money he had on deposit, which was lost by reason of the subsequent failure of the bank.

Depue, J. This action is an action on the case for deceit. There is a distinction between relief, either affirmative or defensive, in courts of equity, on the ground of fraud, and the remedy for fraud in a court of law. Courts of equity grant affirmative relief by way of reformation or cancelation of instruments, and even defensive relief in proceedings to enforce an obligation or liability, on the ground of constructive fraud, such as would afford no relief in law, especially by action for deceit. 2 Pom. Eq., § 872; *Arkright* v. *Newbold*, L. R., 17 Ch. Div. 302, 317, 330; *Redgrave* v. *Hurd*, 20 Id. 1, 12. *Reese River Silver Mining Co.* v. *Smith*, L. R., 4 H. of L. Cas. 64, in which Lord Cairns held that "if persons make assertions of facts of which they are ignorant, whether such assertions are true or untrue, they become, in a civil point of view, as responsible as if they had asserted that which they knew to be untrue," is an instance of equitable relief by way of rescission. The bill was filed by a subscriber for stock to be relieved from a subscription induced by false representations as to the property of the corporation. In that case, as appears in the report in L. R., 2 Ch. App. 604, the directors issued the prospectus containing the false statement on the faith of representations of the vendor of the property and without any knowledge of their untruth, and a subscriber for stock, who was misled by the representations, was relieved in equity from his subscription. The doctrine of equitable estoppel, or estoppel *in pais*, which has been adopted by courts of law from the courts of equity, also presents considerations which do not apply to an action for deceit. The theory on which that doctrine is founded is that a party should not be allowed to retract an admission or affirmation which was intended to influence the conduct of another, if the retraction would materially injure the latter. *Phillipsburg Bank* v. *Fulmer*, 2 Vroom 52, 55; *Campbell* v. *Nichols*, 4 Vroom 81, 87. The cases which hold that an agent who, without competent authority, induces another to contract with him as the agent of a third party, is liable in damages without regard to his moral innocence in the supposition that he had the authority he assumed to have, also rest on a special ground—on the ground of an implied warranty of authority. *Randall* v. *Trimen*, 16 C. B. 786; *Collen* v. *Wright*, 8 E. & B. 647, 656; *Richardson* v. *Williamson*, L. R., 6 Q. B. 276, 279; *Weeks* v. *Propert*, L. R. 8 C. P. 427. The observation of Lord Hatherly that "if a man misrepresents a fact, to that fact he is bound if any other

person, misled by such misrepresentation, acts upon it and thereby suffers damage," was made with respect to cases of this kind. *Beattie* v. *Lord Ebury*, L. R., 7 H. of L. Cas. 102, 130.

The action of deceit, to recover damages for a false and fraudulent representation, differs in principle from the cases that have been referred to. In such an action a false representation, without a fraudulent design, is insufficient. There must be moral fraud in the misrepresentation to support the action.

The principle on which the action for deceit is founded being ascertained, the next consideration is with respect to the proof and the proper instructions upon the evidence; for, whatever the character of the evidence may be—whether it consists of knowledge of the falsity of the representation or some other fraudulent device intended for the purpose of deception—the evidence must be submitted to the jury under proper instructions. And I think much of the apparent conflict in the cases has arisen from the failure to discriminate between the issue to be proved and the force and effect of the evidence presented.

The simplest form in which the question of the sufficiency of proof arises is where the proof is that the representation was false to the defendant's knowledge. The scienter as well as the falsehood being proved, proof of the fraudulent intent is regarded as conclusive. Evidence that the defendant intended no fraud will not be received, and the jury will be instructed to find for the plaintiff, though they should be of opinion that the defendant was not instigated by a corrupt motive of gain for himself, or by a malicious motive of injury to the plaintiff. *Foster* v. *Charles*, 6 Bing. 396; S. C., 7 Id. 105; *Polhill* v. *Walter*, 3 B. & Ad. 114; and *Mylne* v. *Marwood*, 13 C. B. 778, are cases of this kind. In each of these cases the proof was that the representation was false to the knowledge of the defendant. The jury added to its finding an expression of opinion that there was no fraudulent intent, but the court nevertheless entered judgment for the plaintiff on the ground that a wilful falsehood was a fraud. The language of Lord Campbell in *Wilde* v. *Gibson*, 1 H. of L. Cas. 605, 633, was directed to cases of this aspect; and Jessel, M. R., in a case where it was proved that the representation was untrue to the defendant's knowledge, refused to receive evidence that he in fact believed it to be true. *Hine* v. *Campion*, L. R., 7 Ch. Div. 344.

In other cases of actionable frauds, the probative force and effect of the evidence to establish the fraudulent intent will depend upon the circumstances of the particular case. This question is presented in a complex form where the defendant has added to a representation—which turns out to be untrue, but was not false to his knowledge—an affirmation that he made the representation as of his own knowledge. In such cases the force and effect of the evidence will depend, in a great measure, upon the nature of the subject concerning which the representation was made. If it be with respect to a specific fact or facts susceptible of exact knowledge, and the subject-matter be such as that the affirmation of knowledge

is to be taken in its strict sense, and not merely as a strong expression of belief, the falsehood in such a representation lies in the defendant's affirmation that he had the requisite knowledge to vouch for the truth of his assertions, and that being untrue, the falsehood would be wilful and therefore fraudulent. But where the representation is concerning a condition of affairs not susceptible of exact knowledge, such as representations with respect to the credit and solvency of a third person, or the condition or credit of a financial institution, the assertion of knowledge, as was held in *Haycroft* v. *Creasy* (note 1), "is to be taken *secundem subjectam materiam,* as meaning no other than a strong belief founded upon what appeared to the defendant to be reasonable and certain grounds." In such a case the question is wholly one of good faith. The form of the affirmation will cast the burden of proof on the defendant, but when the evidence is in, the issue is whether the defendant honestly believed the representation to be true.[1] In support of such an issue the defendant may, by way of exculpation, resort to evidence not admissible in actions for other kinds of deceit. He may, as in *Haycroft* v. *Creasy,* give evidence that the person whose ability he affirmed lived in a style, and with such appearances of property and means, as gave assurances of affluence. He may give in evidence the information he had upon the subject, (*Shrewsbury* v. *Blount,* 2 M. & G. 475) and show the general reputation for trustworthiness of the person whose credit he affirmed. *Sheen* v. *Bumpsted,* 2 H. & C. 193. In fine, he may avail himself of any evidence which may tend to show good faith or probable grounds for his belief, leaving the question to be determined, upon all the evidence, whether his conduct was bona fide—whether, at the time he made the representation, he honestly believed that his representation was true.[2]

The principle adjudged in *Haycroft* v. *Creasy* is applicable to actions against directors for false and fraudulent representations concerning the financial condition of the institutions in their charge. It was so applied in *Taylor* v. *Ashton,* which has become a leading case in the English law. The affairs of such an institution must necessarily be entrusted to executive officers and subordinate agents, and the directors cannot generally know, and have not the requisite ability to learn, by their own efforts, the exact condition of the

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[1] But see *Wells* v. *Driskell,* 149 S. W. 205 (Tex. Civ. App. May 20, 1912), where it is held that the defendant's innocent belief is no defense when he has stated that a third person was worthy of credit who in fact was not so.

[2] So he may prove that he himself acted in his own affairs on the very information upon which he has based his statements to the plaintiff, *Haycroft* v. *Creasy,* 2 East 92; *Pittsburgh Life & Trust Co.* v. *Northern Central Life Ins. Co.,* 140 Fed. 888 (1905), 148 Fed. 674 (C. C. A. 1906), where the defendant made statements on the faith of statistics prepared for their own guidance; or that he was so informed by a reputable third person, *Connelly* v. *Brown,* 73 N. H. 193 (1905). The seeming absurdity of a belief is not by itself in all cases evidence from which alone it can be found that it was not honestly entertained, see the vigorous opinion of Young, J., in *Spead* v. *Tomlinson,* 73 N. H. 46 (1904), p. 62, action of deceit brought against Christian Science healer for stating that he could cure the plaintiff.

affairs of the company, and it has been found that no vigilance on their part has been adequate to protect these institutions from frauds and peculations covered up and concealed by false entries and false reports. A representation by a director that the institution is in a sound and solvent condition within his own knowledge possesses the legal characteristics of the like representation as to the credit and financial ability of a third person, such as was before the court in *Haycroft* v. *Creasy*, and it must be subject to the same legal rule.

The facts on which this case was founded were these: the plaintiff was a depositor in the bank. About the 1st of August, 1878, there was a rumor in circulation affecting the condition of the bank. The defendant was one of the directors of the bank, and a member of the finance committee. The plaintiff, having heard the rumor, went to the defendant and told him of the rumor in circulation, and that he was a depositor and did not want to lose his money, and proposed to take it out. The defendant said, "It can't be so, unknown to me and Mr. Monks. We are on the finance committee. There can be nothing wrong with that bank unknown to me and Mr. Monks. Don't believe any of these false reports; believe me; take my word for it. The bank is good, paying six per cent.—the best in the state. If all that is in Jersey tells you the bank is bad, don't believe it till I tell you." He also said "there was a surplus of over $6,000 after the dividends were paid." The bank continued to pay all demands down to November 1st, 1878, when it went into the hands of a receiver. It was insolvent on the 1st of August, 1878, when these representations were alleged to have been made.

The defendant was a director of the bank from June 8th, 1869, until its suspension in November, 1878, and a member of the finance committee from November 19th, 1877. The duties of the finance committee were to attend to all applications for loans, and to look after the investing of the company's funds. The general charge and government of the bank devolved upon the executive committee, of which the defendant was not a member. There was no evidence that the defendant had actual knowledge of the condition of the bank. On the contrary, the proof was that at a regular meeting of the directors, on the 31st of May, 1877, the president read his statements, showing a surplus of $6,000, and a motion was adopted declaring a dividend of six per cent. The next regular meeting was on the 19th of November, 1877. It appears by the minutes that a statement of the assets and liabilities was read in detail, and a dividend of six per cent. per annum was declared for six months ending October 31st, 1877. On May 30th, 1878, another meeting of directors was held, at which the minutes of the last meeting were read and approved, and a dividend at the rate of six per cent. for the six months ending April, 1878, was declared. All these dividends were credited, and were paid to such of the depositors as presented their books. The defendant was present at each of these meetings of the directors.

On these facts the defendant was not entitled to the nonsuit he asked for; but he was entitled to a different instruction to the

jury. The case cannot be distinguished from *Haycroft v. Creasy* and *Taylor* v. *Ashton,* and it should have been left to the jury to say whether, upon the evidence, the defendant made the representations with a fraudulent purpose to deceive, or whether he made them in good faith and in the honest belief that they were true.

There will be a certificate accordingly.[8]

NASH *v.* MINNESOTA TITLE INS. & TRUST CO.

Supreme Judicial Court of Mass., 1895. 163 *Mass.* 574.

KNOWLTON, J.:—

These cases have once before been considered by this court (see 159 Mass. 437) and the principal question then raised was whether there was any evidence of fraud on the part of the defendant. It was held that the defendant's statement in regard to the title, taken in connection with the context of the letter and the circumstances under which it was written, purported to be a representation that the defendant had examined the title to the mortgaged real estate, and had found it to be perfect. The property was subject to a prior mortgage of thirty thousand dollars, as the defendant's officers well knew. At the last trial the defendant offered to show that the words were not used in the sense in which they were understood by this court, and that its officers acted honestly, and that there was no intention on their part to state anything falsely. The evidence was rejected, and the ruling was, in substance, that in view of the admitted facts that the defendant's officer knew of the existence of the prior mortgage, and that this letter was to be used to induce persons to buy the mortgage bonds, the representation was, as a matter of law, fraudulent.

Of course one will be presumed to have intended his language to be understood according to its usual meaning, and in ordinary cases, in the absence of a reasonable explanation of his mistake, his testimony that he meant something different from what he had said will have but little, if any weight. But inasmuch as the question involved is what was his state of mind, and his actual intent as distinguished from his apparent intent, he is entitled to explain his language as best he can, if it is susceptible of explanation, and to testify what was in his mind in reference to the subject to which

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[8] *Accord: Cabot* v. *Christie,* 42 Vt. 121 (1869); *Bullitt* v. *Farrar,* 42 Minn. 8 (1889); *Kimber* v. *Young,* 137 Fed. 744 (1905), and cases cited therein; *Tucker* v. *White,* 125 Mass. 344 (1878); *Connell* v. *El Paso Co.,* 33 Colo. 30 (1904); and see *Kountze* v. *Kennedy,* 147 N. Y. 124 (1895), pp. 133-134. It is not necessary that the defendant should in so many words, state that he is speaking of his personal knowledge, *Bullitt* v. *Farrar,* 42 Minn. 8, and *Cabot* v. *Christie,* 43 Vt. 121 (1860). Whether a representation is to be taken as an assertion of personal knowledge or as a strong expression of opinion or belief depends on the nature of the subject-matter and the relation of the maker to it, whether the subject is one susceptible of exact knowledge and whether it lies within the personal knowledge of the maker.

the alleged fraud relates. In this respect his expressions, whether spoken or written, are not dealt with in the same way as when the question is what contract has been made between two persons who are mutually relying upon the language used in their agreement. *Hazard* v. *Loring,* 10 Cush. 267. *Thacher* v. *Phinney,* 7 Allen, 146. *Brown* v. *Massachusetts Title Ins. Co.,* 151 Mass. 127. *Snow* v. *Paine,* 114 Mass. 520, 526. *Edwards* v. *Currier,* 43 Maine 474. *Norris* v. *Morrill,* 40 N. H. 395, 401. *Gifford* v. *Thomas,* 62 Vt. 34, 35. *Seymour* v. *Wilson,* 4 Kernan, 567. *Thurston* v. *Cornell,* 38 N. Y. 281. *Phelps* v. *George's Creek & Cumberland Railroad,* 60 Md. 563. *Berkey* v. *Judd, 22* Minn. 287.

In the present case we need not determine whether the excluded evidence on this subject was very important. It is obvious that, if the defendant's officers knew that their statement in regard to the title was false in the sense in which they generally supposed it would be understood, it is immaterial whether or not they had a purpose to do injury or cause loss to anybody who might rely upon it. It is enough to furnish the foundation for a liability, if they used language in regard to the title which they intended should be understood as a representation that the title was perfect when they knew it was not perfect. *Forbes* v. *Howe,* 102 Mass. 427. *Nash* v. *Minnesota Title Ins. & Trust Co.,* 159 Mass. 437. *Commonwealth* v. *Coe,* 115 Mass. 481. *Spaulding* v. *Knight,* 116 Mass. 148. But a majority of the court are of opinion that it was competent for them to testify what their understanding was in regard to the meaning of the representation, and that the presiding justice gave too broad an interpretation to our former decision in the case.

Holmes, J. (dissenting). I am unable to agree with the decision reached by a majority of the court on the first point discussed by them. I will not in this place go into any extended discussion of general principles. If I were making the law, I should not hold a man answerable for representations made in the common affairs of life without bad faith in some sense, if no consideration was given for them, although it would be hard to reconcile even that proposition with some of our cases. But the proposition, even if accepted, seems to me not to apply to this case. The proper meaning of the words used by the defendant has been settled by this court already. 159 Mass. 437. The representation was not made in casual talk, but in a business matter, for the very purpose of inducing others to lay out their money on the faith of it. When a man makes such a representation, he knows that others will understand his words according to their usual and proper meaning, and not by the accident of what he happens to have in his head, and it seems to me one of the first principles of social intercourse that he is bound at his peril to know what that meaning is. In this respect it seems to me that there is no difference between the law of fraud and that of other torts, or of contract or estoppel. If the language of fiction be preferred, a man is conclusively presumed in all parts of law to contemplate the natural consequences of his act, as well as in the conduct of others as in mechanical results. I can see no difference

in principle between an invitation by words and an invitation by other acts, such as opening the gates of a railroad crossing (*Brow* v. *Boston & Albany Railroad,* 157 Mass. 399), or an intentional gesture, having as its manifest consequence, according to common experience, a start and a fall on the part of the person toward whom it is directed, in either of which cases I suppose no one would say that a defendant could get off by proving that he did not anticipate the natural interpretation of the sign. Of course, if the words used are technical, or have a peculiar meaning in the place where they are used, this can be shown; if by the context, or the subject-matter, or the circumstances, the customary meaning of the words is modified, this can be shown by proof of the circumstances, the subject-matter, and the context; but when none of these things appears, a defendant cannot be heard to say that for some undisclosed reason he had in his mind, and intended to express by the words, something different from what the words appear to mean, and were understood by the plaintiff to mean, and are interpreted by the court to mean, whether the action be in tort or contract.[1]

HADCOCK *v.* OSMER.

Court of Appeals, New York, 1897. 153 *N. Y.* 604.

VANN, J. (p. 606). Prior to the fifteenth of September, 1888, Deloss Brown, as principal, and Joseph Brown, as surety, were indebted to the defendant on a past-due note for over $300 and payment thereof had repeatedly been demanded. After trying in vain to borrow money to pay the note, Deloss told the defendant that he did not know where they could get it, and asked if he must have it. The defendant said yes, and, upon being further asked by Deloss

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[1] "A man may make a statement which he intended to mean one thing only, but which negligently and stupidly he sends out in such shape as to bear another meaning and the plaintiff may act upon that meaning. On that I need only say that the defendant, in such a case, would have great difficulty in establishing that it was only honest blundering; but if he did, as for instance, by showing that his manuscript sent to the printer, contained the word 'not', which by some printer's error was omitted in the printed prospectus, or that 10,000 was by printer's error printed 100,000, which escaped notice in revising the proofs, I should say it was not a fraud, though perhaps gross negligence," Lord Blackburn in *Smith* v. *Chadwick,* L. R. 9 A. C. 187 (1884), p. 201.

Bowen, L. J., in *Angus* v. *Clifford,* 2 Ch. D. 449 (1891), p. 472; "A man ought to have a belief that what he is saying is true; but a man may believe what he is saying—the expression which he uses—to be true, because he is honestly using the words in a sense of his own, which, however inappropriate, however stupid, however grossly careless, if you will, is the special sense in which he means to use the words, without any consciousness being present to his mind that they would convey to other reasonable persons a different sense from that in which he is using them—a man may believe a statement in that sense of his, and yet the use of the language may be wholly improper, that is to say, in respect of want of caution in the use of it. It does not follow because a man uses language that he is conscious of the way in which it will be understood by those who read it. Unless he is conscious that it will be un-

where the money could be had, recommended him to call on one Benjamin Hadcock. He did so and was told by Benjamin that he could not lend the money, but that his brother Emmanuel, who was stopping with him, could let him have it. Deloss reported to the defendant that he thought he could get the money of "the Hadcocks," and that they would let him have it "some time in October." When the time came around, the Messrs. Brown started to see if they could get the money of Emmanuel Hadcock, but first went to the defendant and asked him to go along. He said that he could not, when Deloss declared there was no use of their going alone, and thereupon the defendant wrote and delivered to the Browns a paper, of which the following is a copy: "Mr. Hadcock: The Browns are good for what money you let them have." (Signed.) "L. Osmer." The Hadcocks did not know the Browns, but, as they knew the defendant, on the strength of this paper Emmanuel Hadcock lent them $400, taking their note therefor, and on the same day they used the most of the money to pay their debt to the defendant. Both of the Browns were insolvent at this time, and while the defendant may have believed they were good, he did not know whether they were good or not and did not try to find out. Upon the trial of this action, which was brought to recover damages for false representations by means of said paper, there was but slight dispute as to the representations, their falsity or the injury resulting therefrom, but the defendant insisted that as he did not know that his representations were false, there could be no recovery against him. Through his counsel, he asked the trial court to charge the jury "that there can be no recovery in an action of deceit unless it appears that the defendant made the representations, knowing them to be false, with intent to deceive and that the plaintiff suffered damages in consequence thereof." The court refused to so charge, except with the modification "that if he made the statement that they were good, as a fact, not as an opinion, without knowing whether it was true or not, then it was false in the sense that he made a statement of fact as though he knew it to be true, which he did not know to be true. That, together with what I have already said in my charge in regard to it, will enable the jury to understand what I mean." Exception was taken to the refusal to charge as requested and to charge as made. In the body of the charge, the court after instructing the jury as to the difference between the assertion of a fact and the expression of an opinion, told them in

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derstood in a different manner from that in which he is honestly though blunderingly using it, he is not fraudulent, he is not dishonest. An honest blunder in the use of language is not dishonest. What is honest is not dishonest."

In *Slater Trust Company* v. *Gardiner*, 183 Fed. 268 (Circ. Ct. Southern Dist. N. Y. 1910), it was held that the president of a company was not liable for false statements in a mortgage, which he signed, honestly believing on the advice of his New York counsel that the company's counsel in St. Louis, one of the most experienced attorneys of that place, had described in such words, as under the laws of Missouri, most accurately covered them, the legal rights of the company under the facts which he, the defendant, had correctly laid before such St. Louis counsel.

substance that if the defendant made the representation, either knowing it to be untrue, or, without knowing whether it was untrue or not, stating it as an existing fact, intending that it should be taken and acted upon as such, they might infer an intent to defraud; "because," as the court continued, "a man has no right to state a thing as a fact, which misleads the other party to his damage, unless he knows whether it is true or untrue; and if he states it, knowing and understanding that he does not know whether it is true or not, he just as much misleads the other man as though he stated it with the knowledge that it was untrue."

An action to recover damages for deceit cannot be maintained without proof of fraud as well as injury. Actionable deceit cannot be practiced without an actual intention to deceive, resulting in actual deception and consequent loss. But while there must be a furtive intent, it may exist when one asserts a thing to be true which he does not know to be true, as it is a fraud to affirm positive knowledge of that which one does not positively know. Where a party represents a material fact to be true to his personal knowledge, as distinguished from belief or opinion, when he does not know whether it is true or not and it is actually untrue, he is guilty of falsehood, even if he believes it to be true, and if the statement is thus made with the intention that it shall be acted upon by another, who does so act upon it to his injury, the result is actionable fraud. (*Kountze* v. *Kennedy*, 147 N. Y. 124, 130; *Rothschild* v. *Mack*, 115 N. Y. 1, 7; *Marsh* v. *Falker*, 40 N. Y. 562, 573; *Bennett* v. *Judson*, 21 N. Y. 238; Addison on Torts, 1007; 1 Bigelow on Fraud 514.) Such seems to be the case now before us, as the facts are presumed to have been found by the jury. The plaintiff's testator did not ask for information in regard to the solvency of those who wished to borrow money of him, but the defendant volunteered to give it. He was interested in the result of the loan, for the bulk of the proceeds was for his benefit. On being told that the loan would not be made without his presence, he armed the proposed borrowers with a written statement over his own signature, containing a positive assertion of a material fact, with the intention that it should be acted upon and should induce the loan of the money. Yet he did not know the assertion, thus positively made for such an important purpose, to be true, and he did not investigate or seek to discover whether it was true or not, although he had dealt some with the Browns and had some information as to their circumstances. He intended, as the jury has found upon sufficient evidence, that the leader should understand him as communicating his actual knowledge and not as expressing his opinion, judgment or belief. Knowing that he did not know what he said he did, and what he intended to cause another to believe he did, he took the responsibility of its truth, and honesty of belief in the supposed fact, under such circumstances, cannot relieve him from the imputation of falsehood and fraud. As was said by Judge Peckham, in *Rothschild v. Mack* (*supra*): "He either knew or he did not know of the financial condition of the makers of the note. If he did know

it, then he knew that the note, as to both makers and indorsers, was without value. If he did not know its condition, he yet assumed to have actual knowledge of the truth of his statement. * * * He certainly meant to convey the impression of actual knowledge of the truth of the representations he made as to the value of the note, and he either knew such representations were false or else he was conscious that he had no actual knowledge while assuming to have it and intending to convey such impression. If damage ensue this makes an actionable fraudulent representation." The language of Chief Judge Andrews, in *Kountze* v. *Kennedy* (*supra*), is equally applicable: "One who falsely asserts a material fact, susceptible of accurate knowledge, to be true of his own knowledge, and thereby induces another to act upon the fact represented to his prejudice, commits a fraud which will sustain an action for deceit. This is not an exception to, but an application of the principle that actual fraud must be shown to sustain such an action. The purpose of the party asserting his personal knowledge is to induce belief in the fact represented, and if he has no knowledge, and the fact is one upon which special knowledge can be predicated, the inference of fraudulent intent in the absence of explanation naturally results." The rule is the same in other states and in England. Thus, in *Chatham Furnace Co.* v. *Moffatt* (147 Mass. 403) the court said: "The charge of fraudulent intent, in an action for deceit, may be maintained by proof of a statement made, as of the party's own knowledge, which is false, provided the thing stated is not merely matter of opinion, estimate or judgment, but is susceptible of actual knowledge, and in such case it is not necessary to make any further proof of an actual intent to deceive. The fraud consists in stating that the party knows the thing to exist, when he does not know it to exist, and if he does not know it to exist he must ordinarily be deemed to know that he does not. Forgetfulness of its existence after a former knowledge, or a mere belief of its existence, will not warrant or excuse a statement of actual knowledge." (See also, *Bullitt* v. *Farrar*, 42 Minn. 8; *Hexter* v. *Bast*, 125 Pa. St. 52; *Wells* v. *McGeoch*, 71 Wis. 196; *Swayne* v. *Waldo*, 73 Iowa 749; *Craig* v. *Ward*, 1 Abb. Ct. App. Dec. 454; *Evans* v. *Edmonds*, 13 C. B. 777.)

Judgment affirmed.[1]

The liability for breach of warranty appears to have existed before the separation of tort and contract. The action in the King's Court was trespass on the case upon the warranty, see Fitzherbert

[1] *Accord: Cooper* v. *Schlesinger*, 111 U. S. 148 (1883); *Riley* v. *Bell*, 120 Iowa 618 (1903); *John Gund Brewing Co.* v. *Peterson*, 130 Iowa 301 (1906); *Bullitt* v. *Farrar*, 42 Minn. 8 (1889); *Cahill* v. *Applegarth*, 98 Md. 493 (1904); *People's Central Bank* v. *Central Trust Co.*, 179 Mo. 648 (1904); *semble; Hexter* v. *Bast*, 125 Pa. St. 52 (1889), p. 72; *Shackett* v. *Bickford*, 74 N. H. 57 (1906). Many cases often cited as following *Chatham Furnace Co.* v. *Moffatt*, *ante.*, are either expressly decided on the same grounds as the principal case or are cases in which the facts are similar to it. see *Hamlin* v. *Abell*, 120 Mo. 188 (1894); and *John Gund Co.* v. *Peterson*, 130 Iowa 301 (1906).

de Naturae Brevium (1643) 213 c.[1] Until the middle of the eighteenth century the practice was to declare in deceit upon the warranty, (*warrantizando vendedit*), and while the warranty was alleged to be false and fraudulent, the averment of fraud like that in the early actions of assumpsit, itself a form of action on the case for deceit, was sufficiently established by proof that the goods were not in fact as warranted and that thus the purchaser was deceived in that his just expectations were disappointed. The practice of declaring in assumpsit is said by Lord Mansfield in *Stuart* v. *Wilkins,* 1 Douglas 18 (1778), to be then of twenty years standing and was probably introduced in order to allow the joinder of the money counts, see Ashurst, J., in the above case and Lord Ellenborough in *Williamson* v. *Allison,* 2 East 449 (1802), p. 451. In the action of deceit for false warranty it was not necessary to aver a scienter or to prove it if averred, *Williamson* v. *Allison,* 2 East 449 (1802). The plaintiff in such an action might recover by proof of the warranty and its breach or by proof of a material misrepresentation false to the vendor's knowledge, *Vail* v. *Strong,* 10 Vt. 457 (1838); *Place* v. *Merrill,* 14 R. I. 578 (1884); but see *Mahurin* v. *Harding,* 28 N. H. 128 (1853), where it was held that if the warranty and its breach is not expressly averred as the deceit sued upon, but representations though amounting to a warranty are averred merely as inducing the sale, the scienter must be proved; and see *Erie City Iron Works* v. *Barber,* 102 Pa. St. 156 (1883), *accord,* where a further distinction is taken between express and implied warranties.

In *Pierce* v. *Carey,* 37 Wis. 232 (1875), it is held that if the action is in deceit upon a warranty, the scienter must be proved, though leave will be granted to amend the complaint by striking out the averments of fraud so turning the action into one *ex contractu.*

In *Caldbeck* v. *Simanton,* 82 Vt. 69 (1909), it was held that where no scienter is alleged the action though in form on tort, is in substance *ex contractu,* so that the plaintiff could not proceed by arrest on a capias.

SECTION 5.

Plaintiff's Right to Rely on the Defendant's Statements.

(a) Statements made to persons other than plaintiff.

GEORGE W. BUTTERFIELD v. ANDREW J. BARBER

Supreme Court of Rhode Island, 1897. 20 *R. I.* 99.

Case for deceitful representations by a debtor to his creditor, the plaintiff having subsequently purchased the claim from the

[1] In two cases in the Fair Court of St. Ives in 1317 and 1324, Select Pleas of the Law Merchant, (Selden Society), p. 102, 105, the defendant is attached to answer in plea of covenant, for breach of, in the one case an "assurance" and in the other of a pledge in a sale bound by giving God's penny that the goods sold corresponded to a sample shown. The defendant denied "tort and force" and the question of the existence and breach of the covenant was tried by an inquest.

latter in the form of a promissory note. Heard on defendant's petition for a new trial.

PER CURIAM. Assuming that the representations testified to by the plaintiff were made by the defendant, the testimony shows that they were made for the purpose of being communicated to Murphy to procure an extension of time for the payment of his claim against the defendant. At the time they were made the defendant had no expectation that the note, which was subsequently made, was to be taken by the plaintiff, who, in the meantime, had purchased the claim from Murphy. We do not think that in these circumstances the plaintiff had the right to rely on the representations, if they were made, because they were not made with the intention of inducing his action, and consequently that he has no ground to maintain an action for deceit.

Case remitted to the Common Pleas Division, with directions to enter judgment for the defendant for costs.

Patrick H. Mulholland, for plaintiff.

George A. Littlefield, for defendant.

WELLS *v.* COOK.

Supreme Court of Ohio, 1865. 16 *Ohio State Reports* 677.

Error to the Common Pleas of Union County. Reserved in the District Court.

On the 26th of February, 1863, the plaintiff, Orlando Wells, filed his petition, against the defendant Cook, as follows[1]:

The defendant on or about the first day of November, sold to the plaintiff, as the agent of his brother, Osmond Wells, a herd of sheep, the defendant well knowing at the time of the purchase that the said sheep were to be turned in with a large flock of sheep, owned at that time by the said Osmond Wells, which flock at the time were sound and healthy and free from any disease. The defendant, at the time of the said purchase, wrongfully and fraudulently represented to plaintiff that said sheep purchased of him were sound and healthy and free from any disease; although the sheep were apparently sound and healthy, were not sound and healthy as the defendant then well knew. The plaintiff on or about the first day of December purchased of his brother all of the latter's sheep, including those purchased of the defendant, solely relying, as to the soundness of said sheep, upon his own knowledge of said 1,100 owned by his brother and relying upon the representations of the defendant as to the soundness of those purchased of him. The plaintiff avers that the said sheep purchased of the defendant were, at the time of the purchase, unsound, and had a disease known as foot rot, which is contagious and which was communicated to the

[1] The facts of the petition are considerably abridged.

rest of the flock, by the turning in with them of the sheep purchased by the defendant. And the defendant further avers that at the time of the purchase from his brother, that the disease had not made its appearance in his brother's flock so as to be noticed by the plaintiff or his brother, but it had since broken out among the said flock so as to render them almost entirely valueless. To the damage of the plaintiff four thousand dollars, for which he prays judgment.

To this petition the defendant demurred, on the ground that the same does not state facts sufficient to constitute a cause of action. The court sustained the demurrer, and thereupon gave judgment for the defendant. The plaintiff, to reverse this judgment, filed his petition in error in the district court, alleging for error the sustaining of the demurrer to his petition in the court below, and the case was thence reserved for decision in this court.

BRINKERHOFF, C. J. The question is, whether the state of facts set forth in the petition constitutes a cause of action. The question is one of some difficulty; and the facts, as alleged, make a case which strongly inclines the mind to sustain the action, if that can be done without so far trenching upon established rules of law as to amount to judicial legislation. We have, therefore, held the case for some time under advisement, and have bestowed upon it the best consideration of which we are capable, but have been compelled to the unanimous conclusion that the court below was right—that, upon the facts alleged, no action can be sustained.

Lord Campbell, in *Gerhard* v. *Bates,* 20 E. L. & E. R. 136, lays down the rule thus: "If A fraudulently makes a representation which is false, and which he knew to be false, to B, meaning that B shall act upon it, and B, believing it to be true, does act upon it, and thereby suffers a damage, B may maintain an action on the case for deceit." We have been able to find no case which transcends the limits thus defined—no case which purports to hold, or is decided on the principle, that if A makes a false and fraudulent representation to B, meaning that C, and C alone, shall act upon it, and B thereupon assumes to act upon it, and suffers damage, B can maintain an action against A for the deceit. And as transactions of the kind last supposed must be of frequent occurrence in every commercial country, the fact that no such case can be found, is strong evidence that such a doctrine is unknown to the law. And the case last above supposed, is, really, the case before us. The representations complained of were not made to the plaintiff, *meaning that the plaintiff should act upon them* in any manner or matter affecting his own interests, but were made to the plaintiff, acting as the avowed agent of his brother, simply in a representative capacity, meaning that the *brother* should act upon them; and the fact that the brother was meant to act upon them, through the plaintiff, as his agent, cannot, it seems to us, alter the case in any legal aspect.

The cases which seem most nearly to approach a doctrine which it would be necessary to hold in order to sustain this action, are *Thomas* v. *Winchester,* 2 Selden's R. 397, and *Langridge* v. *Levy,* 2 M. & W. 518, and same case on error, 4 M. & W. 336.

In the former case it was held, that "a dealer in drugs and medicines, who carelessly labels a deadly poison as a harmless medicine, and sends it, *so labeled,* into market, is liable to all persons, who, without fault on their part, are injured by using it as such medicine *in consequence of the false label,*" and this "though the poisonous drug with such label may have passed through many intermediate sales before it reaches the hands of the person injured." In that case, the article sold purported to be a medicine, was intended for retail in minute quantities, and to be administered in doses to a great number of persons. And the court regarded the accompanying label as a continuous representation to, and intended to be acted on by, whomsoever it might concern; that the article was what its label purported. In these particulars, and others, the case differs from that before us, and falls short of being conclusive of it, if the case be accepted as authority. It is worthy of remark, however, that Gardiner, J., in his concurring opinion, places his concurrence solely on the ground that the sale of the poison, without a label indicating that it was a poison, was declared a misdemeanor by a statute of New York.

(The discussion of *Thomas* v. *Winchester* is omitted.)

In the latter case, *Langridge* v. *Levy,* the plaintiff's father bought of the defendant, avowedly for the use of himself and his sons, a gun, which the defendant falsely and fraudulently warranted to be of the make of one N, and to be a good, safe and secure gun; whereas the gun was not made by N., but by an inferior maker, and was unsafe, ill-manufactured, dangerous and unsound; of all which the defendant, at the time of the warranty, had notice; and the plaintiff knowing and confiding in the warranty, used the gun, which but for the warranty he would not have done; and the gun, being in the hands of the plaintiff, by reason and wholly in consequence of the unsoundness, etc., burst and injured the plaintiff, etc. The action in the court of Exchequer was held to be maintainable, and the judgment was afterwards affirmed on error. Parke, B., in delivering the opinion of the court, indicates so clearly the distinctions between the case and the one now before us, that I quote him at some length. He says: "It is clear that this action cannot be supported upon the warranty as a contract, for there is no privity in that respect between the plaintiff and the defendant. The father was the contracting party with the defendant, and can alone sue upon that contract for the breach of it. The question then, is, whether enough is stated on this record to entitle the plaintiff to sue, though not on the contract; and we are of the opinion that there is, and that the present action may be supported. We are not prepared to rest the case upon one of the grounds on which the learned counsel for the plaintiff sought to support his right of action; namely, that wherever a duty is imposed on a person by contract or otherwise, and that duty is violated, any one who is injured by the violation of it may have a remedy against the wrongdoer; we think this action may be supported without laying down a principle which would lead to that *indefinite extent of liability,* so strongly put in the course of

the argument on the part of the defendant; and we should pause before we made a precedent, by our decision, which would be an authority for an action against the vendors, even of such instruments and articles as are dangerous in themselves, at the suit of *any person* whomsoever in whose hands they might happen to pass, and who should be injured thereby. We do not feel it necessary to go to that length, and our judgment proceeds upon another ground. If the instrument in question, which is not of itself dangerous, but which requires an act to be done, that is, to be loaded, in order to make it so, had been simply delivered by the defendant, without any contract or representation on his part, to the plaintiff, no action would have been maintainable for any subsequent damage which the plaintiff might have sustained by the use of it. But if it had been delivered by the defendant to the plaintiff, for the purpose of being so used by him, with an accompanying representation to him that he might safely so use it, and that the representation had been false to the defendant's knowledge, and the plaintiff had acted upon the faith of it being true, and had received damage thereby, then there is no question but that an action would have lain, upon the principle of a numerous class of cases, of which the leading one is that of *Pasley* v. *Freeman,* 3 T. R. 51; which principle is, that a mere naked falsehood is not enough to give a right of action; but if it be a falsehood told with an intention that it should be acted upon by the party injured, and that act must produce damage to him; if, instead of being delivered to the plaintiff immediately, the instrument had been placed in the hands of a third person, *for the purpose of being delivered to and then used by the plaintiff,* the like false representation being knowingly made to the intermediate person to be communicated to the plaintiff, and the plaintiff had acted upon it, there can be no doubt but that the principle would equally apply, and the plaintiff would have had his remedy for the deceit; nor could it make any difference that the third person also was intended to be deceived by the defendant; nor does there seem to be any substantial distinction if the instrument to be delivered, in order to be so used by the plaintiff, though it does not appear that the defendant intended the false representation itself to be communicated to him. There is a false representation made by the defendant, with a view that the plaintiff should use the instrument in a dangerous way, and, unless the representation had been made, the dangerous act never would have been done. If this view of the law be correct, there is no doubt that the facts which upon this record must be taken to have been found by the jury bring this case within the principle of those referred to. The defendant has knowingly sold the gun to the father, *for the purpose of being used by the plaintiff* by loading and discharging it, and has knowingly made a false warranty that it might be safely done, in order to effect the sale; and the plaintiff, on the faith of that warranty, and believing it to be true, (for that is the meaning of the term 'confiding',) used the gun, and thereby sustained the damage which is the subject of this complaint. The warranty between these parties has not the effect of a contract; it

is no more than a representation; but it is no less: The delivery of the gun to the father is not, indeed, averred; but it is stated that, by the act of the defendant, the property was transferred to the father, in order that the son might use it; and we must intend that the plaintiff took the gun with the father's consent, either from his possession or from the defendant's; for we are to presume that the plaintiff acted lawfully, and was not a trespasser, unless the contrary appear. We therefore think, that as there is fraud, and damage, the result of that fraud, *not from an act remote and consequential, but from one contemplated by the defendant at the time as one of its results,* the party guilty of the fraud is responsible to the party injured. We do not decide whether this action would have been maintainable if the plaintiff had not known of and acted upon the false representation; nor whether the defendant would have been responsible to a person not within the defendant's contemplation at the time of the sale, to whom the gun might have been sold or handed over. We decide that he is responsible in this case for the consequences of this fraud whilst the instrument was in the possession of a person to whom his representation was either directly or indirectly communicated, *and for whose use he knew it was to be purchased.*"

It will be seen that, in order to render the case before us analogous to that of *Langridge* v. *Levy,* it would have been necessary for the plaintiff, at least, to have alleged that the diseased sheep were purchased for the avowed purpose of turning them in with other sheep of his own; but it does not even appear that, at that time, he had any sheep of his own, or that he expected to have any. And in the subsequent case of *Winterbottom* v. *Wright,* 10 M. & W. 107, Lord Abinger declares that the case of *Langridge* v. *Levy* has been much misapprehended, and that the principle of that case ought not to be extended.

The influences of human conduct, good or bad, are far-reaching, and are often seen and felt in consequences exceedingly remote, but uncertain and complicated. It is simply impossible that municipal law should take cognizance of all these consequences. From necessity, a large share of them must be left to the jurisdiction of public opinion, individual conscience, and, finally, to the retributions of another world. There must, somewhere, be a fixed limit between the near and remote, direct and indirect consequences beyond which the law will not take cognizance of them. And in this case we are satisfied that one of the prescribed limits is this—that the false and fraudulent representations must have been intended to be acted on, in a matter affecting himself, by the party who seeks redress for consequential injuries. If this limit is to be extended, it must be the work of the legislature.

We have considered this case solely upon principles of the common law; for, under the ruling of this court, in *Vining* v. *Bricker,* 14 Ohio St. 331, the act of February 19th, 1837, "to prevent the spread of disease among sheep," leaves the civil rights and remedies

of parties sustaining damage by reason of the sale of diseased sheep, unchanged.

Judgment affirmed.

Scott, Day, White and Welch, JJ., concurred.[2]

TINDLE *v.* BIRKETT.

New York Court of Appeals. 171 *N. Y.* 520 (1902).

O'BRIEN, J. The plaintiffs sought to recover in an action based upon allegations of fraud and deceit practiced upon them by the defendant, the price of three bills of goods which they were induced by such fraud to sell to a firm of dealers of which the defendant was a member. The firm was composed of the defendant and another person who died before the trial, and by an order of the court the action was continued against the defendant. At the trial before the court and a jury the plaintiffs were nonsuited and their counsel excepted and this exception presents the question of law in the case. The judgment was affirmed on appeal.

There is practically no dispute about the facts and the question presented by the appeal is whether the plaintiff's proof did not sustain or tend to sustain the action. The three bills of goods were sold and delivered by the plaintiffs to the firm at the following dates respectively: November 30th, 1898, January 24th, 1899, and March 25th, 1899, and amounted in aggregate to $901.86. On the 15th day of April following the last sale both members of the firm were adjudged bankrupts on their own petition in the Federal court. About eighteen months prior to filing the petition and on the 16th of September, 1897, the defendant, for the purpose of securing a rating by the mercantile agency of R. G. Dun & Co., made and delivered to that agency a statement in writing as to the financial condition of the firm, which showed net assets of $152,858.22. More than a year thereafter and on the 2d day of November, 1898, in reply to a request from the agency, the defendant wrote a letter in which he practically reiterated his former statement and added

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[2] See *accord, Thorp* v. *Smith,* 18 Wash. 277 (1897), plaintiff's agent bought property from defendant. He caused defendant to recite a larger consideration than that actually paid, representing that the property was to be turned over to a company to be formed from which he and the plaintiff desired to obtain a large price, in fact the agent used the recital to defraud the plaintiff, his principal, and not the stockholders of the proposed company; held that no action lay. See also, *Marshall* v. *Hubbard,* 117 U. S. 415 (1886), vendor held not liable to plaintiff who, without his knowledge, takes original vendor's place in the transaction.

Whether a man who has extorted a statement from one reluctant to say anything by putting him in a position where silence would amount to an admission of a fact which it is his duty (or to his interest) to keep secret, is entitled to rely on such statement appears not to have been decided. The facts in *Tackey* v. *McBain,* note to *Polhill* v. *Walter,* raised the question, but the case was decided on other grounds.

that the business of the firm was "large, increasing and profitable." Still later and on March 9th, 1899, just before the purchase of the last two bills of goods from the plaintiffs, a representative of the agency called upon the defendant personally and received from him a verbal statement that there had been no material change in the financial condition of the firm. The agency gave the firm a rating of from $125,000 to $200,000, which was maintained and never changed. Substantially the same rating was given to the firm by the Bradstreet agency upon like statements and representations, though made at an earlier date, and the defendant at all times knew that the credit of the firm was so rated in reference books sent by these agencies to merchants and business people. The plaintiffs had and used these reference books of both agencies in their business, and when defendant applied for credit they consulted these books and in reliance on the correctness of the rating, without any other knowledge, sold and delivered the goods in question upon credit. The statements upon which these ratings were given, at least as to the Dun agency, were grossly false. The learned court below correctly described this phase of the case in these words which we can very well adopt:

"That the statement upon which the rating of the defendant's firm was based by the mercantile agency of R. G. Dun & Co. were grossly false, and that the plaintiffs relied upon such rating in giving the firm credit for the goods purchased upon the several occasions mentioned, are facts concerning which there is and can be no serious dispute, and had such statements been made directly to the plaintiffs under circumstances which would fairly warrant the assumption, that they were so made by way of inducing credit, there would, of course, be no question as to the right of the plaintiffs to maintain an action of this character."

But the learned court held that since these false and fraudulent statements were not made to the plaintiffs personally and directly by the defendant, but to the agencies, and since the plaintiffs never saw the statements themselves, but only the result of them in the reference books, the action could not be maintained. That one merchant may defraud another under modern business methods just as effectually by a false and fraudulent statement to a commercial agency as in any other way no one can doubt. That the defendant did actually deceive and defraud the plaintiffs by thus putting into circulation in the business world a false, fraudulent and fictitious rating purporting to express his true commercial standing and financial ability is equally clear. Disregarding mere forms and methods, it cannot be doubted that the defendant spoke false and deceitful words to the plaintiffs through the agency just as effectually as if they had met face to face and the statements had been made directly and personally. The buyer of goods may become liable to the seller in fraud, although they have never met or seen each other, and no personal communication that is false or fraudulent has passed between them. If the former does just what this defendant did and procures a fraudulent rating, intending that it should be published to

the business community and taken as true, that is fraud upon the person who relies and acts upon it to his damage. But it is not necessary to argue this question as an original one since it has been deliberately decided by this court.

In *Eaton, C. & B. Co.* v. *Avery,* (83 N. Y. 31), it was held that when a member of a firm makes statements to a commercial agency, which he knows to be false as to the financial condition of the firm, with the intent that the statements shall be communicated to persons interested in ascertaining the pecuniary responsibility of the firm, intending thus to procure credit and to defraud such persons, and such statements are communicated to one who in reliance thereon sells goods to the firm on credit, an action for deceit may be maintained against the buyer of goods in favor of the seller who has suffered by the fraud. That decision is controlling in the case at bar, since the two cases are almost identical in their facts, and all the objections urged by the learned court below to a recovery in this case were fully answered upon principle and authority. The court states that the case was new in its facts but old in the principle involved, and the cases cited sustain the statement. The same principle was stated in a more recent case. (*Bliss* v. *Sickles,* 142 N. Y. 647.)

The objections urged to a recovery in a case like this are quite untenable. It is said that it would put business men at the mercy of commercial agencies. No one need have any fear of that, since no business man can be affected unless he makes use of such an agency to give information to the business world of his financial condition in order to show that he is worthy of credit, and then it is impossible to harm him unless he makes statements that he knows to be false for a fraudulent purpose, and if he does, there is no reason why he should not respond to one who has suffered thereby. So, also, it is said that these agencies procure information from other sources than from the statement of parties seeking credit. That may be so, but there is little danger that any one will be made liable in fraud for false statements other than his own. If the defendant in this case could show that he never made the statements referred to he would have little difficulty in defeating this action notwithstanding the high rating in the reference books. A party who is really innocent can always protect himself against the unauthorized statements of others. In this case there was clearly a false and excessive rating which was justified by the statements made by the defendant, and it is admitted that these statements were false and fraudulent and that the plaintiffs relied upon the rating in giving the credit. Clearly, this state of facts is a sufficient basis for a charge of fraud and deceit. The proof was certainly sufficient to carry the case to the jury and hence the plaintiffs were improperly nonsuited.

The judgment should be reversed and a new trial granted, costs to abide the event.

BARTLETT, J. I agree with the result reached in the prevailing opinion for reversal. It was clearly error for the trial judge to

nonsuit the plaintiffs, and the affirmance of the judgment entered thereon by the Appellate Division cannot be sustained.

I am of the opinion, however, that we should deal with the question that induced the Appellate Division to sustain the nonsuit. In the opinion of the learned court it is said: "Mercantile agencies do not always base their rating of a person's responsibility solely upon information obtained from the individual himself. Upon the contrary, it is well understood that they obtain such information from various sources, and this is especially true in cases where, as it often happens, a business man, for various reasons best known to himself, declines to furnish the public with any statement of his financial condition."

It seems to be conceded that the defendant made representations to the mercantile agency of R. G. Dun & Company that were grossly false and calculated to mislead the plaintiffs, who consulted the ratings given to the defendant by that agency.

The Appellate Division seems to have held that the plaintiffs were not authorized to rely upon these ratings for the reason that they were based upon the representations of the defendant and also upon information received as to defendant's commercial standing from outside sources.

The opinion of the court below further states: "It follows, therefore, that, if the rule contended for by the plaintiffs were to obtain, a trader who has made a report to a mercantile agency as to his pecuniary standing might be held liable to arrest and imprisonment for the rating, which, although based in part thereon, was nevertheless due in a much larger measure to information obtained from a business rival, a personal enemy or some other equally unreliable source."

If the fact that the commercial agencies of the country base their ratings of merchants not only upon the representations of the latter, but upon information obtained from other sources, renders such rating unavailable to persons contemplating the giving of credit, the information obtained by these agencies would be of little value.

I am of the opinion that the plaintiffs were entitled to submit to the jury the question whether the grossly false representations made by the defendant to the mercantile agency were one of the causes, if not the sole inducing cause, which led to the sale of the goods in question. (*Morgan* v. *Skiddy*, 62 N. Y. 319.)

VANN, J. (dissenting). The rating of a mercantile agency is merely its conclusion as to the financial status of the person to whom it relates. In this case, the concluison was based partly upon statements furnished by the defendant and partly upon information derived from other sources. There had been a long course of dealing between the parties, and the statements made by the defendant, which included an itemized enumeration of assets and liabilities, were not communicated to the plaintiffs, and were neither known to nor relied upon by them when they gave the credit. It is not only unsafe, but a violation of sound principles, to permit a recovery for deceit, with the severe consequences that may follow, unless the evidence connects the false statements directly with the person alleged to have

practiced the deceit, or with his duly authorized agent acting within the scope of his authority. A mercantile agency is not such an agent as to make its mere inference as to the effect of the debtor's statements binding upon him. Its authority, so far as he is concerned, is limited to the transmission of his statement, as made by him, or the substance thereof, to its subscribers. When it gives its opinion, simply, it does not act as his agent, but as the agent of the subscriber. In *Eaton, C. & B. Co.* v. *Avery* (83 N. Y. 31), the statements made by the purchaser were communicated to the seller, not the mere rating of the agency, and this court said: "By making a statement as to the financial condition of his firm to such an agency he virtually instructed it what to say if inquired of;" that is, the agency should report what the purchaser said, not its conclusion as to the effect of what he said.[1]

Judgment reversed.[2]

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[1] *Accord: Holmes* v. *Harrington,* 20 Mo. App. 661 (1886).

[2] *Accord: Bradley* v. *Seaboard National Bank,* 167 N. Y. 427 (1901); *Triplett* v. *Rugby Distilling Co.,* 66 Ark. 219 (1899); *Staver & Abbott Co.* v. *Coe,* 49 Ill. App. 426 (1893); *Cox Shoe Co.* v. *Adams,* 105 Iowa 402 (1898); *Salisbury* v. *Barton,* 63 Kans. 552 (1901); *Courtney* v. *Knabe,* 97 Md. 499 (1903); *Genessee Savings Bank* v. *Michigan Barge Co.,* 52 Mich. 164 (1883); *Dime Savings Bank* v. *Fletcher,* 158 Mich. 162 (1909); the defendant, vice-president of a company, was held liable for false statements made by him in his report to the Secretary of State, upon which report a commercial agency had given the company a rating, which enabled the defendant to obtain a loan from the plaintiff upon the stock of the company; *Emerson* v. *Detroit Steel Co.,* 100 Mich. 127 (1894); similar facts. In the majority of these cases the vendor's fraud is alleged as avoiding a sale procured thereby.

The defendant's statement must have been made to the agency for the purpose of obtaining credit. If made in answer to inquiries by it, and in a form indicating no desire for credit, no action will lie, though credit be actually extended in reliance upon it; *Macullar* v. *McKinley,* 99 N. Y. 353 (1885).

In *Reid, Murdoch & Co.* v. *Kempe,* 74 Minn. 474 (1898); it is held that it is not the duty of a merchant to give notice to a commercial agency, which has previously given him a rating upon information true when furnished, of changes in the condition of his business, which makes such rating misleading, but see *Mooney* v. *Davis,* 75 Mich. 188 (1889); where it is held that there is a duty to correct statements, though true when made, when the conditions change so soon thereafter that it is evident that the report will be taken to be a statement of an existing financial condition, and see *Lindauer* v. *Hay,* 61 Iowa 663 (1883).

In *Cox Shoe Company* v. *Adams,* 105 Iowa 402 (1898), it was held that a false statement of the vendor's financial condition made to a commercial agency would invalidate a sale made to a customer of the commercial agency one year thereafter, the condition of the vendor's business not having changed in the interval, but see *Macullar* v. *McKinley,* 99 N. Y. 353 (1885).

Though the report is not made from information derived from the defendant, if the defendant knowing of its character refers a purchaser to it, he is guilty of a fraud if it be untrue to his knowledge, *Cox Shoe Company* v. *Adams,* 105 Iowa 402 (1898).

A commercial agency is not the agent of him who gives information to it in regard to his financial condition, such person is not answerable for misquotation by such agency of true statements made by him, nor for improper conclusions drawn by such agency therefrom; *Wachsmuth* v. *Martini,* 154 Ill. 515 (1894).

It is not necessary that the plaintiff obtain the rating directly from the commercial agency, or that he be himself a client of such agency, *Davis* v. *Louisville Trust Co.,* 181 Fed. 10 (C. C. A. 1910).

HINDMAN *v.* FIRST NATIONAL BANK.

United States Circuit Court of Appeals, 1902. 112 *Fed.* 931.

Action of deceit to recover damages for the fraudulent representation of the defendant, whereby he was induced to buy shares of the capital stock of the Columbian Fire Insurance Company, which shares have proven worthless.

The Insurance Company, a Kentucky corporation, could not, under the laws of that State, begin business until the State Insurance Commissioners should be satisfied that all of its capital had been actually paid in in cash. The cashier of the defendant bank certified that the Insurance Company had on deposit $248,182.90, of which $200,000 had been paid in as the full amount of the stock of the said Company and the balance had been paid in as surplus. While the statements were literally true, the cashier knew that the money had been raised by methods which make them substantially false. The Insurance Commissioner thereupon issued a license to the Insurance Company which among other things certified that it had a paid up capital of $200,000 and a surplus of $48,182.90, "as shown by the certificate of the cashier of the said bank." The plaintiff before purchasing stock was referred to the bank, the president of which told him the stock was good and that the bank had made the above statement to the Insurance Commissioner which they would not have done had it not been true. The plaintiff then visited the Commissioner and asked to see the certificate of the bank, whereupon he purchased eighty shares of stock, paying $10,000 therefor. About a year later the Company failed and the stock became valueless. The shares purchased were part of a block of stock which the bank held as collateral for the note of the principal organizer of the company which the bank had discounted and the proceeds of which had formed part of the deposit of the Insurance Company.[1]

LURTON, J. To what extent did the plaintiff have a right to rely upon the truth of the representations contained in the cashier's certificate? Some direct connection between the bank and the plaintiff in error in the communication of this certificate is essential to a recovery. If the statement was addressed to, and intended only to influence the action of, the State Insurance Commissioner in respect to the licensing of the insurance company, he cannot sustain a recovery, even though he and others may have been led into the purchase of the shares of the insurance company as a consequence of the action of the Insurance Commissioner in admitting the company to do business upon the representation of the bank's certificate. The plaintiff's action, in the aspect of it now under consideration, is for fraud and deceit, and such an action must be bottomed upon false representations made to him, and with intent that he should be influenced thereby. The plaintiff does not sufficiently connect himself with the misrepresentations by the bare fact that he bought stock in

[1] The facts are greatly abridged.

a company which was improperly admitted to do business upon representations addressed to the state Commissioner. The injury in such case is too remote. In *Bedford* v. *Bagshaw,* 4 Hurl. & N. 538, an action was sustained against certain promoters and managers of a company who had made false statements in respect to the capital of the company in order to secure its insertion in the official lists of the stock exchange. The plaintiff, knowing that the rules of the stock exchange admitted no stocks to its lists until two-thirds of the shares had been paid up, bought on the exchange in reliance that the shares so bought had been paid up accordingly. This proving not to be the case, the plaintiff was suffered to recover, although the false representation had been made to the committee of the stock exchange, and not to the plaintiff directly. The decision was subsequently overruled in *Peek* v. *Gurney,* L. R. 6 H. L. 377, 397. Lord Chelmsford, on commenting on the decision, said: "The actions were brought upon the allegation of a false representation made to the plaintiff. But no representation at all was made which reached either his eyes or ears. From his knowing the rules of the stock exchange, he assumed that a certain representation had been made, and acted upon it."

In *Peek* v. *Gurney* a descriptive prospectus was put forth by the directors of a company, in reliance upon which the plaintiff bought shares on the open market. It was held that the prospectus in its terms was not an invitation to the public ultimately to become holders of shares, but to join the company at once by becoming original allottees of shares, and that only those drawn in by the misrepresentations of the prospectus to become allottees could have a remedy in action for the deceit.[2] In line with *Peek* v. *Gurney* is the case of *Hunnewell* v. *Duxbury,* 154 Mass. 286, 28 N. E. 267, 13 L. R. A. 733. The law of Massachusetts required the officers of a foreign corporation desiring to do business in the state to file with the commissioner of corporations a certificate showing its financial condition. The plaintiff gave credit upon the faith of the statements in such a certificate, which had been called to his attention by his own attorney. The Massachusetts court held that the action would not lie, saying: "To sustain such an action, misrepresentations must either have been made to the plaintiff individually, or as one of the public, or as one of a class to whom they are in fact addressed, or have been intended to influence his conduct in the particular of which he complains. This certificate was not communicated by the defendants or by the corporation to the public or to the plaintiff. It was filed with a state official for the definite purpose of complying with a requirement imposed as a condition precedent to the right of the corporation to act in Massachusetts. Its design was, not to procure credit among merchants, but to secure the right to transact business in the state. The terms of the statute carry no implication of such a liability."

That this certificate constituted a part of the files in the office of

[2] *Accord* on very similar facts, *Cheney* v. *Dickinson,* 172 Fed. 109 (C. C. A. 1909).

the state insurance commissioner, and that it was his duty, on demand, to furnish copies to any of the public, or that he might himself, as a state official, include such certificate in his own official publications, is not enough to show that the bank had any other design in giving it than to influence the action of the commissioner. The circumstances that it might thus come to the eye of persons disposed to deal in the company's shares, and thus induce them to buy, is only evidence to be looked at with other circumstances tending to show that the bank designed to influence the public at large or the plaintiff in particular to buy the company's shares. The Kentucky statute carries no implication of civil liability for a false statement, although it does make the giving of a false statement to the commissioner a criminal offense. The right of one of the public who has sustained a loss by the wrongful setting on foot of an insurance company whose capital has not been paid in, and of one who has bought shares or given credit to such a company in reliance upon the truth of such representations made to the commissioner only for the purpose of inducing his action, must depend upon the general principles of law in respect of action for false representations. It has never been a ground of action that the defendant made a dishonest representation, and that the plaintiff had relied upon it and sustained injury. The moral obligation to speak the truth is not ground for a civil action, unless the misrepresentation was intended to induce the very action by the plaintiff which has resulted in his damage. Cooley, Torts, p. 493; *Wells* v. *Cook*, 16 Ohio St. 67, 88 Am. Dec. 436; *Barry* v. *Crosky*, 2 Johns. & H. 1. However lamentable the eventual results of a dishonest representation to persons who in reliance thereon have come to grief, they cannot recoup such losses unless they are able in one way or another to bring themselves within the class of persons for whom the representation was intended.[a]

But it was never meant to decide in *Peek* v. *Gurney* that a company's prospectus might not be broad enough to stand not only as an invitation to original allottees, but to all others who might be disposed to deal in the company's shares. And so the case was ex-

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[a] *Accord: Webb* v. *Rockefeller*, 195 Mo. 57 (1906); 6 L. R. A. (N. S.) 872, with valuable note; incorporators falsely making the statement, required by statute to be made to the secretary of state as a condition precedent to doing business, that one-half of their capital stock had been paid in, held not liable to creditors; *Utley* v. *Hill*, 155 Mo. 232 (1900), directors of a company held not liable to depositors therein for false statements in a report, which they were required to make periodically to the secretary of state in regard to their financial condition, which report was required to be published in a newspaper in the city or county where the bank was located, Marshall, J., saying, "The law exacts a statement, hence it is not voluntarily made. * * * The statement is required to be made to the secretary of state, so that he may take steps to close a bank if it is dangerous to the welfare of the people, but it is in no sense a statement of the directors made with the intent to induce persons to deposit their money in the bank."

Contra: Morse v. *Switz*, 9 How. P. R. (N. Y.) 275 (Supreme Court of New York, 1860); president and cashier of a bank held liable to one purchasing stock therein in reliance upon false statements made by him in a report of the financial condition of the bank, which he was required by statute

plained in *Andrews* v. *Mockford* (1896), 1 Q. B. 372, where it was held that if the object of a prospectus is not only to induce applications for original allotments of shares, but also to induce persons to whom it was sent to purchase shares in the market, its functions would not be exhausted when all the shares should be subscribed, and that the persons issuing the prospectus would be responsible for the injury sustained in reliance upon the truth of statements therein, known to be false, by any person to whom the paper was sent, who should, in consequence, buy on the market. *Scott* v. *Dixon,* 29 Law J. Exch. 62, note, was approved in *Peek* v. *Gurney.* This case seems only to be reported in a note to *Bedford* v. *Bagshaw,* 4 Hurl. & N. 538. As stated in the opinion of Lord Chelmsford, the action was for a misrepresentation made in a report by the directors to the shareholders of a banking company. Plaintiff was not a shareholder, and, in the absence of other circumstance, could not be regarded as addressed. But it was shown that copies of the report were left at the bank, and were to be had by brokers and all persons applying for them who desired information with a view to the pur-

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to make to the superintendent of the banking department; *Taylor* v. *Thomas,* 106 N. Y. S. 538 (1907), reversed in 108 N. Y. S. 454 (1908) for the reason that the defendants were directors of a national bank, whose liability for false statements made in reports required by the National Banking Act was held in *Yates* v. *The Jones National Bank,* 206 U. S. 158 (1907), to be governed by the specific provisions on the subject contained in that act, the remedy provided by that act being exclusive, so that no action at common law would lie; *Warfield* v. *Clark,* 118 Iowa 69 (1902); purchaser of stock of an insurance company allowed to recover against officer who made fraudulent statements in a report of its financial condition, required by law to be filed with the auditor of the state; *National Bank* v. *Thoms,* 28 Ohio L. J. 164 (1892); *Mason* v. *Moore,* 73 Ohio St. 275 (1906), *semble; McBryan* v. *Universal Elevator Co.,* 130 Mich. 111 (1902); *Schley* v. *Dixon,* 24 Ga. 273 (1858), *semble; Dime Savings Bank* v. *Fletcher,* 158 Mich. 162 (1909); *Emerson* v. *Detroit Steel Co.,* 100 Mich. 127 (1894); in the last two cases the plaintiff acted in reliance upon reports of commercial agencies based on statements made by the defendant in reports, which they were required by statute to make.

In *Webb* v. *Rockefeller,* 195 Mo. 57 (1906), and in *Hunnewell* v. *Duxbury,* cited in the principal cases, the statute did not provide for the publication of the report when made. In *Warfield* v. *Clark,* 118 Iowa 69 (1902), emphasis is laid upon the fact that publication is required. In *Morse* v. *Swits,* 19 How. P. R. (N. Y.) 275 (Supreme Court of N. Y. 1860), publication was required, but this was regarded as immaterial. It is to be noted that in *Warfield* v. *Clark,* the plaintiff did not learn of the statements after their publication, but he discovered them by search in the Auditor's Office, before they had been published. See also, *McBryan* v. *Universal Elevator Co.,* 130 Mich. 111 (1902), where it is stated that "it would be a disgrace to the law, if creditors, dealing with the corporations in reliance upon these statements, which they have examined in the public offices where they are on file, should have no remedy."

As to the right of a creditor in Pennsylvania to recover in deceit against directors, knowingly making false statements in their obligatory reports, see *Cochran* v. *Arnold,* 58 Pa. St. 399 (1868); *Patterson* v. *Franklin,* 176 Pa. St. 612 (1896); *Haines* v. *Franklin,* 87 Fed. 139 (1898). In *Ashuelot Savings Bank* v. *Albee,* 63 N. H. 152 (1884), it is held that no action will lie by one induced to become surety upon the official bond of the treasurer of a savings bank, in reliance upon the statement of the auditing department, that the

chase of shares, and that the plaintiffs, through their broker, purchased at the bank a copy of the report, and in reliance bought shares and sustained a loss; a material statement being false. There was a judgment for the plaintiffs. Lord Chelmsford said: "I do not doubt the propriety of this decision. The report, though originally made to the shareholders, was intended for the information of all persons who were disposed to deal in shares; and the representation must be regarded as having been made, not indirectly, but directly to each person who obtained the report from the bank, when it was publicly announced it was to be bought, in the same manner as if it had been personally delivered to him by the director."

The true inquiry is, who did the bank design to influence by its false representation? If the representation here involved was not only made to induce favorable action by the state insurance commissioner, but was also intended for the information of all who should be disposed to deal in the company's shares, and who should inspect it for information in respect of the company's capital, it should be regarded as addressed to every such person. So, if the jury should find that the plaintiff was known to the bank as a person disposed to buy such shares, and was referred to this statement for information concerning its capital, they would be justified in finding that the representation was addressed to him personally. Such reference of the plaintiff to the certificate would be a repetition of the misrepresentation addressed directly to him, and render it liable, irrespective of the original design and purpose with which the certificate was given.[4]

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bank is in a sound financial condition, required to be made to the State Banking Commissioner and to be published by him, though in fact no careful examination had been made and the treasurer was a defaulter to a large amount. The publication of such reports is intended for the information of the public having occasion to do business with the bank, and the statement is therefore, not to be intended to influence persons in becoming sureties for the officers thereof.

In all of these cases the statements were known by the defendants to be false, or, at least the defendants made positive statements in regard to facts of which they knew they were ignorant; in *Tate* v. *Bates*, 118 N. Car. 287 (1896), it was held that bank directors are bound to know the condition of their institution and are liable for false statements thereof, though innocently made. In *Gerner* v. *Mosher*, 58 Nebr. 135 (1899), and *Yates* v. *Jones National Bank*, 74 Nebr. 734 (1905), it was held that an action would lie against the directors of a national bank for false reports innocently made; but see *Yates* v. *Jones National Bank*, 206 U. S. 158 (1907), overruling the latter case.

[4] See *accord*, *Hunnewell* v. *Duxbury*, 154 Mass. 286 (1891), in which it is said that the directors of a corporation which filed a false certificate with the Commissioner of Corporations, for the purpose of doing business in Massachusetts, would have been liable to plaintiff who had accepted notes of the corporation, if they had referred him to the report filed by them for information as to the financial standing of the corporation; so it was held in *Greene* v. *Mercantile Trust Co.*, 60 Misc. (N. Y.) 189 (New York Supreme Court 1908), that an allegation in a complaint that the defendants had published a prospectus for the sale of certain bonds, containing certain false statements in regard to the assets of the company, with the intent that such statements should be believed by the public, and that the public and the plain-

SECTION 5.

(b) Statements of law.

GORMELY *v.* GYMNASTIC ASSOCIATION OF THE SOUTH SIDE OF MILWAUKEE.

Supreme Court of Wisconsin, 1882. 55 *Wis.* 350.

TAYLOR, J. We think, under the rules established by this court in *Supervisors of Kewaunee County* v. *Decker,* 30 Wis. 624, we must hold this complaint was intended to set out a cause of action in tort, for false and fraudulent representations made on the part of the respondent, by reason of which the appellant was induced to make the agreement to lease the respondent's hall and sell liquors, tobacco, and cigars therein without a license to do so, by reason of which he suffered damages in the manner stated in the complaint.

As an action of tort it seems to us very clear the complaint is insufficient. The substance of the charges of fraud and deceit are that the respondent said he had the right and privilege of a retail liquor dealer, etc., to sell such liquors, etc., at the bar in said hall, and that if appellant leased the hall he would have the right to retail such liquors, etc., at the bar in the said hall during his occupancy thereof, without himself procuring a license from the government of the United States, or of this state. The false charge is simply that the respondent said, "If you lease the hall you can retail liquors,

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tiff should thereby be induced to purchase stock, showed a good cause of action, though on its face, the object of the prospectus appeared to be to procure subscriptions to the bonds of the company, it being suggested that these allegations might be satisfied by proof that the defendants had a large block of stock, the disposal of which they designed to accomplish by the unduly favorable statements in the prospectus, *accord, Gerhard* v. *Bates,* 2 El. & Bl. 476 (1853).

A false statement in a bond or deed is a representation to all persons who may have occasion to examine the bond or deed in order to ascertain its validity: *Baker* v. *Hallam,* 103 Iowa 43 (1897); plaintiff loaned money upon the bond as collateral; *Leonard* v. *Springer,* 197 Ill. 532 (1902); plaintiff purchased bonds secured by a deed containing false recitals of consideration, so a forged or unauthorized acceptance of a bill of exchange, *Polhill* v. *Walter, ante,* or a forged endorsement of a promissory note, *Lobdell* v. *Baker,* 1 Metc. 193 (Mass. 1840), is a representation to all to whom it may be offered in the course of circulation, but the defendant must put it in circulation, *Costelo* v. *Barnard,* 190 Mass. 260 (1906), one who forged the maker's name to a certificate of indebtedness not liable for keeping it so negligently that a third person was enabled to negotiate it.

Even though the false statement is, like a forged acceptance, endorsement or signature of the maker of a bill of exchange promissory note, on its face intended to be made to all whom the bill or note may be offered in the course of circulation—*Polhill* v. *Walter, ante;* and *Lobdell* v. *Baker,* 1 Metc. 193 (Mass. 1840)—the forger is not liable unless he himself puts or suffers it to be put in circulation, even though he keeps it negligently so that a third person is enabled to put it in circulation, *Costelo* v. *Barnard,* 190 Mass. 260 (1906).

etc., at the bar," under and by virtue of a license or licenses which the respondent held from the United States and from the city of Milwaukee. The fact, therefore, whether the respondent had a license from the United States, or from the city of Milwaukee, or from both, was entirely immaterial, as such fact would not have given the appellant a right to retail liquor, etc., at the bar of the hall in case he leased the same. See R. S. of U. S., § 3232. The appellant was just as much bound to know that the license of the respondent would not protect him in the sale of liquors, etc., as the respondent was. It was a question of law whether such licenses would protect the appellant, and a false or mistaken representation as to what the law is upon an admitted state of facts is no basis of an action,[1] especially where there are no confidential relations between the parties. This rule of law is too well settled to need discussion. Cooley on Torts, 485, 486, and cases cited in note; 3 Wait's Act. & Def., 434, § 5, and cases cited.

The allegation that the representation as a representation of fact was false because the respondent did not in fact have a license to retail liquors, etc., is, as we have seen, wholly immaterial, for the reason, that if it had been true it would not have protected the appellant from the consequence which followed.

By the Court.—The order of the circuit court is affirmed, and the cause remanded for further proceedings according to law.[1]

[1] *Accord: Thompson* v. *Phoenix Insurance Co.*, 75 Maine 55 (1883); misstatements by an insurance agent that the insured's removal from his house vitiated his insurance thereon, held not actionable; *Fry* v. *Day*, 97 Ind. 348 (1884), p. 350, "misrepresentations of the legal effect of a written instrument do not constitute fraud;" *Fish* v. *Cleland*, 33 Ill. 238 (1864), statements that land could not be sold even by order of the court without the consent of all parties interested, not actionable though false; *Dillman* v. *Nadlehoffer*, 119 Ill. 567 (1886), p. 577, false statements as to the validity of a patent; *Unckles* v. *Hentz*, 43 N. Y. S. 749 (1896), statements that the "National Lead Trust" was a legal organization, no allegation or proof that the defendants knew it to be illegal; *Bilafsky* v. *Conveyancers Title Co.*, 192 Mass. 504 (1906). But the misstatement of the legal effect of a written instrument made to an ignorant and illiterate man, known to be relying upon such assertions as true, is actionable, *Decker* v. *Hardin*, 5 N. J. L. (2 Southard) 579 (1819).

"Certain words such as ownership, marriage, settlement, etc., import both a conclusion of law and facts justifying it, so that, when asserted without explanation of what the facts relied on are, they assert the existence of facts sufficient to justify the conclusion," Holmes, J., *Alton* v. *First National Bank*, 157 Mass. 341 (1892), p. 343; and see the admirable statement of Jessel, M. R., in *Eaglesfield* v. *Londonderry*, L. R. 4 Ch. D. 693 (1876), p. 703, in which he concludes: "It is not the less a statement of facts, that in order to arrive at it you must know more or less of the law."

In *Whitehurst* v. *Life Insurance Co. of Va.*, 62 S. E. 1067 (N. Car. Dec. 2, 1908), it was held that statements by an insurance agent that a certain stipulation in the policy, read by the agent to the insured, a blind man, meant that the premium would be paid back at the expiration of ten years with 4 per cent. interest, was actionable, if found by the jury to have been intended to be understood as a statement of fact and not as a mere expression of opinion: See as to recovery of money paid because of fraudulent misstatement of law, *British, etc., Insurance Co.* v. *Cunleppe*, 16 T. L. R. 502 (C. A. Eng. 1902), *contra, Thomson* v. *Phoenix Ins. Co.*, 75 Maine 55 (1883). In *Whitehurst* v. *Insurance Co.*, 62 S. E. 1067 (N. Car. 1908), it is held that even

(c) Statements of opinion.

SMITH *v.* LAND AND HOUSE PROPERTY CORPORATION.

28 *L. R. Ch. D.* (1884) 14.

BOWEN, L. J.:—

"The action is by vendors for specific performance, and the purchasers allege that there is in the particulars a misrepresentation which disentitles the plaintiffs to specific performance. To sustain this defence the defendants must prove that there was a material misrepresentation, and that they entered into the contract on the faith of the representation.

Was there then a misrepresentation of a specific fact? This partly depends on the question, whether on the construction of the particulars, what they say as to Fleck is a representation of a specific fact, a question which the Court of Appeal has the same means of deciding as the Judge in the Court below.

In considering whether there was a misrepresentation, I will first deal with the argument that the particulars only contain a statement of opinion about the tenant.[1] It is material to observe that it is often fallaciously assumed that a statement of opinion cannot involve the statement of a fact. In a case where the facts are equally well known to both parties, what one of them says to the other is frequently nothing but an expression of opinion. The statement of such opinion is in a sense a statement of a fact, about the condition of a man's own mind, but only of an irrelevant fact, for it is of no consequence what the opinion is. But if the facts are not equally known to both sides, then a statement of opinion by the one who knows the facts best involves very often a statement of a material fact, for he impliedly states that he knows facts which justify his opinion. Now a landlord knows the relations between himself and his tenant, other persons either do not know them at all or do not know them equally well, and if the landlord says that he considers that the relations between himself and his tenant are satisfactory, he really avers that the facts peculiarly within his

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an innocent misstatement of this sort is fraudulent, if the defendant from his position has better means of knowing the law than the plaintiff, but see *contra, Harse* v. *Pearl Life Assn. Co.*, L. R. 1904 1 K. B. 558. In *Moreland* v. *Atchison*, 19 Tex. 303 (1857), it was held that the misstatement of the law of a foreign country or of another state was a misstatement of fact, and this applied when a Texan misstated the Texas law to a person who had just come to Texas from another state.

See also, the extraordinary case of *Sears* v. *Wegner*, 150 Mich. 388 (1907), where it was held that a plaintiff, who was induced to enter into a secret marriage with defendant by his representation that his prior marriage with another woman was void and by his promise to have a public ceremony as soon as the prior marriage was set aside, might maintain an action for fraud and deceit.

knowledge are such as to render that opinion reasonable. Now are the statements here statements which involve such a representation of material facts? They are statements on a subject as to which prima facie the vendors know everything and the purchasers nothing. The vendors state that the property is let to a most desirable tenant, what does that mean? I agree that it is not a guarantee that the tenant will go on paying his rent, but it is to my mind a guarantee of a different sort, and amounts at least to an assertion that nothing has occurred in the relations between the landlords and the tenant which can be considered to make the tenant an unsatisfactory one. That is an assertion of a specific fact. Was it a true assertion? Having regard to what took place between Lady Day and Midsummer, I think that it was not. On the 25th of March a quarter's rent became due. On the first of May, it was wholly unpaid and a distress was threatened. The tenant wrote to ask for time. The plaintiffs replied that the rent could not be allowed to remain over Whitsuntide. The tenant paid on the 6th of May £30, and on the 13th of June £40, and the remaining £40 shortly before the auction. Now could it at the time of the auction, be said that nothing had occurred to make Fleck an undesirable tenant? In my opinion a tenant who had paid his last quarter's rent by driblets under pressure must be regarded as an undesirable tenant.

FRY, L. J.:—

It seems to me that the vendors by describing him as such stated in substance that they knew no fact which shewed him not to be a desirable tenant. The Judge in the Court below has found that they did know facts which shewed him not to be a desirable tenant, and I see no reason to dissent from that conclusion.[1]

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[1] *Accord: Burns* v. *Dockray*, 156 Mass. 135 (1892): "No doubt, even a positive statement that a title is good may involve somewhat matter of opinion; but it also imports that there are no facts that affect its validity, just as statements that goods are attached, or that stock is non-assessable, are representations that facts exist which justify the statements; *Burns* v. *Lane*, 138 Mass. 350 (1885); *Windram* v. *French*, 151 Mass. 547 (1890)," Morton, J., p. 137; *Hickey* v. *Morrell*, 102 N. Y. 454 (1886), statements that storage building was fireproof, to say of an article that it is fireproof conveys no other idea than that the material out of which it is constructed is fireproof," Danforth, J., p. 459; *Olston* v. *Oregon Water Power & Ry. Co.*, 52 Ore. 343 (1908), defendants obtained a release from plaintiff by statements that it was useless expense for plaintiff to get legal advice from a lawyer, that defendants' lawyer authorized it to tell plaintiff that there was no legal responsibility to him and that if an action was brought the defendant would keep the case in court for ten years and would prevent him or his heirs from recovering any damages whatever: "Sometimes a statement of an opinion is necessarily based on a fact or carries with it such an inference of fact that it can be interpreted as a statement of facts," Eakin, J., p. 355; *New* v. *Jackson*, 95 N. E. 328 (App. Ct. of Indiana 1911): *Martin* v. *Veana Food Co.*, 153 Mich. 282 (1908); *Andrews* v. *Jackson*, 168 Mass. 266 (1897), a statement that notes are as good as gold includes a statement that the maker is solvent and of high financial reputation.

SECTION 5.

(d) Statements of value or of price paid.

HARVEY *v.* YOUNG.

39 Elisabeth, Yelverton 21a.

J. S. had a term for years, and there being a discourse between him and J. D. about buying that term, J. S. said and affirmed to J. D. that the term was worth 150 lbs. to be sold upon which J. D. gave J. S. 150 lbs. for the term; and afterwards J. D. offered and endeavored to sell the term again, and could not obtain, nor get for the term 100 lbs., whereupon he brought an action on the case in nature of a deceit against J. S. and declared ut supra, and that J. S. asseruit to him that the term was worth so much, to which assertion J. D., fidem adhibens, did buy the term for so much money, but could not sell it again for so much money as was given at first, in fraud and deceit of the plaintiff to his damages, &c.; and upon not guilty pleaded it was found for the plaintiff, and alleged in arrest of judgment that the matter precedent did not prove any fraud; for it was but the defendant's bare assertion that the term was worth so much, and it was the plaintiff's folly to give credit to such assertion. But if the defendant had warranted the term to be of such value to be sold, and the plaintiff had thereupon given and disbursed his money, there it is otherwise; for the warranty given by the defendant is a matter to induce confidence and trust in the plaintiff. Between Harvey and Young, Mich. 39 Eliz., as Towes of the Inner Temple said at the bar, and that he was of counsel with the defendant. Quod nota.[1]

KIMBALL *v.* BANGS.

Supreme Judicial Court of Massachusetts, 1887. 141 *Mass.* 321.

MORTON, C. J. We are of the opinion that all the representations alleged in the declaration, which are material, fall within what is known as "dealer's talk," and are not sufficient foundation for an action of deceit. The law recognizes the fact that men will naturally overstate the value and qualities of the article which they have to

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[1] *Accord: Van Epps* v. *Harrison,* 5 Hill 63 (N. Y. 1843); *Bradbury* v. *Haines,* 60 N. H. 123 (1880), *semble; Shade* v. *Creviston,* 93 Ind. 591 (1883); *Ellis* v. *Andrews,* 56 N. Y. 83 (1874); *Gordon* v. *Butler,* 105 U. S. 553 (1881), one who had lent money held not entitled to recover in an action of conspiracy against the borrower and two others who had falsely stated the property mortgaged to be worth 150 per cent. more than the amount of the loan.

sell. All men know this, and a buyer has no right to rely upon such statements.[1]

The representations that the apparatus or invention was of great value, that in its use there was no dirt, smell or smoke, that it burned a long time and could be run for a small expense, are all in their nature statements of opinion as to the value and utility of the invention.

The representation that "experiments had been made therewith which had proved successful" is really of the same character, though put in the form of a statement of a past fact. The only material part of the statement is that the apparatus upon experiment worked well, which is in its nature mere opinion, and not a statement of any definite fact.

All these are representations as to the operation and utility of an invention. Such representations must in most cases be matter of opinion, expectation, and probability, upon which a purchaser cannot safely rely, and they will not sustain an action of tort, unless he has been fraudulently induced to omit an examination for himself, which is not sufficiently averred in this declaration. *Parker* v. *Moulton,* 114 Mass. 99.

The representations that the defendant was treasurer of the National Heat and Light Company, and that said company owned the apparatus, are statements of fact but they are not material. The declaration alleges that the plaintiff purchased the exclusive right to sell the apparatus of the National Heat and Light Company, thereby implying that they were the owners. The gist of his complaint is, not that he did not procure a valid transfer of the right, but that it was of no value. The statements we are considering have no bearing upon this matter, and, whether true or false, are immaterial upon any issue in the case.

We have thus far considered the first count of the declaration. The same objections apply to the second count, and we are of opinion that the demurrer was well taken to both of them.

Judgment for the Defendant affirmed.[1]

PICARD *v.* McCORMICK.

Supreme Court of Michigan, 1862. 11 *Michigan* 68.

CAMPBELL, J.:

McCormick sued Picard to recover damages on account of false representations whereby the former was induced to purchase of the latter watches and other jewelry to a large amount.

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[1] *Accord: Bishop* v. *Small,* 63 Maine 12 (1874); *Deming* v. *Darling,* 148 Mass. 504 (1889), statement that a railroad bond was an A No. 1 bond; *Rockafellow* v. *Baker,* 41 Pa. St. 319 (1861), Woodward, J., p. 321, "But there is neither fraud nor mistake in the legal sense of these terms, when a buyer of an article which he finds in a market has a full opportunity to examine it, and when the means of information relative to facts and circumstances affecting the value of the commodity are equally accessible to both parties. There is no confidence between buyer and seller, unless a warranty be demanded and

The declaration contains several different counts, and, inasmuch as it is claimed that all or some of them are fatally defective, it becomes necessary to refer to them.

The first count avers the ignorance of plaintiff concerning the value and quality of the articles sold, the defendant's knowledge of such ignorance, he himself being a skilful dealer in such goods, the application by defendant to McCormick to induce him to purchase, the refusal of McCormick to do so except in reliance upon Picard's representations, and a sale based on fraudulent representations of the value of the property, whereby the purchaser was damnified.

The second count is for a breach of warranty of value, by which Picard knowingly, falsely and fraudulently deceived McCormick.

The third count is for false representations concerning the value and quantity of gold in a necklace which Picard, knowing McCormick's ignorance, induced him to purchase by such representations.

The fourth and fifth counts are framed like the first, but upon different representations.

The principal objection alleged against these several counts (which is taken on assignment of error and not by demurrer) goes to the materiality of the frauds charged. It is claimed that an allegation of value, although false, cannot be made the ground of an action.

It is undoubtedly true that value is usually a mere matter of opinion; and that a purchaser must expect that a vendor will seek to enhance his wares, and must disregard his statements of their value. But, while this is generally the case, yet we are aware of no rule which determines arbitrarily that any class of fraudulent misrepresentations can be exempted from the consequences attached to others. Where a purchaser, without negligence, has been induced by the arts of a cheating seller to rely upon material statements which are knowingly false, and is thereby damnified, it can make no difference in what respect he has been deceived, if the deceit was material and relied on. It is only because statements of value can rarely be supposed to have induced a purchase without negligence, that the authorities have laid down the principle that they cannot usually avoid a bargain. But value may be frequently made by the parties themselves the principal element in a contract; and there are many cases where articles possess a standard commercial value, in which it is a chief criterion of quality among those who are not experts. It is a matter of every day occurrence to find various grades of manufactured articles known more generally by their prices than by any test of their quality which can be furnished by ordinary inspection. Frauds are easily committed by dishonest dealers, by confounding these grades, and cannot be detected in many cases except by persons of experience. In the case before us the alleged fraud consisted of false statements of a jeweler to an unskilled purchaser of the value of articles which none but an expert could be reasonably

given. They deal at arms' length. They use not each other's eyes, but each his own. The seller is allowed to express freely his opinions of the value of his wares—the buyer is at equal liberty to answer that it is naught."

supposed to understand. The dealer knew of the purchaser's ignorance, and deliberately and designedly availed himself of it to defraud him. We think that it cannot be laid down as a matter of law that value is never a material fact; and we think the circumstances of this case illustrate the impropriety of any such rule. They show a plain and aggravated case of cheating. And it would be a deserved reproach to the law if it exempted any specific fraud from its remedial action, where a fact is stated and relied upon, whatever may be the general difficulty of defrauding by means of it. The same reasoning will dispose of the objection that in the second count the representations are not set out as having been relied upon, or as having been made in deliberate breach of confidence. If value can be regarded in any case as a material fact, then it may be made the subject of a warranty. This count is in the usual form for breach of a fraudulent warranty, and is therefore good.

There is no error in the proceedings, and the judgment must be affirmed, with costs.

The other Justices concurred.[1]

FAIRCHILD *v.* McMAHON.

New York Supreme Court, 1893. 139 *N. Y.* 290 (1893).

O'BRIEN, J. The plaintiff sought to foreclose a mortgage assigned to her, before the commencement of the action, executed and delivered by the defendant, upon certain real estate of which she was the owner, subject to other mortgage liens, and bearing date April 30th, 1890, for $1,500, payable one year from date, with semi-annual interest. The mortgage was given to one Joseph H. Cain, with whom the negotiations and transactions which resulted in its

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[1] *Andrews* v. *Jackson,* 168 Mass. 266 (1897), statement that a promissory note was "as good as gold" held actionable, where the defendant professed to know the maker, a resident of Boston, and the plaintiff, who lived in a suburban town, knew nothing about him; *Manley* v. *Felty,* 146 Ind. 194 (1896), in which, however, it was held that a fiduciary relation existed between the parties, the defendant, an attorney, having grossly overstated the value of land to which the plaintiff was heir, in order to induce him to agree to pay an exorbitant fee; *Stover's Adm.* v. *Wood,* 26 N. J. Eq. 417 (1875); *Cruess* v. *Fessler,* 39 Cal. 336 (1870); *Simar* v. *Canaday,* 53 N. Y. 298 (1873); *Leonard* v. *Springer,* 197 Ill. 532 (1902); *contra, Bradbury* v. *Haines,* 60 N. H. 123 (1880), *semble.*

So while mere laudatory statements of the quality of an article sold is not generally actionable, "the purchaser may maintain an action of deceit if the seller fraudulently misrepresents the quality of the property sold, in particulars of which the purchaser did not have equal means of knowledge with himself, or, having such means, is induced to forego further inquiry which he would otherwise have made." Smith, J., *Bradbury* v. *Haines,* 60 N. H. 123 (1880); *Estell* v. *Myers,* 54 Miss. 174 (1876); *Stewart* v. *Stearns,* 63 N. H. 99 (1884), statements that a stock of goods were "clean," "desirable," "of good style and salable" held actionable if made to a purchaser who through inexperience could have learned little, if anything, by an inspection; *Cornelius* v. *Molloy,* 7 Barr. 293 (Pa. 1848), false statements of character or quality of an article actionable "if it appear that the purchaser, not enjoying equal means of knowledge, trusted to such representation," Bell, J., p. 297.

execution and delivery were had, or with agents acting for him or in his interest. The defense is fraud practiced upon the defendant, by means of which she was induced to make and deliver the mortgage and the accompanying bond. The facts to sustain this defense are stated with considerable detail, the substance of which, in brief, is as follows:

On the 9th of April, prior to the execution of the mortgage, the defendant, through her husband acting for her, entered into an agreement with Cain to exchange real estate. Each owned a house and lot incumbered by mortgage, the equity of redemption in which was to be conveyed to the other, and the agreement was actually carried out by the execution and delivery of proper conveyances. The mortgage in question was executed and delivered in pursuance of this agreement. It is alleged in substance that one Yoran, the plaintiff's son, was the principal actor in the transaction and the real party to be benefited. That though the record title to the real estate to be conveyed to the defendant was in Cain, yet his title was nominal, as his name was simply used by Yoran in the purchase of the property and in the negotiations for its sale to the defendant and in the conveyance. It is then charged in substance that Yoran, Cain and their broker, and another broker employed by and acting for the defendant's husband, her agent, conspired together to cheat and defraud the defendant by false and fraudulent representations concerning the value and condition of the house which the defendant by the agreement was to receive in exchange for her property and which she subsequently conveyed, and that, in reliance upon the truth of the statements, she, through her husband, entered into and executed the agreement and made the exchange. It is further averred that upon discovery of the fraud the defendant offered to rescind the whole transaction. The courts below have sustained the defense, and the charges of fraud and other facts alleged by the defendant are found by the learned trial judge to be substantially true. The testimony upon the issues of fact was very conflicting, but after considering it with all the circumstances we are unable to say that any of the findings, material to the defense, and challenged by exception, are without support and, therefore, feel concluded by them as to the facts.

There are one or two questions of law, however, that should be noticed. One of the false representations made by Yoran and his broker to the defendant's husband, as appeared from the findings, which was relied upon, and which influenced her action in making the exchange and giving the bond and mortgage in suit, and upon which the finding of fraud is based, was that the house and lot transferred to the defendant in the exchange, was worth $15,000. That Cain had just purchased it at the price of $12,000, from the executors of the deceased owners, who were compelled to sell at a price below the real value, and that such was the consideration expressed in the deed to him from the executors, as would appear from the record in the county clerk's office.

It is further found that the defendant's husband, before entering into the transaction, did examine the deed in the clerk's office

under which Cain took the title, and that it appeared from the same that the consideration was $12,000, and that the defendant and her husband believed the statement. That while it was true that the consideration stated in the deed was $12,000, it was not true that the real consideration paid was that sum, but, on the contrary, the fact was that about twenty-four days before the transaction, Yoran had purchased the property for $7,000, which was its true value, and had taken the deed in the name of Cain, expressing a fictitious consideration, for the purpose of deceiving investors, and that the defendant had procured the consideration to be falsely stated in the deed. This finding raises the question whether a false statement, deliberately made, by a party about to sell property, to the party about to purchase it, with respect to the price which he had paid for it to a former owner, is a sufficient basis upon which to predicate a finding of fraud, when the statement is relied upon by the party to whom made.

It has been held that a false statement by a vendor to a vendee concerning the value of property about to be sold, will not sustain an action for fraud, but the vendee in such cases must rely on his own judgment. (*Ellis* v. *Andrews,* 56 N. Y. 83.)

It may be that the rule in such cases would be different if the purchaser was prevented by any act or artifice of the seller from exercising his judgment in ascertaining the value.[1]

But the question here is not one arising out of a representation as to value. The representation was with respect to a fact which might, in the ordinary course of business, influence the action and control the judgment of the purchaser, namely, the price paid for the property about to be sold by the vendor, within less than a month prior to the transaction; and so, we think, that a false statement with respect to the price paid under such circumstances, which is intended to influence the purchaser, and does influence him, constitutes a sufficient basis for a finding of fraud.

It was so held in *Sanford* v. *Handy* (23 Wend. 260), where a new trial was granted to the plaintiff in an action of this character, on the ground that the proof of such representations was improperly excluded at the trial. Ch. J. Nelson, delivering the opinion of the court (p. 269), said:

"I am also inclined to think that any misrepresentation as to

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[1] In *Way* v. *Ryther,* 165 Mass. 226 (1896), it was held that though the mere statement that goods sold for $300 were billed to the vendor at $394, would not go beyond the limits of permissible "dealer's talk"; (see *Medbury* v. *Watson, post*), if the vendor in answer to the vendee's request to see the bill and understanding that the latter took him to assert that the contents of the bill were in accordance with his statement of it, falsely asserted that the bill was lost in order to prevent vendee from finding out that this was not so, "The case would present a different aspect. The letter under such circumstances, adhered to without correction, becomes a more deliberate affirmation and gains in its power to deceive;" per Holmes, J., p. 229; and in *Leonard* v. *Springer,* 197 Ill. 532 (1902), the defendant, who, in order to deceive purchasers of certificates of indebtedness secured by a deed of trust of land purchased by him, induced the vendor to grossly overstate in the deed the consideration paid, was held liable in deceit.

the actual cost of the property is a material fact, and naturally calculated to mislead the purchaser. . . . Misrepresentation as to the cost of an article stands somewhat on the same footing. It is a material fact, which not only tends to enhance the value, but gives to it a firmness and effect beyond the force of mere opinion.

"The vendor is not bound to speak on the subject, but if he does, I think, he should speak the truth."

The same principle received the sanction of the court in *Van Epps* v. *Harrison* (5 Hill 63), and is apparently recognized in *Smith* v. *Countryman* (30 N. Y. 655), *Hammond* v. *Pennock* (61 id. 151), and *Goldenbergh* v. *Hoffman* (69 id. 326).

There is another question in the case as to how far these statements as to the cost of the property made by a broker employed by Yoran can bind the plaintiff or Cain, her assignor. But it sufficiently appears that Yoran used Cain's name in the transactions with his consent, and that he also employed the broker to sell the property or negotiate the agreement for an exchange. All persons who acted for or in the name of Cain, or with his consent, in bringing about the transaction must now be deemed to be his agents, and as he accepted the fruits of their efforts in this regard and took the title to the bond and mortgage, which was part of the result of their negotiations, and transferred them to the plaintiff, all the methods employed by either Yoran or his broker to procure the agreement for an exchange and the mortgage in suit are imputable to the person in whose name they acted, and who voluntarily received the securities thus procured. He could not, even though innocent, receive a mortgage thus procured, and at the same time disclaim responsibility for the fraud by means of which the defendant was induced to deliver it. (*Krumm* v. *Beach*, 96 N. Y. 398.) The findings imply that the broker was the general agent of Cain, and as such his statements bound his principal, and those findings are sustained by the evidence.

The plaintiff took no other or different title to the bond and mortgage than Cain had. The record discloses no estoppel or other principle of equity which can protect the plaintiff against any defense which might have been urged if the securities had remained in the hands of the original parties.

We have examined the other exceptions in the case, and as they do not present any question requiring discussion or any error that affects the judgment it should be affirmed, with costs.

All concur.

Judgment affirmed.[2]

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[2] *Accord: Grinnell* v. *Hill*, 1 Cal. App. 492 (1905), false statements of price paid by vendor for stock sold to plaintiff; *Dorr* v. *Cory*, 108 Iowa 725 (1899), false statement of price paid by vendor for land sold by him; *Stoney Creek Woolen Co.* v. *Smalley*, 111 Mich. 321 (1896), defendant in order to enable one Davis to induce the plaintiff to subscribe to a corporation to be formed to take over his land, which he had contracted to sell to Davis, gave the latter a receipt falsely stating the price at which it had been sold; *Hokanson* v. *Oatman*, 165 Mich. 512 (1911), *semble; Kohl* v. *Taylor*, 62 Wash. 678 (1911); false statements by vendor of price paid for corporate stock sold by him.

In all these cases the vendor's fraud is held to vitiate the contract, in actions to enforce the contract by the vendor, or in proceedings to rescind the

MATTAUCH *v.* WALSH BROS. & MILLER.

Supreme Court of Iowa. 136 *Iowa* 225. 1907.

Appeal from District Court, Polk County, Hugh Brennan, Judge.

Action for damages caused by deceit alleged to have been practiced on plaintiff resulted in a direct verdict for defendants. The plaintiff appeals.

Allen & Lingenfelter, for appellant. Sullivan and Sullivan, for appellees.

LADD, J. The plaintiff exchanged a stock of millinery of the estimated value of $2,000 to one Bannister for eighty acres of land near Cooper at $60 per acre. Deceit with respect to the value and character of the land is alleged, and the evidence such that this issue should have been submitted to the jury. The plaintiff testified that some time previous to the transaction she had said to Benkert that she would sell the stock if she could get a good price; that Benkert replied that he would get a deal; that later, when she had been purchasing goods in Des Moines and was about to take the train for Earlham, Benkert and Walsh met her at the depot, and the latter informed her that they had been over to see her stock, and that he had a fine deal for her; that the land he proposed to exchange was all tillable, with forty acres under cultivation, and had certain buildings on it; that he had been over every foot of it, as he had a farm nearby, and that he knew it was worth $60 per acre; that she told him she knew nothing about land and would like to wait until her husband returned, to which Walsh replied: "It is a fine thing, and the land is worth $60 per acre and do not, on any account, let it slip."

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contract by the vendee. In *Thompson* v. *Koewing*, 79 N. J. L. 246 (1910), an action of deceit was held to lie against the vendor by one induced to purchase a mortgage by false statements of price paid for the mortgaged property, and the same distinction is drawn as in the principal case as between mere statements of the value of the property mortgaged and statements of the price paid for it.

So false statements by the vendor that he has been offered a certain price for his property are actionable in deceit or vitiate the contract induced thereby; *Seaman* v. *Becar*, 38 N. Y. S. 69 (1896); *Ives* v. *Carter*, 24 Conn. 392 (1856), the vendor held liable in deceit for falsely stating that a third party had offered a certain price for the property sold and was willing to take the property off the purchaser's hands at that price if the latter became dissatisfied with his bargain; *Strickland* v. *Graybill*, 97 Va. 602 (1899), vendor of patent right falsely stated that he had refused an offer of a certain sum for the right to sell his patent in a particular territory; *Somers* v. *Richards*, 46 Vt. 170 (1873), false statements of the price at which the defendant had sold the patent right for certain states made with the intent to make the plaintiff purchase the residue of such rights held actionable in deceit.

So false statements by a vendee that the vendor's competitors had offered him similar goods at a certain price is a defense to an action on a contract of sale induced thereby; *Smith* v. *Smith*, 166 Pa. 563 (1895); and see *Weaver* v. *Cone*, 174 Pa. St. 104 (1896), the vendor of minority stock recovered in deceit from the purchaser's agent, who had falsely stated, as an inducement to the plaintiff to sell his stock, that he had sold his own majority stock at the price offered the plaintiff, and *Kilgore* v. *Bruce*, 166 Mass. 136 (1896).

At this time a mutual acquaintance came up, and, upon being informed of the negotiations, cautioned Walsh not to take advantage of the lady, when Walsh assured him of the value of the land, and that she was getting a fine deal. Thereupon plaintiff decided to stay over and examine the land the next day, and telephoned her sister-in-law at Van Meter to accompany her. They went to the depot in the morning, and while waiting for the train to go to Cooper in came Benkert and Walsh, who invited them to another part of the room to talk over the affair. Here it developed that she and Walsh belonged to the same church, and they talked until it was found the train had gone. Walsh then assured her that she could trust him; that the land was worth what he said; that in looking at it she would occasion an expense without benefit; that he was an Irish Catholic like herself, and would not cheat her; that the deal would wait no longer, and she had better take advantage of it. They then went to defendants' office, and after some conversation with the owner and Miller, who assured she could rely upon Walsh and another, the deal was consummated. Plaintiff was corroborated in her account of the transaction in the morning by the testimony of her sister-in-law, and much of the testimony of both is contradicted by the evidence adduced on the part of defendants.

As verdict was directed, however, we are concerned only in ascertaining whether there was affirmative evidence tending to support the charge of deceit. It turned out that the Coon River runs through the farm a distance of 65 or 70 rods, and also that a highway extended through it from north to south, that but 15 to 22 acres in patches were in cultivation; that the river bank is high, and a portion of the land hilly, some of it a hundred feet above the river. The witnesses of plaintiff estimated the value of the land at $25 to $30, and those of the defendants from $40 to $45 per acre, except one, who placed it from $40 to $60. So that the jury might have found: (1) That the value of the land was asserted to be $60 per acre as a fact, and not as of opinion, and the character of the land was described; (2) that the land was worth at least $20 per acre less, and was not of the character represented; (3) that plaintiff in exchanging relied upon the representations made, and was deceived thereby to her damage. The only doubt is as to whether the evidence was such that the jury might have found that the representations, when made, if at all, were known to be false and made with intent to deceive. In view of what might be regarded as a scheme to prevent plaintiff from examining the land, the assurance of Walsh that she could trust him, his testimony that he had never seen the land, that he knew that a part of it was rough with the river through it, and that it was worth from $40 to $50 per acre only, we think the evidence was ample to carry these issues also to the jury. Counsel have discussed somewhat the question as to whether a statement of value may be regarded as an assertion of fact, or should be treated as the expression merely. This must necessarily depend on the circumstances of each case, and usually upon the intention of the party making the statement. Here the evidence in behalf of plaintiff clearly indicated the intention of Walsh that his assertion of the

value of the land should be acted upon as true, and not merely as his estimate, and, if so, and it was knowingly false and induced an exchange by plaintiff to her damage, it was actionable. *Dorr* v. *Cory*, 108 Iowa 725, 78 N. W. 682; *Hansen* v. *Kline*, (Iowa) 113 N. W. 504. See *Brown* v. *Holden*, 120 Iowa 195, 94 N. W. 482; also *Brown* v. *Krouse*, 132 Ill. 177, 23 N. E. 1012, where the court held that "if the vendor dissuades the vendee from examining the property upon the assurance that it is useless expense, and that his statements may be relied upon, the statements, if false, will be grounds for setting aside the sale." The cause should have been submitted to the jury.

MEDBURY *v.* WATSON.

Supreme Judicial Court of Massachusetts, 1843. 6 *Metcalf Rep.* 246 (1843)

HUBBARD, J. No objection is made to the instructions given to the jury, and no motion for a new trial has been made, on the ground of its being a verdict against evidence; but the defendant moves in arrest of judgment, on the ground that no action can be maintained upon the allegations in the writ. The allegations are in substance these: that the plaintiffs, wishing to purchase a tannery for the purpose of carrying on a joint business in the making and vending of leather, inquired of the defendant, if he could inform them where they could purchase such an establishment; that the defendant, intending to deceive and defraud them, and to induce them to purchase a tannery in Worthington, belonging to one Thomas D. Wasson, and to give a much greater sum for it than it was worth, falsely asserted and affirmed to them, that he knew of such a tannery as they wanted, belonging to Thomas D. Wasson, who was ready to sell it, and that it could be purchased for $4,000, being the same sum which Thomas D. paid one James Wasson for it; and that he would aid the plaintiffs in making the purchase; at the same time knowing that Thomas D. Wasson paid only $3,000 for it, and that it was not worth that sum at the time Thomas D. Wasson purchased, nor at the time of his (the defendant's) making the false representation, and that he wrongfully and deceitfully encouraged them to make the purchase, and pay for it a much larger price than it was worth, namely, $4,000; and that the plaintiffs, confiding in his false assertions and affirmations, and believing them to be true, and being ignorant of the value of the property, made the purchase, etc. The evidence fully sustained all the allegations in the writ; but the question is, whether these facts, as thus alleged and proved, are in themselves actionable. The action on the case for deceit is one well known; and, for a long series of years, has been maintained in the English courts. It has also been sustained by us as an efficient means for the punishment of frauds, and for the protection of the weak and the ignorant against the designs and artifices of the crafty.

But in actions on the case for deceit, founded upon false affirma-

tions, there has always existed the exception, that naked assertions, though known to be false, are not the ground of action, as between vendor and vendee; and in regard to affirmations and representations respecting real estate, the maxim of *caveat emptor* has ever been held to apply. When, therefore, a vendor of real estate affirms to the vendee that his estate is worth so much, that he gave so much for it, that he has been offered so much for it, or has refused such a sum for it; such assertions, though known by him to be false, and though uttered with a view to deceive, are not actionable. They are mere affirmations of the vendor, on which the vendee cannot safely place confidence, and will not excuse his neglect in not examining for himself, and ascertaining what the facts are, and what credit is to be given to the assertions.[1] But even this is qualified

[1] *Accord: MacKenzie* v. *Seeberger*, 76 Fed. 108 (C. C. A. 1896); statements made by the vendor of land of the price paid by him therefor; *Banta* v. *Palmer*, 47 Ill. 99 (1868); *Ripy* v. *Cronan*, 131 Ky. 631 (1909); *Holbrook* v. *Connor*, 60 Maine 578 (1872); but see dissenting opinion of Dixon, J.; *Bishop* v. *Small*, 63 Maine 12 (1874); *Davis* v. *Reynolds*, 107 Maine 61 (1910), statements of what third party had paid for an undivided interest; *Hemmer* v. *Cooper*, 8 Allen 334 (Mass. 1864); *Boles* v. *Merrill*, 173 Mass. 491 (1899); *Page* v. *Parker*, 43 N. H. 363 (1861), *semble*; *Beare* v. *Wright*, 14 N. Dak. 26 (1905); in *Horsey* v. *McAleer*, 35 Md. 439 (1871), a distinction is suggested between the price paid for land and for shares in a mining claim.

So false statements by a vendor that he has been offered a certain sum for the property in question are not actionable in the absence of fiduciary relation between the parties, proof that they do not stand on equal terms, or, that some artifice was practiced to prevent the vendee from securing information which he might otherwise obtain; *Boles* v. *Merrill*, 173 Mass. 491 (1899); *Noetling* v. *Wright*, 72 Ill. 390 (1874); *Mooney* v. *Miller*, 102 Mass. 217 (1870), *semble*, where the vendor has falsely asserted that he has been offered a certain figure for his property and would take it unless plaintiff bought it at once.

Even in these jurisdictions, however, recovery is allowed if a fiduciary relation exists between the parties; *Banta* v. *Palmer*, 47 Ill. 99 (1868); *Beare* v. *Wright*, 14 N. Dak. 26 (1905); *Dillman* v. *Nadlehoffer*, 119 Ill. 567 (1886); misrepresentations by one negotiating for the purchase of land for another as to the price asked for it, entitled the purchaser to recovery in an action of deceit; *Hughes* v. *Lockington*, 221 Ill. 571 (1906); *Green* v. *Bryant*, 2 Ga. 66 (1847); so one buying property on joint account for himself and the plaintiff is liable for misstatements of the price he has paid for the property; *Hauk* v. *Brownell*, 120 Ill. 161 (1887); *Yeoman* v. *Lasley*, 40 Ohio St. 190 (1883).

In *Beare* v. *Wright*, 14 N. Dak. 26, Engerud, J., says: "The term 'fiduciary relation' is not used in its technical sense. We apply it to any situation where trust or confidence are imposed by one party in another, under such circumstances as to impose on the person trusted the obligation to act in good faith." So it is held that representation of the actual cost to the defendant of property which he has turned over to a corporation to be organized to purchase it, will sustain an action of deceit by one buying stock in such corporation on the faith thereof; *Teachout* v. *VanHoesen*, 76 Iowa 113 (1888); but see *contra*, *Holbrook* v. *Connor*, 60 Maine 578; *Tuck* v. *Downing*, 76 Ill. 71 (1875); so the statement by the agent of a company, if made to the subscriber for stock, that its land cost a certain sum, is, if false, a ground for rescinding the contract for subscription; *Zang* v. *Adams*, 23 Colo. 408 (1897); *Alabama Foundry* v. *Dallas*, 127 Ala. 513 (1900); *Short* v. *Stevenson*, 63 Pa. St. 95 (1870).

But where the price paid by the vendor is made the criterion of the price to be paid by the vendee, as where the goods are sold "at cost," a false statement of the price paid by the vendor is actionable in deceit, or, is grounds for deceit and is a defense to an action to enforce the contract, or, ground for viti-

by one of the more ancient decisions; as where a vendor had falsely affirmed as to the amount for which the estate rented, and had induced a person to give a higher price for the estate in consequence of such false affirmation respecting the rent, there an action was held to lie, on the ground that it was a matter within his own knowledge, and the tenant might not disclose the amount of rent paid by him. *Elkins* v. *Tresham*, 1 Lev. 102, 1 Sid. 146. And so fraudulent misrepresentations of particulars in relation to the estate, which the buyer has not equal means of knowing, and where he is induced to forbear inquiries that he otherwise would have made, are not to be viewed in the light of assertions *gratis dicta;* and therefore, where damage ensues, the party guilty for the fraud will be liable for the injury sustained.

I do not think it necessary to go over, in detail, the authorities cited by the counsel for the defendant, they having often been the subject of comment; but I presume that I am safe in affirming, that the greater part, if not all, the cases cited, are those of false affirmation by the vendor to the vendee, where the maxim *caveat emptor* applies, and not those resting upon the false representations of a third person with regard to the value of the property. And the distinction between the two cases is marked and obvious. In the one, the buyer is aware of his position; he is dealing with the owner of the property, whose aim is to secure a good price, and whose interest it is to put a high estimate upon his estate, and whose great object is to induce the purchaser to make the purchase, while in the other, the man who makes the false assertions has apparently no object to gain, he stands in the situation of a disinterested person, in the light of a friend, who has no motive nor intention to depart from the truth, and who thus throws the vendee off his guard, and exposes him to be misled by the deceitful representations.

In the present case, we think the averments in the declaration would not have supported an action, if the false representations had been made by the vendor to the vendees. But the representations

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ating the same; *Mason* v. *Thornton*, 74 Ark. 46 (1905), in which the defendant having sold goods at cost, fraudulently altered the cost marks: *Welch* v. *Burdick*, 101 Iowa 70 (1897); *Pendergast* v. *Reed*, 29 Md. 398 (1868); *Barnard* v. *Colwell*, 39 Mich. 215 (1878); *Elerick* v. *Reid*, 54 Kans. 579 (1895); *McFadden* v. *Robison*, 35 Ind. 24 (1870); and this is so even in those jurisdictions which follow *Medbury* v. *Watson*, 6 Metc. 246 (Mass. 1843), *Blacks* v. *Catlett*, 3 Litt. 139 (Ky. 1823); *Lord* v. *French*, 61 Maine 420 (1873): *Gassett* v. *Glasier*, 165 Mass. 473 (1896); in which Allen, J., says (p. 480): "The distinction may be rather nice between an agreement to sell at cost, where the cost is represented at a certain sum, and an agreement to sell at a certain sum, which sum is represented to have been the cost. This distinction, however, exists, and it would be more marked, if at the time of entering into the agreement of sale, the vendor should not fix or know the exact cost, and the parties should leave it to be ascertained afterwards."

In *Way* v. *Ryther*, 165 Mass. 226 (1896), the court intimates its reluctance to extend the protection afforded to vendors indulging in "dealers' talk;" further than the decided cases required, and in *Race* v. *Weston*, 86 Ill. 91 (1877), it is held that while no action would lie for false statements made by the vendor as to the cost of property sold by him, a contract induced by such statements will not be specifically enforced.

were made by a third person, apparently disinterested, and who proposed to aid the plaintiffs in making the purchase, and to procure the estate for them at a price which he stated that he knew that it cost, and which he affirmed it was worth. Such false affirmations and representations, having been made by a third person, with the intent to defraud, we hold are actionable; and though the declaration might have contained a more full averment of the facts expected to be proved, yet we are of opinion that sufficient was stated to maintain the action and to let in the other proofs connected with and growing directly out of the assertions set forth in the declaration.[2]

For these reasons, the motions for a new trial, and in arrest of judgment, are overruled, and there must be judgment on the verdict.

BUSTERUD *v.* FARRINGTON.

Supreme Court of Minnesota, 1887. 36 Minn. 320.

BERRY, J. It is not necessary to the action that the person making the representation should receive any benefit from the deceit, or that he should collude with the party who is benefited. *Pasley* v. *Freeman,* 3 Term. R. 51; *Upton* v. *Vail,* 6 John. 181, 5 Am. Dec. 210; *Hubbard* v. *Briggs,* 31 N. Y. 518; *Hubbell* v. *Meigs,* 50 N. Y. 480; *Medbury* v. *Watson,* 6 Metc. (Mass.) 246, 39 Am. Dec. 726. "The gravamen of the charge is that plaintiff has been deceived, to his hurt, not that the defendant has gained an advantage." *Fisher* v. *Mellen,* 103 Mass. 503.

A vendor's false representation of the value of a thing which he proposes to sell, is ordinarily not actionable, (*Wilder* v. *De Cou, supra,*) though it may be so under special circumstances. *Griffin* v. *Farrier,* 32 Minn. 474, 21 N. W. 553. But this immunity is not extended to a person not a vendor. He is held responsible generally for a false representation of value; the excuse of interest, and of the natural disposition of men to overestimate their own property, not being allowed in this case. Grinnell, Law of Deceit, 41-45, 50-52, 64; *Medbury* v. *Watson, supra.* A false representation as to the condition, quality, or other matters affecting the value of property, of which the person to whom the representations are made is contemplating a purchase, is a false representation as to material

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[2] *Accord: Manning* v. *Albee,* 11 Allen 520 (Mass. 1866); *Busterud* v. *Farrington,* 36 Minn. 320 (1887); *Kenner* v. *Harding,* 85 Ill. 264 (1877), vendor, who induced third person to corroborate his assertion that such person had offered a certain price for the land sold to the plaintiff, who had never seen it, held liable in deceit; and see *Belcher* v. *Costello,* 122 Mass. 189 (1877), statements by vendor of the price paid by one other than the vendor. In *Jude, Snow & Co.* v. *Woodburn,* 27 Vt. 415 (1855), it was there held that a statement by a defendant seeking credit that he was worthy of credit, was a mere matter of opinion and not actionable. The decision can only be supported in the distinction taken in the principal case, since similar statements in regard to the credit of third persons are habitually held actionable.

facts; that is to say, of facts material to the purchaser with reference to the question whether the purchase will be for his advantage. Bigelow on Torts, 17; *Litchfield* v. *Hutchinson, supra; McAleer* v. *Horsey, supra;* Grinnell, Law of Deceit, 38-40.

BOURN *v.* DAVIS.

(*76 Maine Reports* 223.)

SYMONDS, J. Case for deceit alleged to have been practised by the defendants in effecting an exchange of real estate with the plaintiff.

One of the allegations of fraud relied upon at the trial was that the defendants said the place in Belfast, which they exchanged with the plaintiff for her farm in Fayette, was valued by the appraisers upon the estate of Lydia A. Hollis, mother of the defendant, Grace U. Davis, at one thousand dollars, when in fact the appraisal was only two hundred and twenty-five dollars.

In this respect the jury were directed by the presiding judge that if the defendants stated "as a matter of fact, that the appraisal had been made by the official appraisers under their oaths in performing their official duty under the laws of this state and that statement was false (and there is no dispute, I believe, about the fact that the appraisal was two hundred and twenty-five dollars instead of one thousand dollars), and was known by them to be false at the time, and was made for the purpose of deceiving the plaintiff and as an inducement to her to make the exchange, and she did rely upon it and was thereby induced to make the exchange, "it was a fraudulent misrepresentation which would give the plaintiff a right of action to recover the damages which she sustained thereby. The ruling appears to have been a *pro forma* one, and, the verdict being for the plaintiff, the question of its correctness is reserved upon exceptions by the defendants.

It is the general rule at least in Massachusetts and Maine that an action of tort for deceit in the sale of property does not lie for false and fraudulent representations by the vendor to the vendee concerning its cost or value, or the prices which have been offered or paid for it. *Long* v. *Woodman,* 58 Maine 52; *Holbrook* v. *Connor,* 60 Maine 578; *Martin* v. *Jordan,* 60 Maine 531; *Bishop* v. *Small,* 63 Maine 12. "When a vendor of real estate affirms to the vendee that his estate is worth so much, that he gave so much for it, that he has been offered so much for it, or has refused such a sum for it, such assertions, though known by him to be false, and though uttered with a view to deceive, are not actionable." *Medbury* v. *Watson,* 6 Metc. 259; *Gordon* v. *Parmelee, 2* Allen 212; *Hemmer* v. *Cooper,* 8 Allen 334; *Mooney* v. *Miller,* 102 Mass 220; *Cooper* v. *Lovering,* 106 Mass. 78; *Parker* v. *Moulton,* 114 Mass. 99; *Poland* v. *Brownell,* 131 Mass. 138; *Page* v. *Parker,* 43 N. H. 368.

With this rule established, it is difficult to see how a distinction

can be drawn so as to hold a false statement about an appraisal of property actionable, when proof of similar misrepresentations in regard to prices offered or actually paid for it would fail to support the action.

It will be observed that in this case the false affirmations alleged are by the vendor to the vendee, personally or by agent, not as in *Medbury* v. *Watson, supra,* by a third person who stands "in the light of a friend who has no motive nor intention to depart from the truth, and who thus throws the vendee off his guard and exposes him to be misled by the deceitful misrepresentations." This is the distinction drawn in that case, between misstatements of this class by the vendor and the same by a person who assumes to be disinterested, not between misrepresentations by the vendor on the one hand as to what he himself had paid and on the other as to what had been paid by third persons, as the dicta in *Manning* v. *Albee,* 11 Allen 522, and *Belcher* v. *Costello,* 122 Mass. 190, would seem to imply. We can see no difference in legal effect between a misrepresentation by the vendor in regard to the price which he paid, and one by him in regard to the price paid by other persons. The case of *Medbury* v. *Watson* draws no such distinction and the other cases cited only purport to follow that.

In this respect, then, the misrepresentations as to the appraisal stand upon the same footing as that class of affirmations of cost and value, which the authorities hold are not material. They were made by vendor to vendee. The ruling so regards them. In another respect they are even less dangerous to a vendee in the exercise of common diligence; the proceedings of appraisers upon estates being matters of public record and therefore open to the inspection of all persons interested. Notwithstanding the official character of the action of the appraisers, it still expresses only the judgment of individuals as to the values of property, and from the time of *Harvey* v. *Young,* Yelv. 21 a, it has been held as a general rule that mere affirmations of value between vendor and vendee are not actionable, though false; "for it was but the defendant's bare assertion that the term was worth so much, and it was the plaintiff's folly to give credit to such assertion."

The extension of this rule to false statements about prices paid or offered, seems to include in its application to fraudulent representations, such as appear in this case, about an appraisal of property.

In *Buxton* v. *Lister,* 3 Atk. 385, a decree for the specific performance of an agreement to buy timber-trees was resisted on the ground that the plaintiff had secured the contract by representing that two timber merchants had valued the trees at three thousand five hundred pounds, when in fact their valuation was only two thousand five hundred pounds. Lord Hardwicke held that this, if proved, was good ground for refusing to decree specific performance, for such a decree is in the discretion of the court and should be entered only when the agreement is certain, fair and just in all its parts. This case is cited in 2 Kent's Comm. 487, as illustrating the greater strictness of the rule in this respect in equity than at law, and also

as showing that in equity there is a distinction between enforcing specifically and rescinding a contract. "It does not follow that a contract of sale is void merely because equity will not decree a specific performance."

Under the principle which the decisions in this state have established, we think that proof of the fraudulent representation alleged in regard to the appraisal of property was not sufficient to sustain the action.

Exceptions sustained.[1]

Peters, C. J., Barrows, Danforth, Virgin and Libbey, JJ., concurred.

GRAFFENSTEIN *v.* EPSTEIN & CO.

Error from the Lyon District Court, Supreme Court of Kansas, 23 Kan. Rep. 443 (1880).

BREWER, J.: Plaintiffs sued defendant for a breach of the following contract:

"Emporia, May 26, 1879.

"I have sold this day to E. Epstein & Co. my wool (1,100 fleeces), at 20 cents per pound, to be delivered at Emporia. Received ten dollars on contract. WM. GRAFFENSTEIN."

One ground of defense was as follows:

"3d. For a third defense, defendant says that at the date, to wit, May, 1879, the plaintiffs came to the premises of defendant, and contracted to purchase some wool of defendant at the price of twenty cents per pound, and at the time falsely and fraudulently represented that said price was higher than the market-price, they well knowing to the contrary—which representations defendant, not knowing the market-price thereof at that time, relied on and agreed to let them have it at that price; but plaintiffs were wool-buyers at the time, and had been long before, and the fact was that wool had at that time largely advanced, and said sum was much less than market-price, and plaintiffs well knew it at the time; that as soon as defendant discovered the fraud, he declined and refused to comply with the said contract."

Upon the trial, defendant offered testimony in support of this count in the answer, but the court ruled that the testimony was inadmissible, and this ruling is the error alleged. Counsel for plaintiff in error fairly state the question thus presented to be, "Whether a false and fraudulent representation as to the market-price of a commodity made by a purchaser who knows, to a seller who does not know the market-price, to induce a sale more advantageous to the purchaser than he could otherwise get, and which representation

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[1] But see *Coles* v. *Kennedy*, 81 Iowa 360 (1890), where a statement that a certain well-known man had subscribed for 5,000 shares of stock was held actionable, when in fact the stock had been given him for the use of his name, the only value of his subscription as an inducement to the plaintiff to purchase stock was because it expressed the alleged subscriber's belief in its value.

is believed and relied on by the seller to his damage, is such a fraudulent representation as avoids his contract of sale?"

This question thus presented must be answered in the negative. It will be noticed that, as stated, the question eliminates two elements which sometimes enter into affect the force of the misrepresentation, i. e., that some personal trust or confidential relation, and that of peculiar means of knowledge. Sometimes there are such relations between the parties, or their situations are such, that a peculiar obligation rests on the one who knows to reveal his knowledge. There may be some trust relation between the two, or a recognized habit of dealing in dependence upon the party's statements and representations. In such cases, there is a peculiar duty resting upon the party to disclose the true facts. A confidential adviser, an attorney, a factor, an agent, all hold such relations that they are under special duty to tell the truth, the whole truth, and nothing but the truth. So, where from a long-continued course of dealing the party making the representations knows that the other has become accustomed to act upon his representations, he may not presume upon such confidence to impose a falsehood. So, also, where there are peculiar means of knowledge possessed by one and not open to the other, as where a dealer in precious stones trades with one inexperienced and ignorant of the values of such articles. Acquaintance with such values, or the tests of quality, is not acquired at once, or by the mere asking; it requires training and time. So if a dealer knows that a party is confined to his room by injury or disease, and compelled to depend on the information brought to him—and indeed, generally, where the parties cannot, by reasonable care and diligence, place themselves upon equal terms, the law casts a higher obligation to reveal the truth.

None of these elements enter into this case. The article was one of general commerce; there was no special relation of trust or confidence; no peculiar training was prerequisite to a knowledge of values; the market-price was a matter of public knowledge, and could be ascertained by any one by reasonable effort and inquiry. Under such circumstances, if the one party chooses to take the statements of the other, and act upon them, rather than make any inquiry as to the market-price, he cannot thereafter repudiate his contract on account of the falsity of the statements. "It must appear that the injured party not only did in fact rely upon the fraudulent statement, but had a right to rely upon it in the full belief of its truth, for otherwise it was his own fault or folly, and he cannot ask of the law to relieve him from the consequences." (2 Parsons on Conts., 3d ed., p. 270.)

Counsel argue in favor of the rule as they claim it, that it will tend to promote honesty in business transactions, and encourage the confidence which one man should have in another in the statements he makes. It may be well doubted whether, as a matter of public policy, such a rule would be wise; whether it is not better that every one should understand that it is his duty to make reasonable and ordinary effort to acquaint himself with all the facts necessary for his guidance in making a contract before he makes it, and that if

he fails to make such effort, he must abide by the contract. Attention to business and prudence in making contracts are of no small importance; inquiry before is vastly better than inquiry after. A disposition, after entering into a contract which proves unfavorable, to search for some means of getting out of it, is unfortunate; it encourages misconstruction of statements, misrecollection of words, and wilful falsehood. A party who finds on inquiry that he cannot avoid his contract, except by proof of misrepresentations by the other party, is under fully as strong temptation to impute such misrepresentations, as a party seeking a contract is to make them.

But it is scarcely necessary to pursue this question of policy further. We think the law is the other way, and any change in the rule must be made by the Legislature.

We see no error in the ruling, and the judgment will be affirmed.[1]

All the justices concurring.

RIPY *v.* CRONAN.

Court of Appeals of Kentucky, January 27th, 1909, 131 *Ky. Rep.* 638 (1909).

The particular charges brought against the defendant are: That he presented to the Louisville school board an option on the property purchased by it, signed by Edmonia Shannon, by which she agreed to dispose of the property to the Louisville school board for the sum of $5,985; that during the negotiations for the sale, and at the time the sale was effected, Cronan had in his possession an agreement executed by Mrs. Shannon to sell and dispose of said property to the Louisville School Board for the sum of $3,100; that the defendant falsely represented that $5,985 was the lowest sum at which said property could be bought. In determining the questions whether these allegations, if true, show fraud on the part of the defendant, we must take into consideration the fact that the property involved in the transaction was real estate, and that it consisted of two lots of ground located in the city of Louisville. The property was there for the inspection of the members of the board. They could have inspected it individually, collectively, or by means of a

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[1] *Accord: Foley* v. *Cowgill,* 5 Blackf. 18 (Ind. 1838); *Cronk* v. *Cole,* 10 Ind. 485 (1858); *contra Smith* v. *Countryman,* 30 N. Y. 655 (1864) *semble,* fraud alleged as a defense in an action on a contract.

Where, however, the property is not dealt in any open market, so as to give both parties equal means of knowledge of the current price, statements that stock has not been sold for less than a certain figure or that all the original stockholders had paid par for their holdings, or that the price, offered or asked, is the same as that paid by others, are actionable fraud or ground for rescinding a contract induced thereby; *Adams* v. *Collins,* 196 Mass. 422 (1907); *Maxted* v. *Fowler,* 94 Mich. 106 (1892); *Hubbard* v. *International Agency Co.,* 68 N. J. Eq. 434 (1904); *Coolidge* v. *Goddard,* 77 Maine 578 (1885); *Weaver* v. *Cone,* 174 Pa. St. 104 (1896); *Kilgore* v. *Bruce,* 166 Mass. 136 (1896).

So a defendant is liable who deceives the plaintiff as to the current price by producing forged newspapers containing false quotations thereof. *Manning* v. *Albee,* 11 Allen 520 (Mass. 1866).

committee appointed for that purpose. They were all sui juris and capable of determining, not only the value of the property, but the price they were willing to pay for it. No obligation was placed upon the school board to buy. They could buy or not, just as they pleased. Although the defendant stated that $5,985 was the lowest sum for which the property could be purchased, it was, after all, entirely optional with the members of the board whether or not they would pay that sum. If the law were as contended for by appellant, then every vendee of property could escape the obligation of his contract just so he afterwards established the fact that at the time of the sale the vendor or the agent representing him was willing to take less than he represented that he would take for the property disposed of. This would impose no duty on the purchaser. The validity of his purchase would depend, not upon what he was willing to pay, but upon the price at which the property might be purchased. There is nothing in this record to show that Mrs. Shannon was a nonresident of Louisville when the members of the school board examined the property in question. If they considered the price too high, they might have inquired of the owner whether or not she would accept less. In doing this, they would have exercised only ordinary prudence. People who are capable of acting for themselves cannot decline to act, and then put the entire blame for a bad trade upon a vendor or his agent. In every transaction some allowance must be made for what is called "trade talk." The statement that a certain sum is the least that a piece of property can be bought for is a very common expression, and forms a part of nearly every trade. A purchaser who relies upon such talk and purchases property without using ordinary prudence to investigate the truth of the statement does so at his own risk, and is not entitled to recover on the ground of fraud or deceit.

Appellant relies upon the case of *Kice & Co.* v. *Porter*, 21 Ky. Law 871, 53 S. W. 285. That appellee wanted to buy a house and went to appellant's office, knowing that he was a real estate agent and had property for sale, for the purpose of having it shown to her; that he had a man in his office named Boswell to take her in his buggy and show her all the property in his hands for sale; that she liked best a certain piece of property, and offered $6,500 for it, but it was then priced at $7,500 on the books. She then intimated that she would pay $7,000, and suggested to Boswell that she would see Mr. Kellar, the owner of the house, and see if he would not take less than $7,000 for it. Boswell told her that this was no use, that Kellar would not take less than $7,000; that they had the matter in their hands, and it would do no good to see anybody but them. A day or two after this Kellar came to Kice's office and agreed to take $6,500 for the property. That night Boswell went to appellee's home and sold her the property for $7,000. Appellee brought suit for $500, charging that appellants had appropriated it to their own use and had obtained it from appellee by fraud. The facts of the above case are different from those in the case at the bar. In this case no effort or artifice was used by Cronan to prevent inquiry or investigation by the members of the school board. In the case cited

the proposed purchaser desired to see Mr. Kellar, the owner of the property, and ascertain whether or not he would take less than $7,000 for it. Boswell told her this was no use, that Kellar would not take less than $7,000 for the property, that they had the matter in their hands, and it would do no good to see anybody but them. The ruling of the court in the above case was in accordance with the well-known principle of law that false representations as to the condition, situation and value of real estate, knowingly made by the vendor to the purchaser, are not actionable, unless the purchaser has been fraudulently induced to forbear inquiry as to their truth; and in such case the means by which he has been thus induced to forbear inquiry must be specifically set forth in the declaration. *Parker* v. *Moulton,* 114 Mass. 99, 19 Am. Rep. 315.

Thus it will be seen that the two exceptions to the rule of caveat emptor are: First, where confidential relations exist between the two; and, second, where fraud or artifice is used to prevent inquiry or investigation. In the case at bar there was no confidential relationship existing. The charge that Cronan was the agent of the school board was abandoned. The amended petition does not charge that any fraud or artifice was used to prevent inquiry or investigation by the members of the board. We therefore conclude that the rule of caveat emptor applied in the case of the purchase complained of, as it was not charged that Cronan, in effecting the sale, was the agent of the school board, or that he employed any artifices to prevent inquiry or investigation by the board.[1]

SECTION 5.

(e) Statements of quality open to observation or investigation.

Drew Barantine v. *E. C. of Chicester,* 13 Hen. IV, pl. 4; Hanford, "If a man sells me a blind horse, and warrants it sane in all its members, I shall not have an action of deceit against him, after that, because I could have seen it. But if he be sick within his body, I shall have such an action, because I could not have knowledge of that malady. So is the case here. If he had bailed the serplers to the plaintiff with such warranty, where they were never weighed, the plaintiff shall not have an action of deceit, because the plaintiff could have weighed them." Thirning, C. J. "If I buy a horse of you in an-

[1] *Accord: Merryman* v. *David,* 31 Ill. 404 (1863); *Bosley* v. *Monahan,* 137 Iowa 650 (1908), where the agent made false statements as to the price at which he was authorized to sell; *Vernon* v. *Keys,* 12 East 632 (1810), false statements by one of the several joint purchasers as to the price his associates would allow him to pay.

Contra: Hokanson v. *Oatman,* 165 Mich. 512 (1911), and see *Hughes* v. *Lockington,* 221 Ill. 571 (1906), where, however, the defendant purporting to act for the purchaser, conspired with the vendor to put up the price on him.

The agent who sells at a higher price than that demanded by his principal, must of course account to him for the entire amount received, *Merryman* v. *David,* 31 Ill. 404 (1863).

other place than that where the horse is, through the confidence I have in you, and you warrant it sane in all its members, when in truth it is blind, I shall have a good action of deceit against you."

"Fairfax—If I buy a thing of a man with a warranty, if the warranty be of such a thing of which I could have had notice by my five senses at the beginning, if they are not as they are warranted to me, I shall not have an action; for example if he sells to me clothes of murry and warrants to me that they are blue, etc., because I can see for myself when they are sold to me that they are blue.

Brian—If he who bought them in your case were blind he would have an action of deceit.

Fairfax—If a man sell to me certain clothes and warrants them to me that they are of such a length, if they are not of that length I shall have an action of deceit, for I could not know the length by looking at them, but by means of some collateral proof, that is to say through measurement, and then when I have given credence to you that they are of such a length and you have deceived me, it is reasonable that I should have an action of deceit, etc."

Anon, Y. B. 11, *Edw. VI. pl.* 6.

BRIAN, J. "If a man sells me a horse and guarantee he has two eyes and he has not, there will be no action of deceit, because I could have discovered this myself at the beginning of the transaction."

FAIRFAX. "If I buy a thing of a man with a warranty, if the warranty be of something of which I could have notice by my five senses at the beginning, if it be not such as it is warranted to me, I shall not have an action."

SHERWOOD *v.* SALMON.

Supreme Court of Errors of Connecticut, 1805. 2 *Day.* 128.

This was an action on the case. The declaration was substantially as follows: "That on or about the first day of December, 1794, the defendant applied to the plaintiffs and proposed to sell them 32,162 acres of land lying in the commonwealth of Virginia, at the price of twenty-five cents per acre, and to give his deed of the same to the plaintiffs; and to persuade and induce the plaintiffs to purchase the same, did, on or about the first day of December, affirm and declare to the plaintiffs, that two-thirds of said tract of land, with the exception of six hundred acres, was good, arable land, of an excellent quality; being one-third level bottom land, one-third side hill, fine for pasture land, and the other part being good timber land, the whole of which except the six hundred acres, was worth a dollar an acre; and did further affirm and declare that said six hundred-acre tract was wholly bottom land, fit for all agricultural purposes, without any waste or broken land therein, and well worth two dollars per acre; and to further persuade and induce the plaintiffs to purchase the land, did exhibit to the plaintiffs a map of the tract, therein representing large and beautiful streams running through the same, thereby the better to convince the plaintiffs of the truth of his

assertions as to the quantity and proportion of bottom lands; and the plaintiffs further say that the defendant, at divers times and places, previous to the 20th day of December, 1794, made each and every of the aforesaid declarations and affirmations; and further, that if the plaintiffs would purchase the land from him at the present value they would thereby make great gains and profits. And the plaintiffs say that placing full confidence in the declarations and affirmations of the defendant and believing the same to be true, on or about the 20th day of December, did, in fact, purchase of the defendant the said land, and did pay to him therefor the sum of $8,040.50." And the plaintiffs further say that the defendant represented to them that the deeds given by him to the plaintiffs for the said tract of land were well executed according to the laws and usages of the commonwealth of Virginia, and so as to vest the fee of the whole of said land in the plaintiffs; and that the plaintiffs took the said land and deeds in full faith and confidence. "Now the plaintiffs say that all the declarations, affirmations and representations of the defendant, made to the plaintiffs as aforesaid, were at the time of the making of the same, and still are, false and fraudulent; and the defendant at the time of the making of the same well knew they were false and fraudulent, and were made by him with a view to cheat, injure and defraud the plaintiffs of their property." The declaration then specifically denies the truth of the various representations of the defendant, and further states that "there is not and never was any bottom land in the said tract, and that the same is wholly made up of rocks and inaccessible mountains; and the plaintiffs further say that the aforesaid deeds, executed and acknowledged as aforesaid, conveyed to the plaintiffs no part of the tract, nor were they executed according to the laws and usages of the commonwealth of Virginia; all of which the defendant, at the time of executing, acknowledging and delivering the same to the plaintiffs well knew, and of which the plaintiffs were wholly ignorant. And the plaintiffs say, they have paid the whole of said sum of $8,040.50, expecting and depending upon it, that they should, by the deeds of conveyance aforesaid, receive a valuable property and consideration therefor; yet they say, that they have received nothing; whereby they, in consideration of the premises, are greatly injured, defrauded, and have sustained damage," &c.

The defendant pleaded a special matter in defense. The plaintiffs replied, traversing a part of the plea; and thereupon issue was joined. A verdict was returned for the plaintiffs. The defendant moved in arrest of judgment, alleging, that the declaration was insufficient, and the issue immaterial. This motion was overruled by the court, and the judgment rendered for the plaintiffs.

By the court unanimously, the judgment was reversed.

The questions are, was the declaration insufficient, and the issue material?

With respect to the first.—The maxim *caveat emptor* applies forcibly in this case. The law redresses those only who use due diligence to protect themselves;—such diligence as prudent men

ordinarily use.—The quality of land, on which its value depends, and which is too various for a market standard, the purchaser can see, if he will but look. And the course that prudence has established requires that he should look; if not with his own eyes, by those of an agent, or some one in whom he can reasonably place a confidence. Whatever morality may require, it is too much for commerce to require, that the vendor should see for the purchaser. It is enough for him, in point of law, that he does not conceal the knowledge of secret defects, nor give a warranty, express or implied. Here he has done neither.

Whether lands be five or five hundred miles from the purchaser's residence, does not vary the requisition of due diligence, though it may the expense of complying with it. Land is not like a ship at sea; it has a known location and can be approached. And even should it be necessary to purchase land unseen, which can scarcely happen in a provident course of business, covenants may be inserted respecting quality, as well as seisin, or title.

As there must be a reversal upon this point, which makes an end of the case, it is not necessary to unravel lengthy and intricate pleadings to get at the other.

Accord: Gordon v. *Parmelee,* 2 Allen 212 (Mass. 1861), statements of the quality of land not actionable though when the sale was made the land was so covered with snow, that its true character was not apparent; in *Parker* v. *Moulton,* 114 Mass. 99 (1873), it was held that an allegation that the plaintiff had no opportunity to inspect the land did not excuse the lack of examination, there being no allegation that he was fraudulently induced to forbear inquiry.

Where, however, the property is situate at a great distance or in another state, it was held in *Savage* v. *Stevens,* 126 Mass. 207 (1879), that false statements of its condition were actionable, see *accord, Spalding* v. *Hedges,* 2 Barr 240 (Pa. 1846), misstatement of distance of property from the city of St. Louis; *Cornelius* v. *Molloy,* 7 Barr 293 (Pa. St. 1848).

DIRECTORS, ETC., OF CENTRAL RAILWAY CO. OF VENEZUELA *v.* KISCH.

(*House of Lords,* 1867. *L. R. 2nd English & Irish App.* 99.)

This was an appeal against the decision of the Lord Justices reversing an order of Sir John Stuart, V. C., dismissing the plaintiff's appeal for the reason that his subscription to shares in the defendants' company alleged to have been procured by fraudulent representations contained in their prospectus.

LORD CHELMSFORD:—[1] (After holding that the statements in the prospectus were fraudulent misrepresentations.) But the appellants say that even admitting the prospectus to be open to the objections which are made to it, the respondent has no ground of complaint, because he had an opportunity of ascertaining the truth of the representations contained in it, of which he did not choose to avail

[1] The concurring opinions of Lords Cranworth and Romilly are omitted.

himself; that he was told by the prospectus that "the engineer's report, together with maps, plans, and surveys of the line, might be inspected, and any further information obtained, on application at the temporary offices of the company;" and in his letter of application he agreed to be bound by all the conditions and regulations contained in the memorandum and articles of association of the company, which, if he had examined, would have given him all the information necessary to correct the errors and omissions in the prospectus.

But it appears to me that when once it is established that there has been any fraudulent misrepresentation or wilful concealment by which a person has been induced to enter into a contract, it is no answer to his claim to be relieved from it to tell him that he might have known the truth by proper inquiry. He has a right to retort upon his objector, "You, at least, who have stated what is untrue, or have concealed the truth, for the purpose of drawing me into a contract, cannot accuse me of want of caution because I relied implicitly upon your fairness and honesty." I quite agree with the opinion of Lord Lyndhurst, in the case of *Small* v. *Attwood,* 6 Cl. & F. 395, that "where representations are made with respect to the nature and character of property which is to become the subject of purchase, affecting the value of that property, and those representations afterwards turned out to be incorrect and false, to the knowledge of the party making them, a foundation is laid for maintaining an action in a court of common law to recover damages for the deceit so practised; and in a court of equity a foundation is laid for setting aside the contract which was founded upon that basis." And in the case of *Dobell* v. *Stevens,* 3 B. & C. 623, to which he refers as an authority in support of the proposition, which was an action for deceit in falsely representing the amount of the business done in a public house, the purchaser was held to be entitled to recover damages, although the books were in the house, and he might have had access to them if he thought proper.

Upon the whole case I think the decree of the Lords Justices ought to be affirmed, and the appeal dismissed with costs.[2]

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[2] *Accord: Redgrave* v. *Hurd,* L. R. 20 Ch. Div. 1 (1881), the buyer of a business whose profits were misstated held entitled to rescission of the purchase and damages, though he actually had in his hand a bundle of papers showing what had been earned; *Dobell* v. *Stevens,* 3 B. & C. 623 (1825), somewhat similar facts; *Crandall* v. *Parks,* 152 Cal. 772 (1908); *Linington* v. *Strong,* 107 Ill. 295 (1883); *Robinson* v. *Reinhart,* 137 Ind. 674 (1894), though stated as applicable to property at a distance; *Riley* v. *Bell,* 120 Iowa 618 (1903); *Scott* v. *Burnight,* 131 Iowa 507 (1906), land situated at a distance; *Eastern Trust, etc., Co.* v. *Cunningham,* 103 Maine 455 (1908); *Smith* v. *McDonald,* 139 Mich. 225 (1905), Carpenter, J.—"One who perpetrates a fraud because his victim continues to have confidence which a more vigilant person could not have;" *Smith* v. *Werkheiser,* 152 Mich. 177 (1908), the defendant, selling a newspaper, placed the books at the purchaser's disposal to verify his statements as to circulation; the purchaser, who appears to have made a very inaccurate and fragmentary inspection, was allowed to recover; *Redding* v. *Wright,* 49 Minn. 322 (1892); *Oswald* v. *McGhee,* 28 Miss. 340 (1854); *Cottrill* v. *Krum,* 100 Mo. 397 (1890); *Hines* v. *Royce,* 127 Mo. App. 718 (1908), and this, though the plaintiff was in the employ of the company whose stock

EKINS *v.* TRESHAM.

(15 *Car.* 2. 1 *Levinz*, 102.)

Case, That whereas the plaintiff and defendant were in treaty for the sale of a messuage; the defendant falsely and fraudulently affirmed it was let at £42 per annum; whereto the plaintiff gave faith, gave him £500 for it, where in truth it was let at £32 per annum only. After verdict for the plaintiff, it was moved in arrest of judgment that the action did not lie; as for saying that a thing is of a greater value than it is, without warranty no action lies. Yelv. 20. No more will it for saying that it is demised for more than in truth it is, for the party might inform himself from the tenant, and a warranty will not bind a man in a thing that is apparent; as to warrant that a horse has both his eyes, when he is apparently blind of one of them. But by the court, tho' an action will not lie for saying that a thing is of greater value than it is (nor by Wyndham, it is perjury to swear it, because value consists in judgment and estimation, wherein men many times differ); yet to affirm that a thing is demised for more than it is is a falsity in his own knowledge, and the party who is deceived may for such deceit have an action, for perhaps the lease is by parol, or the tenant will not inform the purchaser what rent he gave. And after it had been twice moved judgment was given for the plaintiff in Trinity, 15 Car. 2, by the whole court.[1]

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he bought and remained in its employ for some time after the purchase; *Meade* v. *Bunn*, 32 N. Y. 275 (1865); *Townsend* v. *Felthousen*, 156 N. Y. 618 (1898); *Griffin* v. *Lumber Co.*, 140 N. Car. 514 (1906); *Fargo Gas & Coke Co.* v. *Fargo Gas & Electric Co.*, 4 N. Dak. 219 (1894), containing excellent opinion; *Pentecost* v. *Godfrey*, 23 Pittsburgh L. J. 177 (Pa. 1876); *Lake* v. *Weber*, 6 Pa. Super. Ct. 42 (1897); *Handy* v. *Waldron*, 19 R. I. 618 (1896); *McClennan* v. *Scott*, 24 Wis. 81 (1869). In many of the cases the rule is often stated as limited to facts peculiarly within the defendant's knowledge; see *Eastern Trust Co.* v. *Cunningham, supra.*

Aliter, where the falsity of the fact as asserted is obvious to the sense of him defrauded; *Fargo Gas & Coke Co.* v. *Fargo Gas & Electric Co.*, 4 N. Dak. 219, *semble; Kaiser* v. *Nummerdor*, 120 Wis. 234 (1904); *Long* v. *Warren*, 68 N. Y. 426 (1877), as to which see *Schumaker* v. *Mather*, 133 N. Y. 590 (1892).

It would appear that in Massachusetts recovery is only allowed where the defendant's false statement is intended to induce and does induce the plaintiff to refrain from investigation: *Parker* v. *Moulton*, 114 Mass. 99 (1873); see also *Strand* v. *Griffith*, 97 Fed. 854 (C. C. A. 1899). The Washington cases deny recovery to one who has the power by investigation to disprove the false statements relied upon: *Pigott* v. *Graham*, 48 Wash. 348 (1908), unless the facts can only be ascertained by inquiry from the defendant: *Breese* v. *Hunt*, 67 Wash. 398 (1912), or where the investigation would be unduly onerous or difficult, or the plaintiff would be unable to appreciate the effect of the facts discovered thereby, *Daniel* v. *Glidden*, 38 Wash. 556 (1905).

In *Schwabacker* v. *Riddle*, 99 Ill. 343 (1881), it was held that where the plaintiff bought goods from the defendant at a price represented to be that stated in an invoice, it was a question for the jury whether he had exercised sufficient diligence to guard himself against deception in not asking to see the invoice, which was in the possession of one of the defendants.

[1] *Accord: Risney* v. *Selby*, 1 Salk. 211 (1704), "the value of the rent is matter that lies in the private knowledge of the landlord and tenant"; *Dobell*

JUDD *v.* WALKER.

Supreme Court of Missouri, 1908. 215 *Missouri* 312.

LAMM, J. Judd, the plaintiff, resides in Brookline, Mass., but is in business at Dwight, Ill. Bourland resides at Pontiac, Ill. The defendants, Walker and Naxera, reside in Buffalo township, Pike county, Mo. Naxera owned two tracts of land in Pike county, Ill. Walker was Naxera's agent to sell them. Bourland was Judd's agent to buy them. So acting, at a certain time Bourland purchased from Walker said tracts of Illinois land. Judd and Bourland were strangers in that vicinity, and unfamiliar with the lands. Walker and Naxera were familiar with the lands, and Walker made false representations as to the acreage. After the deed passed from Naxera to Judd, it was ascertained there was a serious discrepancy in the amount of land conveyed by the deed, whereby Judd paid over $1,000 for land he did not get, and which Naxera did not own, and knew he did not own. Thereupon Judd sued Naxera and Walker for damages in the Louisiana Court of Common Pleas, grounding his action on fraud and deceit. No question is made on the pleadings, and the facts seem to be of such sort that the law should throw no mere captious obstacle or dry technicality in the road of recovery—to the contrary, should put its benediction on the effort, if it can be done without overturning settled principles. The laws of hospitality seem to require that strangers should be taken in a good sense, but courts should be astute to not permit such a "taking in" as appears here. At a trial in that court with the aid of a jury, at the close of the plaintiff's evidence, he was cast by a peremptory instruction. Thereat he appealed to the St. Louis Court of Appeals. That court speaking through Nortoni, J., handed down an unanimous opinion reversing and remanding the case (*Judd* v. *Walker,* 114 Mo. App. 128, 89 S. W. 558), but certified it here, being of mind that its opinion was in conflict with *Mires* v. *Summerville,* 85 Mo. App. 183, decided by the Kansas City Court of Appeals.

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v. *Stevens,* 3 B. & C. 623 (1825), vendor of a public house misstated his receipts from the sale of spirits and malt liquors and the rent received from certain rooms.

So in *Braley* v. *Powers,* 92 Maine 203 (1898), it was held that though statements of value were not actionable, statements of facts, peculiarly within the vendor's knowledge and directly affecting values, such as the cost of manufacturing an article, the patent for which was the subject of the sale, if fraudulent, were actionable. So it is actionable to falsely assert that the par value of the stock has been paid in, *Coolidge* v. *Goddard,* 77 Maine 578 (1885): and a misstatement, by one selling a share of a contract for purchase of land, of the amount paid to the owner upon it, was held actionable in *Hoxie* v. *Small,* 86 Maine 23 (1893); *Ellis* v. *Andrews,* 56 N. Y. 83 (1874); *McAleer* v. *Horsey,* 35 Md. 439 (1871), p. 457, defendant not only asserted that he had paid $25,000 for his share in a mining claim but also stated that he had paid in $10,000 as working capital, compare *Davis* v. *Reynolds,* 107 Maine 61 (1910), where defendant's misrepresentations of the price paid were held not actionable, with *Adams* v. *Burton,* 107 Maine 223 (1910), where misstatements of amount of hay cut on a farm were held actionable.

The statement of facts by Judge Nortoni and his conclusions of law are found in 114 Mo. App. 128, 89 S. W. 558. We approve the statement of facts by the learned judge and his conclusions of law. Would it not be a shame to jurisprudence if, on the facts found, the conclusions drawn did not irresistibly follow?

As we read the record there is present here a typical case of actionable fraud and deceit, for instance, false representations of the vendor on material facts leading up to the sale, with his knowledge of their falsity and a present intention they should be believed and acted on by the vendee, coupled with the vendee's ignorance of their falsity and his reliance and acting on such representations to his resulting damage. The fraud, resting in parol, may be proved by parol, and the written documents were mere steps in that proof. It is elementary that a grantee, defrauded as was Judd, is not obliged to sue on the covenants of warranty in his deed, nor need he go into equity to rescind the contract, but he may hold what he got under the contract, and sue at law for his damages. That is what Judd did in this case.

Mires v. *Summerville,* 85 Mo. App. 183, is scantily reported on the facts, and we shall not say the case was not well decided on the record in that case. But the learned judge who wrote the opinion ruled to the effect that, if a vendee is well acquainted with the land purchased, and was over it at the time of the trade, with opportunity to measure the same, he cannot be heard to charge the vendor with fraud in misrepresenting the number of acres it contained. That rule is too harsh as a general proposition. Of course, if the vendor and vendee have equal opportunities to know the acreage, and no false representations are made and acted on, the rule is well enough. But if the rule be construed to mean that a vendee must survey the land and measure it, no difference as to the size of the tract or whether its boundaries are irregular or not, and cannot rely on the positive assurance of the vendor as to his knowledge of the number of acres in his own land, then we do not agree to it as a good doctrine. Such defect as a deficiency in acreage is not a patent defect to be got at by the use of natural faculties and the exercise of ordinary diligence in a land sale. Due diligence does not require that the vendee should suspect the vendor of lying, nor that the vendee should survey and measure the land to prevent being deceived by the lies of the vendor. It has sometimes been loosely said that the negligence of the vendee will prevent recovery for the fraud of the vendor. The word "negligence" used in that connection, as we understand its meaning in the law of negligence, is an unhappy expression. Fraud is a wilful, malevolent act, directed to perpetrating a wrong to the rights of another. That such an act in a vendor should not be actionable because of the mere negligence or inadvertence of the vendee in preventing the fraud ought to be neither good ethics nor good law. When one voluntarily shuts his eyes when to open them is to see, such a one is guilty of an act of folly (in dealing at arm's length with another) to his own injury: and the affairs of men could not go on if courts were being called

upon to rip up transactions of that sort. For instance, if B. wants oats, and A. shows B. an open sack of beans (both A. and B. being sui juris, and knowing beans when the bag is open), and A. tells B. they are oats, B. ought not to complain when he buys the sack because he gets beans. If C. points D. to his horses in the field, and tells D. they are black, when in fact they are white, and D. buys them for black horses, he is guilty of an act of folly, and has no remedy. If E. takes F. over his hilly, broken land, and tells F. it is level and arable, and F. buys it as level and arable land, he ought not to recover. In such case the fraud is made innocuous by the fact that it was patent to the vendee. The vendee is held to know what his own eyes would disclose, and, knowing, could not be deceived. But when an element of wilful deception leads up to a transaction, the whole situation changes. Take a very old case put in a well authenticated record: "Joab said to Amasa, Art thou in health, my brother? And Joab took Amasa by the beard with the right hand to kiss him. But Amasa took no heed of the sword that was in Joab's hand; so he smote him therewith in the fifth rib, and shed out his bowels to the ground, and struck him not again; and he died." In that case was Amasa to blame for being deceived by the usual sign of oriental, friendly salutation, though a fighting soldier held sword in hand? And, generally speaking, until there be written into the law some precept or rule to the effect that the heart of a man is as prone to wickedness as is the smoke to go upward, and that every one must deal with his fellow man as if he was a thief and a robber, it ought not to be held that trust cannot be put in a positive assertion of a material fact, known to the speaker and unknown to the hearer, and intended to be relied on.[1]

CURTLEY *v.* SECURITY SAVINGS SOCIETY.

Supreme Court of Washington. March 22nd, 1907. 46 *Wash.* 50.

FULLERTON, J. The appellant at the trial objected to the introduction of any evidence on the part of the respondent on the ground that the complaint did not state facts sufficient to constitute a cause

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[1] *Accord: Stevens* v. *Giddings,* 45 Conn. 507 (1878); *Starkweather* v. *Benjamin,* 32 Mich. 305 (1875); *Coon* v. *Atwell,* 46 N. H. 510 (1866); *Whitney* v. *Allaire,* 1 N. Y. 305 (1848); *Beardsley* v. *Duntley,* 69 N. Y. 577 (1877); *Ledbetter* v. *Davis,* 121 Ind. 119 (1889); *Cawston* v. *Sturgis,* 29 Ore. 331 (1896); *Griswold* v. *Gebbie,* 126 Pa. 353 (1889).

Contra: Gordon v. *Parmelee,* 2 Allen 212 (Mass. 1861); "the vendors," said Bigelow C. J., "pointed out to the vendees the true boundaries of the land. The defendants had the means of ascertaining the precise quantity of land included within the boundaries. They omitted to measure it, or to cause it to be surveyed. By the use of ordinary vigilance and attention they might have ascertained that the statement concerning the number of acres, on which they placed reliance, was false. They cannot now seek a remedy for placing confidence in affirmations which, at the time they were made, they had the means and opportunity to verify and disprove." In *Roberts* v. *French,* 153 Mass. 60 (1891), it was however held that a vendee might rely on statements as to the length of the boundaries, if the defendant asserted that he had measured it himself or otherwise conveyed "the notion of such a measurement."

of action. In support of this contention, the appellant argues that false representations, to be actionable, must be made under such circumstances as will justify a reasonably prudent person in acting upon them, and since it appeared on the face of the complaint that the representations upon which the respondent relied were made with reference to the title to the property, which was a matter of record accessible to the respondent, he cannot be said to have acted as a reasonably prudent person ought to have acted, since he did not avail himself of the opportunity afforded him to test the truthfulness of the representations, and hence cannot be heard to complain of being defrauded. But the argument is not sound. While this court has, in common with many other courts, held that false representations, involving mere matters of opinion, or question of judgment, as much within the knowledge of one party as the other, are not grounds for an action of deceit, it has also held that false representations as to quantity of land contained in a given description, or false representations as to the boundaries and location of land, or as to its title, if made positively and with the intent that they should be relied upon, were not of that sort, but were actionable, if relied upon by the vendee to his injury. *Hanson* v. *Tompkins,* 2 Wash. 508, 27 Pac. 73; *Sears* v. *Stinson,* 3 Wash. 615, 29 Pac. 205; *Lawson* v. *Vernon,* 38 Wash. 422, 80 Pac. 559, 107 Am. St. 880; *Freeman* v. *Gloyd* (Wash.), 86 Pac. 1051. Such, also, is the general rule. 14 Am. & Eng. Ency. Law (2d Ed.) pp. 24, 88; 29 Am. & Eng. Ency. Law (2d Ed.) 654-657; *David* v. *Park,* 103 Mass. 501. The reason usually given for the distinction is that representations as to the quantity of land in a given tract, its title, or as to its location on the ground, are representations as to matters of fact, not of opinion, and that representations of a vendor to a vendee as to matters of fact which he knows to be false, and on which the vendee relies to his injury, will sustain an action of deceit, even if the vendee might have discovered the fraud by further inquiry; while it is only representations involving matters of judgment or opinion that do not afford the remedy of deceit.[1]

PEARSON *v.* LORD MAYOR OF DUBLIN.

(*House of Lords,* 1907. *L. R. App. Cas.* 351.)

LORD LOREBURN, L. C. My Lords, this is an action for deceit brought by Messrs. Pearson & Son, contractors, against the Dublin

[1] *Accord: Watson* v. *Atwood,* 25 Conn. 313 (1856); *Kerwin* v. *Friedman,* 127 Mo. App. 519 (1907), plaintiff not precluded from recovery by the fact that he had not examined the record because of lack of opportunity or confidence in vendor; *Rollins* v. *Quimby,* 200 Mass. 162 (1908), plaintiff did not search records to see whether mortgage was first mortgage as represented, he not knowing that the record could or should be searched and being induced not to employ an attorney by defendant's statement that it was not necessary; *David* v. *Park,* 103 Mass. 501 (1870), plaintiff not required to search Patent Office Records to verify statements as to what a patent covered: *Kehl* v. *Abram,* 210 Ill. 218 (1904); *Riley* v. *Bell,* 120 Iowa 618 (1903), p. 926-927; *Hunt* v. *Barker,* 22 R. I. 18 (1900); and see *Kerr* v. *Kitchen,* 7 Pa. 486 (1848); but see *Pence* v. *Young,* 22 Ind. App. 427 (1899).

Corporation. Inasmuch as I am about to propose that the case be remitted for a new trial, it is desirable that I should say no more than is necessary to explain my view.

The plaintiffs' case is that they were induced to enter into a contract for the construction of certain sewage works by statements made by and on behalf of the defendants as to the existence to a depth of nine feet below ordnance datum of an old wall. Undoubtedly evidence was adduced at the trial from which the jury might, if they thought right, conclude that the plaintiffs were so induced by statements made on behalf of the defendants. Also, there was evidence for the jury that those statements were made either with a knowledge of their falsity, or (which is the same thing) with a reckless indifference whether they were true or false, on the part of the engineers employed by the defendants to make the plans which were submitted to plaintiffs as the basis of the tender. And had the case rested there I gather that the Chief Baron would have left the case to the jury, and that the learned judges who subsequently had this litigation before them would have approved this course.

But another feature of the case was considered fatal to the plaintiffs' claim. The contract contained clauses, which I need not cite at length, to the effect that the contractors must not rely on any representation made in plans or elsewhere, but must ascertain and judge of the facts for themselves. And, therefore, the Chief Baron withdrew the case from the jury. As I understand it, the view he held, in substance confirmed by the Court of Appeal, was that the plaintiffs, so forewarned, had no right to rely on any representation, and could not be heard to say they were induced by statements on which by contract they were not to rely. Or, at all events, it was said that the defendants, being themselves innocent, are protected by such clauses against the consequence of contractors acting on false statements made by defendants' agents, however fraudulent those agents might be.

Now it seems clear that no one can escape liability for his own fraudulent statements by inserting in a contract a clause that the other party shall not rely upon them. I will not say that a man himself innocent may not under any circumstances, however peculiar, guard himself by apt and express clauses from liability for the fraud of his own agents. It suffices to say that in my opinion the clauses before us do not admit of such a construction. They contemplate honesty on both sides and protect only against honest mistakes. The principal and the agent are one, and it does not signify which of them made the incriminated statement or which of them possessed the guilty knowledge.

It is not necessary to say anything as to the Public Authorities Protection Act, for the King's Bench Division held that it did not apply to this case, and I am entirely of the same opinion.

I respectfully recommend to your Lordships that this case be sent for a new trial, and that the respondents pay the costs of this

appeal and the costs in the Court of Appeal, the costs of the first trial to abide the event.

LORD JAMES OF HEREFORD. But the learned Chief Baron, whilst accepting the view that the plaintiffs had produced prima facie evidence of deceit, apparently removed the case from the jury upon the ground that clause 43 of the specification protected the defendants from liability.

Now the learned Chief Baron in respect of this clause expressed the opinion that the contractor was not entitled in point of law to say he acted upon the statement contained in the plans. He was told to act upon his own judgment, and ought to have done so.

If this dictum be read as general in its terms, and so applied, it may be read as conferring considerable advantage upon the designers of fraud. At any rate, by inserting such a clause those who framed it would run a fair chance of the contractor saying, "I assume that those with whom I deal are honest and honourable men. I scout the idea of their being guilty of fraud. An inquiry testing the plan will be expensive and difficult, and so I will not make it." The protecting clause might be inserted fraudulently, with the purpose and hope that, notwithstanding its terms, no test would take place. When the fraud succeeds, surely those who designed the fraudulent protection cannot take advantage of it. Such a clause would be good protection against any mistake or miscalculation, but fraud vitiates every contract and every clause in it.

LORD ATKINSON. The direction given to the jury is to be upheld on the grounds upon which it was purported to be based, it must, in my opinion, be because these several articles of the contract, on their true construction, are to be held to embody a contract by the plaintiffs that they in effect are not, under any circumstances, to have a remedy by action for deceit for any fraud which may be practised upon them by the defendants or by those acting on their behalf in the nature of a false representation, that is a contract to submit to a fraud.

As at present advised I am inclined to think, on the authority of *Tullis* v. *Jacson,* (1892) 3 Ch. 441, and *Brownlie* v. *Campbell,* (1880) 5 App. Cas. 925, 937, 956, that such a contract would be illegal in point of law. And, with the most profound respect for the Chief Baron, I do not think that the articles of the contract relied upon can, on their true construction, be held to have had fraud, whether conscious or unconscious, within their purview or contemplation, or to apply at all to such a case of fraud as the present is alleged to be. They were, I think, intended to apply, and do apply, to inaccuracies, errors, and mistakes, or matters of that sort, but not to fraud, whether of principal or agent or both combined.

(Only a part of the opinions of Lords James of Hereford and Atkinson are given, and the concurring opinions of Lord Ashbourne and the Earl of Halsbury are omitted.)

The order of the Court of Appeal of Ireland reversed and the judgment of the King's Bench Division of Ireland which reversed

the decision of Palles, C. B., and entered judgment for the appellants on the ground that there was a question of fact for the injury upon the allegation of fraud, restored.

SECTION 6.

Plaintiff's reliance on the defendant's statements.

SAFFORD *v.* GROUT.

120 *Massachusetts Reports* 1876, *page* 21.

TORT. The declaration alleged that the defendant desired the plaintiffs to sell him a certain quantity of leather, and, to induce the plaintiffs to sell the goods, offered in payment therefor the promissory note of Marshall Smith, and falsely represented to the plaintiffs that Smith "was a person of ample means and ability to pay said note, and that the note was good," and that the plaintiffs, relying upon said representations, sold the leather to the defendant and took the note in payment therefor; that Smith was then insolvent and known so to be by the defendant. There was also a count in contract for goods sold and delivered; both counts being for the same cause of action. The answer denied the several allegations of the declaration and averred that the plaintiffs took the note after full inquiry, and with the same opportunity for ascertaining Smith's pecuniary responsibility which was possessed by the defendant. Trial in the Superior Court, before Aldrich, J.

The defendant contended that if the plaintiffs took time to inquire, as to Smith's responsibility before delivering the goods and receiving the note, and were convinced by what they heard that it was a fair risk to take, they could not recover in this action under the pleadings; that the pecuniary standing of the man, and the amount of the credit to which he is entitled, is a matter of common knowledge or judgment; and if the plaintiffs availed themselves of this common knowledge and judgment before completing the transaction and delivering the goods and taking the note, and were influenced by what they learned from other persons than the defendant, they could not now hold him responsible in this action.

Upon this point the judge instructed the jury, in substance, that if they found that representations were made by the defendant, that they were false, and that the defendant knew them to be so, the question then was whether they influenced the plaintiffs or induced them to take the note; because, unless such was the fact, the plaintiffs had no ground of complaint against the defendant; that it was not necessary for the plaintiffs to satisfy them that the fraudulent representations of the defendant were the sole operating cause that induced the plaintiffs to take the note; that though they were re-

ferred to other parties for information, and made inquiries, still, if on the whole they would not have taken the note but for Grout's representations, this part of their case was sustained; but that if by their inquiries of other parties, irrespectively of anything the defendant had said to them, they were satisfied to take the note, they were not entitled to recover.

The jury returned a verdict for the plaintiffs; and the defendants alleged exceptions.

COLT, J. No question of pleading arises upon the bill of exceptions; nor does it state all the instructions given to the jury. Under the instructions reported upon the point raised, and those which, in the absence of anything to the contrary, we must presume to have been given, the jury have found that the allegations of the first count were proved.

The defendant asked the court to rule, in substance, that if the plaintiffs took time to inquire as to the responsibility of the maker, availed themselves of the common knowledge and judgment as to his pecuniary standing, and were influenced by what they heard before taking the note, they could not recover. But, instead of this, the court told the jury that it was not necessary for the plaintiffs to satisfy them that the alleged representations were the sole cause, or the sole operating cause, inducing the plaintiffs to take the note; for if they would not have taken it except for the defendant's representations, then they could recover, although they were in part controlled by other influences, for which he was not responsible.

The instruction thus given appears to have been well adapted to and sufficient for the case presented by the evidence and the instruction requested was properly refused. It is not necessary that the false representations should have been the sole or even the predominant motive; it is enough if they had material influence upon the plaintiff, although combined with other motives. *Matthews* v. *Bliss*, 22 Pick. 48.

Exceptions overruled.

ADDINGTON *v.* ALLEN.

Court of Errors of the State of New York, 1833. 11 *Wendell* 376.

WALWORTH, Chancellor.[1] I can see nothing in the charge of the judge, at the circuit, which was calculated to mislead the jury. He certainly was right in saying that it was not only material whether

[1] The facts to which Chancellor Walworth's charges allude are briefly as follows:

Addington had given to one Baker a letter to a Mr. Wilson, in which, after stating briefly certain business dealings between himself and Baker, he concludes: "Any assistance you may give him by way of buying would be greatly acknowledged, he being an acquaintance of mine." In fact Baker was Addington's nephew, and was largely in debt to him. Addington held two judgments against Baker and also a bond warrant authorizing a confession of judgment, the total amount of $2220.

The plaintiff sold goods to Baker through a clerk named Havens. When

the recommendation through Wilson constituted the only recommendation; that it was sufficient if the plaintiff was moved by the recommendation in giving the credit. It appears in this case that the letter of Hickcox, the merchant at Buffalo, was written in good faith, although it does not distinctly appear what the precise contents of that letter were; and there is no doubt that the letter, as well as the false and fraudulent representation of Baker that he had been coming to Wilson, had more or less influence on the mind of the person giving the credit; yet if the recommendation through Wilson was necessary to be superadded to enable Baker to obtain the credit, the defendant is as much liable for the damage sustained, as if that had been the only inducement to the credit. If the mind of the vendor as to giving the credit was nearly balanced, and the jury were satisfied that this fraudulent act of the defendant turned the scale, and induced him to part with the goods, he who was guilty of the fraud was properly holden to be answerable for the consequences thereof. Even where two persons, without preconcert, are guilty of fraudulent misrepresentations as to the credit of a purchaser, if the representations of both were necessary to induce the vendor to part with his goods, either might be made liable for the whole loss, as there is no contribution as between wrongdoers. The fact that the clerk went to Wilson to obtain information as to the credit of Baker, although he had before seen the letter of Hickcox, and after inquiries had been made of one of the members of the firm to whom that letter was addressed, was of itself sufficient to authorize the jury to conclude he was not satisfied with the recommendation, whatever it might have been, which was contained in that letter; and in the language of the judge, that the mind of the vendor was moved in giving the credit, by the recommendation of the plaintiff through Wilson.[2]

Baker introduced himself to Havens, he showed a letter from a Mr. Hickcox addressed to a mercantile house in New York, of whom inquiries were made by the plaintiff. Baker also gave a reference to Mr. Wilson, upon whom Havens called. Wilson said that he had received a letter from Addington in regard to Baker, but did not show the letter. In answer to an inquiry by Havens as to whether he would trust Baker, Wilson said, that if he were selling goods he would sell to Baker on Addington's recommendation.

[2] *Accord: Tatton* v. *Wade,* 18 C. B. 371 (1856); *Scholfield Co.* v. *Scholfield,* 71 Conn. 1 (1898); *Dashiel* v. *Harshman,* 113 Iowa 283 (1901); *Marshall* v. *Gilman,* 52 Minn. 88 (1892); *Kirkendall, Jones & Co.* v. *Hartsock,* 58 Mo. App. 234 (1894); *Morgan* v. *Skiddy,* 62 N. Y. 319 (1875); *Wilson* v. *Talheimer,* 20 Pa. C. C. R. 203 (1897); *Handy* v. *Waldron,* 19 R. I. 618 (1896); *Lebby* v. *Ahrens,* 26 S. Car. 275 (1886); *Shaw* v. *Gilbert,* 111 Wis. 165 (1901). So the plaintiff may recover though in part influenced by other non-actionable statements of defendant, *Tatton* v. *Wade,* 18 C. B. 371 (1856), plaintiff induced to extend credit to a third party in part by defendant's verbal and in part by his written assurances of such party's solvency; *Dashiel* v. *Harshman,* 113 Iowa 283 (1901); *Shaw* v. *Gilbert,* 111 Wis. 165; but see *Proctor* v. *McCoid,* 60 Iowa 153 (1882), where it was held that a plaintiff did not rely upon a warranty and representations that a horse he bought was sound because he testified that when he asked for the warranty he was afraid the horse had glanders.

Where the defendant's fraud though intended to deceive the plaintiff has no influence upon his action, there can be no recovery, *Horsfall* v. *Thomas,*

HUMPHREY *v.* MERRIAM.

Supreme Court of Minnesota, 32 Minn. 197.

MITCHELL, J. This was an action for damages for deceit in the sale of stock of the Florence Mining Company. The deceit consisted, as alleged by the plaintiff, in the false and fraudulent statements of one Carver, defendant's agent, who made the sale, as to the value, condition, and productiveness of the company's mine, and as to the amount of its indebtedness. Assuming that the alleged representations were made, and that they were untrue, (of which facts there was competent evidence,) and that they were material, (which some of them undoubtedly were,) it was incumbent on plaintiff in such an action also to prove (1) that they were fraudulently made; and (2) that he believed them, and relied on them in making the purchase.

We also think that the evidence utterly fails to show that the plaintiff believed these representations, and relied on them in making the purchase. It is true that in his examination in chief he states generally that he relied on them; but his cross-examination conclusively shows that he did not rely on them as true when he made his purchase. He makes the following among other statements: "I wouldn't let him (Carver) touch the money, wouldn't take his word that he was agent for the man. I considered that what he said was wind. I saw a good many men to see how far Carver's representa-

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1 H. & C. 90 (1862), defendant patched up a flaw in a gun, intending thereby to conceal it from a purchaser, who, however, bought without inspection.

It is error to instruct the jury that the plaintiff's belief in the false statements must be the "predominance" motive, *Matthews* v. *Bliss,* 22 Pick. 48 (Mass. 1839), or that the plaintiff cannot recover if he did not rely "so much" upon the false statement as upon individual investigation and judgment. *Marshall* v. *Chapman, supra.*

While the plaintiff can only recover if he has in fact relied and acted upon the defendant's false statements, he need not expressly allege or give direct evidence to prove that he so relied upon them if they are material, *Hicks* v. *Stevens,* 121 Ill. 186 (1887), "when a party ignorant of the real facts and having no ready means of information, makes a purchase or enters into a transaction, as to the subject-matter of which misrepresentations have been made which are material, the law will presume, as a matter of fact, that he relied on them," Shope, J., p. 194; *Redgrave* v. *Hurd,* L. R. 20 Ch. Div. 1 (1881), per Jessel, M. R. p. 21; but see *Runge* v. *Brown,* 23 Nebr. 817 (1888).

As to the effect of lapse of time between the making of the statement and the plaintiff's action as depriving the latter of the right to rely upon it; compare *Bradley* v. *Seaboard National Bank,* 167 N. Y. 427 (1901), plaintiff held entitled to give credit to defendant on faith of false statements to a financial agency made two years earlier; and *Cox Shoe Co.* v. *Adams,* 105 Iowa 402 (1898), with *Lesem* v. *Miller,* 10 Kans. App. 579 (1901), where the plaintiff was held not entitled to sell goods on the credit of a letter of recommendation five months old.

It is immaterial whether the plaintiff is induced to take positive action, as making a contract or purchasing property, or is induced to refrain from action, as where he is induced not to rescind an existing contract, *Bowen* v. *Carter,* 124 Mass. 426 (1878), or to retain stock of a corporation which he had intended to sell, *Fottler* v. *Moseley,* 179 Mass. 295 (1901).

tions were corroborated. I was anxious to see how I could protect myself and take the stock. I didn't intend to take Carver's word that he was Merriam's agent. I wanted to see that I was dealing with a responsible man. These representations of Carver's were as the wind, unless they were certified to by the character of an honest man. I didn't mean that he should get any money, and I meant that Mr. Merriam should get my money, and should he have right to say that these things were true." Again when asked if he would believe anything Carver said, he answered, "No." When he went to see Merriam he says he made him the speech which had been taught him by his attorneys on a former occasion: "I have bought of you, through your agent, Mr. Carver, some Florence." When asked his object in making this speech, he replied, "To see whether he would say Carver was or was not his agent." The evidence also shows that, so far from believing the statements of Carver, he interviewed numerous other parties, stockholders and others, to ascertain what they knew about the mine, and what value they placed upon the stock, and that so far as he made the purchase upon a belief in the existence of facts, he acted upon what information he got from these parties, and not upon what Carver told him.

The evidence clearly shows the plaintiff's position to be just this: He knew that mines were proverbially uncertain, and might prove very profitable or a failure. He found that others had faith in this mine, and therefore he had; but he wished something more certain, and wanted a warranty from a responsible man, so that he could keep his stock and get his dividends from the mine if it turned out well, or get his money back from the defendant if it did not. Whatever may have been plaintiff's belief as to the condition or value, present or prospective, of the mine, that belief was not based upon the statements of Carver. His only reliance upon Carver's statements consisted, not in his belief of their truth, but because he thought, if false, Merriam would be responsible for them. He made his purchase, not because of any belief in their truthfulness, but because he thought Merriam would be liable as a warrantor to make them good if they proved untrue. On such a state of facts, as the court below well remarked, if plaintiff made out anything, it was a cause of action on a warranty and not for deceit.

On either or both of these grounds the action was properly dismissed.

Judgment affirmed.

HAGEE AND ANOTHER *v.* GROSSMAN.

Supreme Court of Indiana, 31 *Indiana Reports* 233 (1869).

Appeal from the Miami Circuit Court.

Suit by the appellants against the appellee. The complaint alleges, that the plaintiffs were engaged in the business of baking bread for sale to the public, which was well known to the defendant; and that the defendant, fraudulently and craftily, intending to cheat

and defraud the plaintiffs, brought to their bakery twelve hundred pounds of flour, in sacks, which he fraudulently and falsely represented to the plaintiffs to be good, sound, merchantable flour, when, in fact, said flour was musty, worthless, and wholly unfit to be used in said business, which the defendant well knew; that the plaintiffs at the time paid the defendant seventy-five dollars for said flour, being $6.25 per hundred, relying on said representations of the defendant, and believing the same to be true; that after they had paid for the flour, they discovered it was worthless for the purpose for which it was purchased, and thereupon they offered to return it to the defendant, who refused to receive it or to repay said sum or any part thereof; whereby the plaintiffs were damaged, &c.

The defendant answered in two paragraphs: first, the general denial; second, that before the sale of the flour to the plaintiffs the defendant took it to their place of business, in sacks, and left it there for several days for them to inspect and try it; that after the plaintiffs had done so and knew the quality of the flour, he sold it to them at $6.25 per hundred, the price agreed upon between the parties, which was less than the market price at that time and place for good, merchantable flour.

Reply, the general denial. Trial by jury; verdict for the defendant, on which judgment was rendered, a motion for a new trial having been overruled.

RAY, J.—The appellants urge a reversal of this case upon the evidence. The only question before the jury was whether the appellants relied upon false representations of the quality of the flour or purchased it upon their own judgment. The flour was left with them for examination for ten or twelve days, and they used one sack from among the lot; and although there is evidence that the flour from the sack used made good bread, and that from the other sacks did not, when used at a subsequent time, make bread fit for sale, still the jury might fairly find from the evidence in the case, that the flour was all of one quality when sold, being but one lot of flour, from the same lot of wheat, and ground at the same time, the sacks being filled from the mill.

This instruction was also given to the jury: "If the jury find that the flour in question was left in the possession of the plaintiffs, for the purpose of being tested by their baker as the agent of the plaintiffs, as to its quality for the purpose for which they wanted it, and the defendant was not guilty of making any false or fraudulent representations or acts at the time, which the plaintiffs relied on as true, by which they were prevented from making such test, and after such test under such circumstances, the plaintiffs, relying upon the judgment of their baker as to the quality of the flour, purchased of the defendant, they cannot recover, although it be true that the defendant had previously made false representations as to the quality of the flour."

If by no act or word of the defendant the baker was prevented from testing the flour, and if the plaintiffs relied upon that test in

making their purchase, they could not have rested upon the statements of the defendant, and he could not be liable for deceit.[1]

SECTION 7.

Damage.

ELY *v.* STANNARD.

Superior Court of Hartford County. 46 *Conn. Rep.* 124 (1878).

CARPENTER, J.:—In July, 1873, the plaintiff was indebted to the defendant in the sum of $1,200, by note payable with interest in 18 months to the order of the defendant. In April, 1874, the plaintiff without the knowledge of the defendant, executed a mortgage of his land to the defendant to secure the note, being desirous of exchanging such land subject to the mortgage for an equity of redemption in certain other lands owned by one Lester S. Hills. The plaintiff then made an exchange of equities with Hills, treating the mortgage as valid, and taking it into account in the settlement. It was expressly agreed that neither party should personally assume any liability upon the mortgage so conveyed. The defendant sold the note before maturity to a bona fide holder for value. While the note was outstanding in the hands of a third party, the plaintiff requested the defendant to transfer the mortgage to him or to some third person and for his benefit to secure the payment of the note. This he refused to do. Afterwards, and while the note was still outstanding in the hands of a third person, Hills induced the defendant to release the mortgage to one White, to whom he had contracted to sell the property free of the mortgage, for doing this Hills paid the defendant $200. The result of this transaction was to take from the plaintiff the amount of the note and place $200 of it in the hands of the defendant, and the balance in the hands of Hills.

[1] *Accord: Southern Development Co.* v. *Silva,* 125 U. S. 247 (1888); *Grauel* v. *Wolfe,* 185 Pa. 83 (1898); *Poland* v. *Brownell,* 131 Mass. 138 (1881); *Allison* v. *Ward,* 63 Mich. 128 (1886); *Walker* v. *Casgrain,* 101 Mich. 604 (1894); *Warren* v. *Ritchie,* 128 Mo. 311 (1895); *Wimer* v. *Smith,* 22 Ore. 469 (1892); all cases where fraud was alleged as a defense to the enforcement of a contract, or as a ground for its rescission. See also, *Wilson* v. *Talheimer,* 20 Pa. C. C. 203 (1897), *semble;* and *Zilke* v. *Woodley,* 36 Wash. 84 (1904); "any representations made before the parties viewed the land are not pertinent. The vendee had no longer the right to rely upon them and they thereafter proceeded in the light of their own knowledge from actual view of the premises and its surroundings;" *per* Hadley, J., p. 89. But the fact that he made inquiries elsewhere is not a bar to recovery if he placed substantial reliance upon the defendant's false statements, *Lewis* v. *Crandall,* 7 Mo .App. 564 (1879): and see *Marshall* v. *Gilman,* 52 Minn. 88 (1892). So he may recover if because of his reliance on the trustworthiness of the defendant's statements he makes a less accurate and exhaustive examination and so fails to discover the truth, *Dyer* v. *Hargrave,* 10 Vesey 506 (1805).

The defendant further claims that the plaintiff cannot recover the amount of the note for the reason that the note had not been paid when suit was commenced. This claim assumes that the plaintiff sustained no injury until the actual payment of the note; that until that time it was fraud without damage. * * * It does not come with very good grace from the defendant to insist, notwithstanding that the fraud is complete, and has yielded its fruit as to himself, that it is not complete as to the plaintiff, he not yet having paid the note, although payment by the wrongful act of the defendant is inevitable.

If the plaintiff is not yet damnified no one is. White certainly is not, for he received just what he purchased and paid for. The holder of the note is not, for the plaintiff, a responsible man, is his debtor. The defendant's claim therefore involves this absurdity, that although he has committed a fraud and received the fruits of it, yet no one is injured. This cannot be. Either the maker or the holder of the note is defrauded. It is certain that one of them must suffer, and as the maker is solvent there is no uncertainty as to which it will be. For all practical purposes therefore the plaintiff suffered damage from the moment the fraud was consummated.

This must be so. The plaintiff's liability was not contingent but absolute. If it had been contingent, if there had been any legal uncertainty about his being called upon to pay it—for instance, if the security had been outstanding so that the holder of the note could have resorted to that for payment—and the wrong had been of such a character as to leave the liability contingent, the case would have presented a different question. In that event the holder might have collected the note from the security and the maker would have suffered no damage. But unfortunately the wrong destroyed the security, and converted a contingent liability into an absolute one. After the defendant sold the note he might at any time, while holding the security, have been compelled to transfer it to the purchaser. When the mortgage was released and the property conveyed to White unencumbered, he purchasing in good faith and paying therefor its full value, it was no longer possible for the holder to look to the security. He could only resort to the maker, and for all practical purposes it was certain that he would do so."

"We do not intend to infringe the rule that a mere liability to loss is not ordinarily sufficient to maintain an action; but we think the rule does not apply when such liability is coupled with a legal obligation from which there is no escape. We think this position is sustained by the authorities. In an old case, Waterer, Hobart, 266, Lord Hobart, C. J., says:—'There must be not only a thing done amiss, but also a damage either already fallen, or else inevitable.' 'There would be neither wisdom nor justice in compelling the defendant to pay the plaintiff money as compensation for a loss which he has not incurred, and may never sustain. These remarks of course do not apply where a liability has attached that may fairly be regarded as inevitable, and sure to be responded to by the party charged.' Sedgwick on Damages, 229. Again, on the same page, the author says:—'A mere probability of future loss is an insufficient

basis of a claim for legal relief. But the case may be different where the plaintiff is fixed with a legal liability to lose, which, consummated, the defendant will be bound to make good.'

Our conclusion then is that the plaintiff had a complete right of action when this suit was commenced; and, inasmuch as the note was paid before trial, he is entitled to recover the full amount of the note.

The Superior Court is advised to render judgment accordingly."[1]

In this opinion the other judges concurred.

ENFIELD *v.* COLBURN.

Supreme Court of New Hampshire, 1884. 63 *N. H.* 218.

CARPENTER, J. A mere naked lie—a falsehood—though told with intent to deceive, upon which nobody acts, and by which nobody is deceived, is not actionable. The declaration alleges, in substance, that the defendant falsely and fraudulently represented that he had a valid claim against the plaintiffs for damages, that the plaintiffs relied upon the representations, and that they investigated them at large expense and found them to be false. One or the other of the last two allegations is untruthful as the representations are claimed to be: both cannot be true. If the plaintiffs relied upon the representations, they did not investigate them: if they investigated them they did not rely upon them. It is a perversion of language to say that they did both. The averments are incurably repugnant, and neither of them can be rejected as surplusage.

If the inquiry had resulted in favor of, instead of against, the validity of the defendant's claim, and if, relying upon the result of the examination and not upon the representations, the plaintiffs had paid the demand, they could maintain no action, however unfounded the claim and however false and fraudulent the defendant's representations might be. He only who has trusted in and acted upon a

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[1] In *Luetzke* v. *Roberts,* 130 Wis. 97 (1906), an action to cancel three promissory notes because procured by fraud, it appearing that the notes, having been transferred to bona fide purchaser for value, could not be cancelled, judgment was rendered for the face value of the notes with interest, though none of them had been paid either at the time of the beginning of the action or of the trial and one at least was not payable till after the date of the trial; see the same rule applied in action for breach of contract to return a note to the maker, *Lyle* v. *McCormick Harvester Co.,* 108 Wis. 81 (1900).

In *Freeman* v. *Venner,* 120 Mass. 424 (1876), it was held that no action could be maintained by one who had been fraudulently induced to become an unrestricted endorser of a promissory note secured by a mortgage which was transferred by the defendant to a bona fide holder for value, unless at the time the action was brought he had been called upon to make payments on account of his endorsement. In that case the makers of the note had become bankrupt before the beginning of the action, and, after the beginning of the action but before trial, the real estate mortgaged to secure the note had been sold and applied to the payment of interest and to the part payment of the principal, and an action had been begun against the plaintiff to recover the balance, which action was pending at the time of the trial, but see *Trayne* v. *Boardman,* 207 Mass. 581 (1910).

falsehood to his injury can maintain an action. It is upon this principle that no action lies for false representations of facts which are equally open to the observation and knowledge of both parties.

If this declaration can be sustained, a plaintiff who makes and institutes a suit upon a false and fraudulent claim, and is beaten, must not only satisfy the judgment against him for costs, but is also liable to an action on the case; and, generally, one may recover the cost of detecting and defeating any fraud which may be attempted upon him. There is no precedent for such an action. It is always at a party's option to act upon the faith of statements made to him, or upon his own judgment of the facts after making full inquiry. If, where he does the latter and makes a mistake, another is not answerable for his blunder whatever pains he may have taken to lead him into it, still less should he be punished if by reason of the injury no mistake is committed. It is the damages which result from acting upon false representations as if they were true, and not the expense of detecting their falsity, which a plaintiff is entitled to recover.

Demurrer sustained.

URTZ *v.* NEW YORK CENTRAL & H. R. R. CO.

Court of Appeals, State of New York, 1911. 202 *N. Y.* 171.

Appeal from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered October 13th, 1910, affirming a judgment in favor of plaintiff entered upon a verdict.

The action was to recover damages sustained by the plaintiff through the false representations made to her by the defendant. The plaintiff's husband was killed at a crossing of the defendant's railroad by an engine of the defendant. One McCormick, a division claim agent of the defendant, was empowered to investigate the facts and was later authorized to effect a settlement with the plaintiff of her claim for damages for the death of her husband, at a sum not greater than $2,500. By certain representations alleged to be false and fraudulent, McCormick induced plaintiff to settle her claim for $500 and to execute a release of the defendant's liability.

At the trial the plaintiff introduced evidence in proof of the false and fraudulent nature of the statements of McCormick and her reliance thereon, and the defendant introduced opposing evidence. The trial judge in his charge instructed the jury in substance that if they found that the statements made by McCormick were misrepresentations of facts and were fraudulently made and were relied upon by the plaintiff, then she was entitled to recover as damages "the amount the plaintiff could reasonably obtain on a settlement where nothing but the true facts were given or relied upon; deduct from that the amount paid, and the residue would be the recovery. In other words, how much could the plaintiff reasonably have demanded and received from the defendant by way of settlement if

these false representations had not been made?" The defendant's counsel requested the judge to charge that the plaintiff, in order to maintain the action, must show, in the first instance, that she had a valid and existing claim against the defendant originally, and the judge responded, "I refuse to charge in that language. She must show that there was a claim which was disputed and contested; that she was alleging a claim based upon facts sufficient that she could reasonably apprehend that she had a just claim and that the defendant could also feel that she had a just claim." Proper exceptions thereto were taken. The verdict of the jury in favor of plaintiff was unanimously affirmed.

COLLINS, J. In an action for the recovery of damages caused by the fraud of the defendant, the plaintiff must allege and prove that he has been injured by the fraud which he charges. The essential constituents of the action are firmly fixed and are tersely stated in *Arthur* v. *Griswold* (55 N. Y. 400), as, "representation, falsity, scienter, deception and injury." Pecuniary loss to the deceived party is absolutely essential to the maintenance of the action. Fraud and deceit alone do not warrant the recovery of damages. Deceit and injury must concur. (*Taylor* v. *Guest,* 58 N. Y. 262; *Ettinger* v. *Weil,* 184 N. Y. 179.)[1]

In the action at bar the plaintiff was not defrauded by the transactions between herself and McCormick unless, as a result thereof, she lost something of value. In case that result was a gain to her or purely negative, representing neither gain nor loss, clearly there is no room for the application thereto of any rule of damages; the enforcement of any measure of damages, when loss and damage are wholly lacking, is impossible and inconceivable. (*Dung* v. *Parker,* 52 N. Y. 494; *Hicks* v. *Decmer,* 187 Ill. 164.)

The jury, in the case here, found that the deceit of the defendant moved the plaintiff to release unto the defendant, in consideration of the sum of five hundred dollars, whatever right or cause of action she had against it through the killing of her husband. Unless the right of action had a value and a value greater than five hundred dollars, the plaintiff was not defrauded. If what she parted with had a value less than or only equal to the value of that which she received, she was not injured; if greater, she was injured and in a sum equal to its excess of value. The basic principle underlying all rules for the measurement of damages in actions for fraud and deceit is indemnity for the actual pecuniary loss sustained as the direct result of the wrong. (*Krumm* v. *Beach,* 96 N. Y. 398.)

The jury were bound, having found the fraud, to determine whether the plaintiff was injured through the fraud, and, if injured, the sum of her damages. In case the right of action had no value,

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[1] *Accord: Freeman* v. *McDaniel,* 23 Ga. 354 (1857); *Alden* v. *Wright,* 47 Minn. 225 (1891); *Kern* v. *Simpson,* 126 Pa. St. 42 (1889); *Nye* v. *Merriam,* 35 Vt. 438 (1862). So the statute of limitations only begins to run from the time when the injury is sustained. *Brackett* v. *Perry,* 201 Mass. 502 (1909). The plaintiff is not entitled to nominal damages upon mere proof of fraud, *Alden* v. *Wright,* 47 Minn. 225 (1891).

It is not necessary that the plaintiff's loss should be due to the non-existence of the fact falsely asserted, if he be led into action or abstention from

she had gained by the transaction and was not injured. It had no value whatever if the true state of facts disclosed that it was an invalid and nonexisting claim or, in other words, that the defendant was not negligent, that the intestate was not free from contributory negligence. If, however, the true state of facts would have established that the defendant was negligent and the intestate free from contributory negligence, then the plaintiff had a valuable right of action, the acquirement of which through the fraud may have injured her. Until the jury found the real facts and that they created a valid claim against the defendant, they had not a basis for estimating the damages the plaintiff had sustained. The action is not to enforce or vacate the compromise but to recover the actual pecuniary loss sustained by the plaintiff.

VANN, J. (dissenting.)[2] I dissent upon the ground that the plaintiff was not bound to show that she had an absolute and certain right of recovery in an action for negligence had one been brought, for it was sufficient if she proved that she had a reasonable chance to recover. A compromise does not necessarily involve the surrender of a certainty, but has valid support if it involves the surrender of a reasonable probability. A reasonable chance to recover a sum of money has a pecuniary value depending upon the strength of the probability and the plaintiff lost that chance on account of the fraud practiced upon her by the defendant through its dishonest agent. She parted with value when she gave up her chance of convincing a jury that the defendant was negligent, and that her intestate was free from contributory negligence. The action for negligence, if brought, might have involved a close question of fact, and she was not obliged to convince the jury in this action that the jury in that would necessarily have found in her favor. She might or might not have succeeded in that action, but she lost her chance to make the attempt when she executed the release in question relying upon the false representations made in behalf of the defendant. The jury could find, and, as we must presume, they did find that her chance of recovery was worth as much more than the sum received on the compromise as to warrant the verdict rendered in her favor for the balance.

Judgment reversed.

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action by the defendant's fraud, he may recover for all the damages naturally resulting therefrom, *Fottler* v. *Moseley*, 185 Mass. 563 (1904); the defendant fraudulently induced the plaintiff to retain stock which he had intended to hold. The stock depreciated in value because of the embezzlement of a director of the company of a large part of its assets, the defendant was held liable for the resulting loss to the plaintiff. "The defendant, if he fraudulently induced the plaintiff to keep his stock, took the risk" of all changes, resulting from causes not altogether abnormal such as the acts, innocent or criminal, of its officers, a fire destroying the company's property, or the bankruptcy of a debtor owing the company a large sum. "The risk of a fall, from whatsoever cause, is presumed to have been contemplated by the defendant, when he falsely and fraudulently induced the plaintiff to retain his stock." Knowlton, C. J., p. 565-566.

[2] With whom Hiscock J. concurred.

AUSTIN *v.* BARROWS.

Supreme Court of Errors of Connecticut, 1874. 41 *Conn.* 287.

PARDEE, J. This in an action on the case for fraud; the defendants demurred to the declaration, and the Superior Court sustained the demurrer.

The material allegations in the declaration are—that Barrows, one of the defendants, was justly indebted to the plaintiffs; that he had property liable to attachment sufficient to pay all his debts; that he conspired with the other defendants to cheat and defraud the plaintiffs and his other creditors; that with this fraudulent intent the defendants agreed that Barrows should make a colorable and collusive sale to another of the defendants of property worth more than $10,000 for less than $6,000; that the defendants should by false and fraudulent statements and representations as to the financial condition of Barrows, induce the plaintiffs and his other creditors to refrain from taking any legal measures to collect their claims and to acquiesce in the fraudulent transfer of his property; that the plaintiffs relied on the truth of the statements and representations of the defendants and were deceived thereby and neglected to take any legal steps to enforce their claim against Barrows; that the defendants pursuant to this fraudulent agreement and conspiracy and with this fraudulent intent secretly and fraudulently conveyed away and converted to their own use all the property of Barrows, so that the plaintiffs were wholly unable to collect by legal process or otherwise any portion of their claim against Barrows; that when the fraudulent conspiracy was entered into by the defendants Barrows was the owner and possessor of property sufficient to pay all his creditors in full, and that the plaintiffs could and would have collected by suit or otherwise their claim against him but for the conspiracy and the fraudulent acts and representations done and made in pursuance of it; and that the defendants so completely consummated their fraud that the plaintiffs did not discover it until the property had been scattered, secreted, and sold to innocent purchasers and the proceeds spent, so that the same could not be found or secured by attachment or otherwise, or by a trustee in insolvency or bankruptcy had one been appointed.

Both principle and precedent compel us to say that these allegations are unequal to the support of this action; and while it is true that the courts uphold the general principle that wherever there is fraud or deceit by the one party, and injury to the other, there an action will lie, that principle must be understood with such limitations and qualifications as other principles of law, equally sound, impose upon it. The law does not undertake to redress all moral wrongs; and there may be also legal torts bringing great damage to individuals, but damage so remote, contingent or indefinite as to furnish no good ground of action.

To maintain an action for the deceit and fraud of another, it is indispensable that the plaintiff should show not only that he has sustained damage and that the defendant has committed a tort, but that the damage is the clear and necessary consequence of the tort

and can be clearly defined and ascertained. (*Lamb* v. *Stone*, 11 Pick. 527.)

So far as the declaration shows, at the time when the acts were performed and the representations were made, of which the plaintiffs complain, they had not obtained, or taken any steps to obtain, any lien upon the debtor's property for the security of their debt by contract or negotiation with him, nor had they acquired any claim upon, or interest in, or right to, any part of it by operation of law. They had taken no steps and formed no plan to procure a writ of attachment whereby to obtain security thereon; and no person had moved in the matter of a division of the property among the creditors, by either bankrupt or insolvent laws. They therefore lost no lien of any kind in consequence of the acts and representations of the defendants.

The point of their complaint is that:—they now think that if no representations had been made to them they would have obtained a lien by attachment. They cannot make legal proof of this, and we cannot say that such an intent would have ripened into action; the property might have been destroyed before they could place a lien upon it; the debtor might have sold it to innocent purchasers and disposed of the proceeds in many lawful ways; their attachment might have been anticipated by others. The law does not undertake to grasp or measure such uncertainty as the value of a mere possibility that a creditor may endeavor, at some future time, to obtain security from his debtor.

Again, what rule of damages shall the court apply to this action?

In this form of a special action on the case the plaintiffs do not seek the property fraudulently conveyed, or its proceeds, but a judgment against one or all of the defendants for the damage they have suffered by reason of the fraudulent conveyance. If one creditor may maintain this action, then may everyone; each one is entitled to compensation for the injuries suffered from the same cause, and may recover it for himself. Shall the fraudulent purchaser pay all the debts, or a sum as damages equal to all the debts of the fraudulent debtor? The effort to do justice, in this way, might result in great injustice, for the value of the property purchased may be wholly unequal to the amount of those debts.

If the value of the property transferred be not sufficient for all, how shall it be divided among the contending creditors seeking payment of damages simultaneously but by different methods? Some, perhaps, by actions for fraud; some by trustee process; some, by attaching the property in the hands of the fraudulent vendee. Shall the first in time take his whole debt? Or shall one kind of process take precedence of another? Can the plaintiffs resort to more than one of these remedies at the same time? And would the judgment in one be a bar to another?

As a rule, whenever in actions in form like the one before us individual creditors have been permitted to pursue a debtor alone, or in connection with those combining and conspiring with him, not for the recovery of the specific property sold, or the proceeds thereof, but for damages for fraudulently assigning, conveying away and

concealing his property for the purpose of placing it beyond the reach of legal process, the action was authorized by statute and did not proceed upon common law principles.[1]

There is no error in the judgment of the Superior Court.[2]

CHAPTER II

Defamation

Van Vechten Veeder, Esq., History of Defamation, 3 Select Essays in Anglo-American Legal History, pp. 449 to 451, 455 to 458; 3 Columbia Law Review, pp. 549 to 551, 554 to 558, (1903): Actions for defamation were common in the seignorial courts in the thirteenth and fourteenth centuries.[1] Many would doubtless resort to the duel, but for the mass of humble folk these courts probably did substantial justice. The manorial rolls show the operation of a jurisdiction sufficiently certain and severe to curb defamation of the baser sort. In these local courts the smirched reputation would be cleared before the very persons in whose presence it had been reviled. So that even at a later day when the king's courts were well established, they do not deal with defamation; for such wrongs the humbler subjects sought their remedy in the more familiar, cheaper, and perhaps more trusted, local courts. When, at length, late in the sixteenth century, actions for defamation became common in the king's courts, the manorial courts were in their decay.

Meanwhile the church punished defamation as a sin. Throughout Europe in the middle ages a great government existed, independent of the separate states; the temporal government was local, but there was a spiritual jurisdiction which was universal. * * *

The demarcation of the real province of this ecclesiastical jurisdiction was a difficult task. The church claimed and exercised jurisdiction, as of a

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[1] A part of the opinion is omitted discussing the cases of *Cowles* v. *Day*, 30 Conn. 410, *Adler* v. *Fenton*, 24 How. (U. S.) 407 (1860), *Smith* v. *Blake*, 1 Day 258, *Lamb* v. *Stone*, 11 Pick. 527 and *Moody* v. *Barton*, 27 Maine 427.

[2] *Accord: Bradley* v. *Fuller*, 118 Mass. 239 (1875), action against treasurer of debtor corporation, *Graham* v. *Peale, Peacock & Kerr*, 173 Fed. 9 (C. C. A. 1909), action against one who by false representation induced plaintiff not to press his claim, and in the meantime collected in full the claim of a trust company of which the defendant was president thereby exhausting the creditor's assets.

Contra: Mott v. *Danforth*, 6 Watts 304 (Pa. 1837), where plaintiff, whose debt was even due, was allowed to recover from one conspiring with debtor to conceal his assets. In *Mercdith* v. *Johns and Benning*, 1 Hen. & Munf. 585 (Va. 1807), while the debt was due, no judgment had been obtained. See also, *Smith* v. *Tonstal*, Carthew 3, where a declaration was held good which alleged that the defendant had fraudulently concealed a debtor's assets whereby the plaintiff was prevented from collecting a judgment of £100 and a further debt of £100 then due.

[1] Select Pleas in Manorial Courts (Selden Soc. Pub.), 19, 36, 82, 95, 109, 116, 143, 170; The Court Baron (Selden Soc. Pub.), 48, 57, 61, 125, 133, 136. Cf. Prof. Maitland in Green Bag, ii, 5, 6, particularly his instructive extract from a hypothetical case found in a book of precedents for pleadings in manorial courts. The manorial rolls indicate that the defendant might allege that his words were true. Select Pleas in Manorial Courts, 82. Thus early slander is said to have been uttered of malice aforethought, and sometimes the plaintiff alleges special damage. Pollock and Maitland, ii, 536.

spiritual nature, not alone over matters of ecclesiastical economy, but over matrimonial and testamentary causes and pledges, and was with difficulty prevented from appropriating the greater part of the province of contract. But its broadest claim was the correction of the sinner for his soul's health. Under this head, along with the whole province of sexual morality, usury, and perjury came defamation. Contumelious words were among the various matters which had been embraced in Roman law under the title *"injuria." Injuria,* in its legal acceptance, meant insult; but it was more comprehensive than the modern significance of the word. A person was insulted in many ways by direct force, as by shouting after him in the street so as to cause a crowd to follow him. Reproachful language which lessened one's good fame was also an injury; and this class of injuries grew in ecclesiastical law into the distinct title *"diffimation."* The Church, then, being answerable for the cleanliness of men's lives, stayed the tongue of the defamer at once *pro custodia morum* of the community, and *pro salute animoe* of the delinquent. The usual ecclesiastical penance for the offence was the acknowledgment of the baselessness of the imputation, in the vestry room in the presence of the clergyman and church wardens of the parish, and an apology to the person defamed. * * *

The significance of the action *De Scandalis Magnatum* is, that it was directed against political scandal, and that the law was administered in the Star Chamber. This cognizance of defamation considered as a political and criminal offence was repeatedly confirmed, and as to particular cases, extended by subsequent statutes. It was a familiar jurisdiction, and one which constantly grew with exercise. Hence it is not surprising to find that by the time of Elizabeth the Star Chamber had assumed jurisdiction of cases of ordinary or non-political defamation, which it decided in the way of criminal proceedings. There was, indeed, a measure of justification for this course. The duel was still a common method of vindication among those who did not come within the terms of the statutory remedy. Now the Star Chamber made every effort in the interest of public peace, to suppress duelling. But it might well feel that it was idle to prohibit this ancient remedy and offer no substitute. Therefore it took cognizance of both political and non-political defamation in the interests of public tranquillity.

Finally we come to the king's courts of common law, which, prior to the reign of Elizabeth, practically gave no remedy for defamation.

For the statement that the pleas of defamation were not entertained in the king's court we have express authority. The earliest mention of the offence in this jurisdiction occurs in a picturesque dispute between two Irish magnates, which had been removed in 1295 to Westminster, where the whole process was annulled for errors, foremost among which was the fact that the case had begun with a charge of defamation—"and it is not used in this realm that pleas of defamation should be pleaded in the king's court." The silence of the Year Books and of the Abridgments confirm this statement. In the Year Books, from the first year of the reign of Edward III to the last year of Henry VIII, a period of two hundred and twenty years, there are in all only ten cases of defamation; one in the time of Edward III, three under Edward IV, one under Henry VII, and five under Henry VIII. The oldest Abridgments, Statham's (1494) and Fitzherbert's (1563), do not mention the *"action sur le cas pur parolx";* and Brooke's Abridgement (1573) contains only two paragraphs under this head. This brings us to the reign of Elizabeth, which marks a turning-point.

The king's courts, then, did not usually entertain such actions. But, as already shown, this denial of a remedy in the king's courts was no denial of a right. There were other courts where reputation was defended. Only as the old local courts fell into decay did denial of a remedy at Westminster come to be a denial of a right. This may serve to explain the few instances in which, in early times and under exceptional circumstances, we do come across the action in the king's courts. The fact that when the action does first appear it is in the form of a special action on the case, is quite conclusive that there was no remedy at common law prior to the statute of Westminster the Second. Prior to that time the right was probably adequately protected by the seignorial courts. When, however, these local courts had fallen into decay, the question of royal jurisdiction would become more important. But by that time the task was not an easy one. The time had passed when a new form of action could be created without statute, which made it necessary to discharge the new function by means of an action on the special case for words, under the statute 13, Edward I. * * *

The principal difficulty doubtless arose from the fact that the ecclesiastical courts, having from remote times corrected the slanderer for his soul's health, had, owing to the decay of the local courts, come to be regarded as having, in some measure, an exclusive right to deal with defamation. The statute *Circumspecte agatis,* passed in the same year as the statute of Westminster the Second, is an indication of the demand, which had even then become pronounced, that more definite bounds should be set to the ecclesiastical jurisdiction. But the Church strenuously resisted all such attempts. The common-law courts resorted to prohibitions. The ecclesiastical courts, on their side, wielded the powerful weapon of excommunication. The protracted struggle has ended in the complete victory of the secular jurisdiction only in our own day. The law of defamation, in common with most of the other subjects originally within the spiritual jurisdiction, still bears the scars of this contest, and some of its doctrines can be explained in no other way.

However acquired, cases of defamation begin to appear in the king's courts soon after the last Year Books. During the reigns of Elizabeth, James I, and Charles I, the reports teem with such cases, and the bulk of litigation in defamation at once assumed very large proportions.

It was during this period that the rules of actionability were formulated which in aftertimes came to be applied exclusively to oral defamation. There was as yet, of course, no distinction at common law between slander and libel. The law thus evolved by no means covered all defamatory words; only certain specific imputations were actionable. The principle of selection was founded partly upon the character of the imputation, partly upon the consequences arising from it. The exceptions to unbridled license of speech founded upon the nature or substance of the charge were: imputations of an indictable offence or crime; imputations of having certain contagious disorders, i. e., syphilis, leprosy, and the plague; any imputation affecting a man's reputation for skill and address in his business, office, trade, profession, or occupation, which tended to cause his position to be prejudicially affected. The other exception, founded upon consequences, allowed an action for any imputation which had in fact directly caused special damage.

How the law came to be thus circumscribed is not entirely clear. The conditions under which the common-law jurisdiction was acquired—i. e., the struggle with the ecclesiastical courts, and the necessity of exercising juris-

diction through the medium of an action on the special case for words, probably lie at the root of the matter.

I. Slander.

History of Defamation by Van Vechten Veeder Esq. "Select Essays in Anglo-American Legal History," Vol. III, pp. 460-461, note 3; 3 Columbia Law Rev. 560 n. 1 (1903).

"A plausible explanation of the method by which the common-law courts acquired jurisdiction in defamation, which would also explain the process of selection of actionable words, was advanced by N. St. John Green in the very interesting article to which reference has already been made. (Am. Law Rev., vi, 593, 607 *et seq.*) It was an established principle of law from the time of Bracton that the *accessorium* must come under the same jurisdiction as the *principale;* that is, jurisdiction over a thing drew with it jurisdiction over all things accessory. It was by means of this rule that the Court of King's Bench, by the fiction that the defendant was in its custody, and the court of Exchequer, by the fiction of indebtedness to the crown, were enabled to extend their respective jurisdictions over most of the matters originally pertaining exclusively to the Common Pleas. Upon this principle the common-law courts may have worked in wresting from the spiritual courts jurisdiction over defamation.

Upon this assumption the various classes of actionable words may be explained. Take the accusation of crime. A court of law having jurisdiction of the offence charged for the purpose of punishing the offender, this jurisdiction might well be held to draw after it as an incident the right to investigate the charge for the purpose of compensating the party defamed if the charge was false. But to give this jurisdiction the imputation must be direct—a crime must be charged. One might suffer as much in reputation and pecuniary damage from being called a thievish knave as from being called a thief. But to call one a thievish knave imputes only a disposition to commit a crime, not a crime committed; and as there is nothing to which the jurisdiction of the court can attach, such an accusation is not actionable in the common-law courts.

The fact that it is actionable to impute that one is suffering from leprosy, syphilis, or the plague, while it is not actionable to charge a person with having any other disease (and not actionable to impute having had those specified), may be accounted for in the same way. In early times, when a person became afflicted with leprosy he was deemed to be legally dead and lost the privileges of citizenship. The Church took the same view, and, on the day when the sufferer was consigned for life to a lazar-house, performed over him the various solemn ceremonies observed in the burial of the dead. As the leper was subject to the writ *de leproso amovendo,* the accusation of leprosy as well as the accusation of crime might be held actionable, and upon the same ground. Persons suspected of having the plague were likewise removed by law to pest-houses and confined. To account for the charge of having syphilis is more difficult. Whether upon the appearance of this disease, in the fifteenth century, it was regarded as contagious, and

so exposed the sufferer to a writ like the writ *de leproso*, or whether the disease was so similar in its outward manifestations to the form of leprosy then prevalent in England, can only be conjectured. It was a disease quite prevalent among the clergy, and there is abundant evidence to show that it was considered no more disgraceful than any other severe disorder.

The earlier cases with respect to defamatory words touching a person in his office or means of livelihood relate almost altogether to the administration of justice. It would not be difficult to bring the slander of a judge within the jurisdiction of the common-law courts. Words spoken of an attorney, of which there are several early cases, likewise touch the administration of justice. To call a merchant a bankrupt was to subject him to the statute of bankruptcy, and might be held actionable upon the same principle as the accusation of crime. That pecuniary loss was the gist of the action, or that damage to a man's business would itself furnish a ground of action in a temporal court, appears to be an idea which originated after the ecclesiastical courts had lost their power. It is founded upon the idea that everything relating to money or business is temporal, as pertaining to matters of this world."

(a) Words imputing the commission of certain crimes.

HELLWIG *v.* MITCHELL.

King's Bench Division, 1910. *L. R.* 1910 1 *K. B.* 609.

Case set down in the special paper for argument as to whether the statement of claim disclosed any cause of action.

The statement of claim was as follows:

"(1). The plaintiff is a hair dresser carrying on business at 37 Walbrook, in the city of London, and residing at No. 17 Cotswold Road, Westcliff, in the county of Essex. The defendant is the manager of the Palace Hotel, Southend, in the said county of Essex.

"(2). On November 1, 1909, at the aforesaid Palace Hotel, the defendant falsely and maliciously spoke and published of and concerning the plaintiff to one Aubrey Bagnald, to one Frank Bagnald, and to divers other persons then present in the said hotel, but whose names are not known to the plaintiff, the words following, that is to say: "I cannot have you in here; you were on the premises last night with a crowd, and you behaved yourself in a disorderly manner and you had to be turned out." Upon the plaintiff protesting that the defendant had made a mistake and that he (the plaintiff) was not in Southend on the previous evening, the defendant further said in the aforesaid circumstances:—"Oh, no, I have not made a mistake, and there are plenty of people here now who saw you and the disorderly way in which you behaved; you have to go out at once; and if you don't go I shall call in the police, and have you turned out."

"(3). By the said words the defendant meant and was understood to mean that the plaintiff had been guilty of disorderly conduct, of committing breaches of the peace and refusing to quit licensed premises, having thereby committed criminal offenses, and that he was not a fit person to associate with respectable people and was incapable of behaving in a rational or decent manner.

"(4). By reason of the premises the plaintiff has been held up to public ridicule, odium, and contempt, and has suffered damage to his credit and reputation.

"The plaintiff claims £250 damages."

BRAY, J. This case is by no means free from doubt. The question is whether the statement of claim discloses any actionable wrong. In the absence of special damage slander is only actionable in certain cases, one of which is where the words impute the commission of a criminal offense punishable by imprisonment. The first point taken on behalf of the plaintiff is that the words alleged in the statement of claim are capable of meaning that the plaintiff was a party to an unlawful assembly, which is an offence punishable with imprisonment. I do not think that without some special innuendo and special evidence the words convey an imputation of that sort, but it may be that, if there had been a special innuendo pleaded, that the words meant that the plaintiff had been a party to an unlawful assembly. I might have thought that there was a question for the jury. The actual innuendo pleaded in the statement of claim does not, in my opinion, allege that the plaintiff had been guilty of being a party to an unlawful assembly.

It was next said that the slander imputed to the plaintiff that he had been guilty of being drunk and disorderly, which is an offence punishable with imprisonment. But there is not a word in the slander imputing drunkenness to the plaintiff, and the words are not capable of bearing that meaning, nor is that meaning alleged in the innuendo. Therefore both these points fail.

Lastly it was contended that the words are capable of bearing the meaning alleged, namely, that the plaintiff had been guilty of disorderly conduct and of committing breaches of the peace, and it was said that a person who commits a breach of the peace may be arrested either by a private individual or by a constable. That is true, but the offence is not punishable by imprisonment. It was contended, however, that the rule does not require that the criminal offence should be one punishable by imprisonment, and that it is sufficient if the offence be one which renders the offender liable to summary arrest and detention. This is not a question of principle, but of judge-made-law, and therefore I must look at the authorities to see how far they support this contention. The first case to which I will refer is *Webb* v. *Beavan*, 11 Q. B. D. 609, in which the court had to consider the question whether it is necessary to allege that the words impute an indictable offence, and it was held that it was not necessary. Pollock, B., in giving judgment said: "The expression 'indictable offence' seems to have crept into the text-books, but I think the passages in Comyn's Digest are conclusive to show

that words which impute any crimnal offence are actionable *per se*. The distinction seems a natural one, that words imputing that the plaintiff has rendered himself liable to the mere infliction of a fine are not slanderous, but that it is slanderous to say that he has done something for which he can be made to suffer corporally." Those last words are, undoubtedly, somewhat ambiguous and may be wide enough to include an offence which, though not punishable by imprisonment, renders the offender liable to arrest. The judgment of Lopes, J., in *Webb* v. *Beavan*, does not carry the matter any further.[1] The next case is *Michael* v. *Spiers & Pond, Ltd.*, 25 Times L. R. 740, where it was contended by counsel for the plaintiff that "the joint effect of § 12 of the Licensing Act, 1872, and § 5 of the Summary Jurisdiction Act, 1879, was to make drunkenness on licensed premises an offence which exposed the person committing it to punishment corporally. The plaintiff under § 1 of the Licensing Act, 1902, was liable to be dealt with corporally on the spot, and therefore this was a slander which was actionable *per se*." It appears, therefore, that the argument which has been raised here was also raised in *Michael* v. *Spiers & Pond, Ltd.*, but A. T. Lawrence, J., apparently did not find it necessary to decide the point, for he held that there was no imputation of an offence within § 1 of the Licensing Act, 1902, but he used these words: "As, therefore, there is no imputation of an indictable offence or of an offence for which a person can be made to suffer corporally by way of punishment, I think special damage is necessary." That is a dictum that the corporal suffering must be by way of punishment. I cannot find in the books a trace of authority for saying that words imputing that the plaintiff has done an act for which he may be arrested, but which is only punishable by a fine, are actionable without proof of special damage, or that a mere liability to arrest is sufficient to make the crime one for which the offender can be said to suffer corporally. Strictly speaking, it is incorrect to say that a person who commits a breach of the peace can be made to suffer corporally. The arrest in that case is not a punishment; it is merely a method of preventing the continuing of the offence.

I am of opinion that it is not desirable to extend the list of actionable wrongs, and for the reasons which I have given I come to the conclusion that the statement of claims discloses no actionable wrong, and the action must therefore be dismissed with costs.

Judgment accordingly.[2]

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[1] The judgment of Lopes, J., was as follows:—"I think it is enough that the words complained of impute a criminal offense. A great number of offenses, which were dealt with by indictment twenty years ago, are now disposed of summarily, but the effect cannot be to alter the law in respect to actions of slander."

[2] *Accord: Elliott* v. *Ailsberry*, 2 Bibb 473 (Ky. 1811); a charge of fornication held not actionable because only punishable by fine, *Buck* v. *Hersey*, 31 Maine 558 (1850), accusation of drunkenness, but see *Shepherd* v. *Piper*, note 3 to *Davis* v. *Carey*, *post*. In Vermont the offense charged, in addition to being *punishable corporally*, must involve *moral turpitude*, *Redway* v. *Gray*, 31 Vt. 292 (1858), qualifying *Billings* v. *Wing*, 7 Vt. 439 (1835); and *Murray* v. *McAllister*, 38 Vt. 167 (1865). In Maryland and Missouri it must be both

DAVIS *v.* CAREY.

Court of Common Pleas of Chester County. 1891. 141 *Pennsylvania St.* 314.

OPINION, MR. JUSTICE CLARK:

The plaintiff, Thompson Davis, was the owner of a three-story stone merchant grist mill, situate in Schuylkill township, Chester County. The mill was insured in the Mutual Fire Insurance Company of Chester County in the sum of $2,500, and in the Ætna Fire Insurance Company in the sum of $5,000. Whilst thus insured, on March 13, 1889, the mill was destroyed by fire. The defendant, Peter G. Carey, is the agent of the first named company, and is one of the managers and adjusters thereof.

In the plaintiff's statement of claim it is charged that about the first day of June, 1889, and at various other times, the defendant charged the plaintiff with setting fire to and burning the mill, to defraud the insurance companies. If the words uttered were actionable in themselves, without proof of special damage, the testimony was abundant to send the case to the jury. The charge was that he had burned the mill himself; that he could not have chosen a better day; that it was beyond doubt he had burned the mill; and, taking these expressions in the connection in which they were made, they were open to the implication that he had burned the mill to defraud the insurance companies. The court having given peremptory instructions to find for the defendant, the truth of the testimony adduced by the plaintiff, with all reasonable inference therefrom, must be assumed. But the learned judge of the court below was of opinion they were not actionable, and upon that ground gave peremptory instructions to find for the defendant.

Upon the question what words containing the imputation of a crime are actionable, without proof of special damages, the cases in this court are in some apparent confusion. They are not contradictory. The course of decision is entirely consistent; the confusion arises from what has been said, not what was decided. The cases are in accord that such words are not actionable unless they import an offence indictable and punishable, either at the common

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indictable and *punishable corporally, Griffin* v. *Moore,* 43 Md. 246 (1875); *Birch* v. *Benton,* 26 Mo. 153 (1858).

In North Carolina it is held that the offense imputed must subject the offender to an infamous punishment, *Skinner* v. *White,* 1 Dev. & Batt. 471 (N. Car. 1836), infamous punishment being one which "involves social degradation by occasioning the loss of the 'libera lex,' *Wall* v. *Hoskins,* 5 Ire. 177 (N. Car. 1844), but in *McKee* v. *Wilson,* 87 N. Car. 300 (1882), an infamous crime is defined to be one, conviction and punishment for which involve moral turpitude and social degradation and it is held that an accusation of a misdemeanor punishable by fine or imprisonment is not actionable." See also, *Harris* v. *Terry,* 98 N. Car. 131 (1887), and compare *Stitzell* v. *Reynolds,* 67 Pa. St. 54 (1870), where a charge of stealing corn was held not to be actionable per se if it referred to standing corn the taking of which was a misdemeanor only and not to the taking of corn already cut and so a felony, the punishment for which the law regards as infamous.

law or by statute.[1] *Harvey* v. *Boies,* 1 P. & W. 12; *Lukehart* v. *Byerly,* 53 Pa. 418; but this is not a criterion: *Klumph* v. *Dunn,* 66 Pa. 141.

In *Miles* v. *Oldfield,* 4 Yeates 423, the words were, "You are a vagrant." It was objected that these words were not actionable, but this court said: "The act of February, 1767, defines the nature of vagrancy, and authorizes a justice of the peace to commit vagrants to the common jail, there to be kept at hard labor for any time not exceeding one month. To charge a person with an offense which subjects him to punishment of this kind is, in the opinion of the court, actionable." This case may, however, be distinguished from others in this, that it was not only averred in the declaration, but it was proved, in the nature of a special injury, that in consequence of the words spoken the plaintiff was apprehended and taken before the justice of the peace as an idle and disorderly person, and thereby suffered damage. In *Shaffer* v. *Kintzer,* 1 Binn. 542, Chief Justice Tilghman says: "With regard to words which will support an action of slander, I take the rule to be as laid down by C. J. DeGrey, in the case of *Onslow* v. *Horne,* 3 Wils. 186, in the year 1771, which is an authority in this court. They must contain an express imputation of some crime liable to punishment, some capital offence,

[1] *Accord: Pollard* v. *Lyon,* 91 U. S. 225 (1875); *Dudley* v. *Horn,* 21 Ala. 379 (1852); *Kinney* v. *Hosea,* 3 Harr. 77 (Del. 1840); *Richardson* v. *Roberts,* 23 Ga. 215 (1857); *Halley* v. *Gregg,* 74 Iowa 563 (1888); *Mudd* v. *Rogers,* 102 Ky. 280 (1897); *Hendrickson* v. *Sullivan,* 28 Nebr. 329 (1889); *Ludlum* v. *McCuen,* 17 N. J. L. 12 (1839); *Young* v. *Miller,* 3 Hill 21 (N. Y. 1842); *Quinn* v. *O'Gara,* 2 E. D. Smith 388 (N. Y. 1854); *Davis* v. *Sladden,* 17 Ore. 259 (1889); *Alfele* v. *Wright,* 17 Ohio St. 238 (1867); *Lodge* v. *O'Toole,* 20 R. I. 405 (1898); *Gage* v. *Shelton,* 3 Rich. L. 242 (S. Car. 1832); *Smith* v. *Smith,* 2 Sneed 473 (Tenn. 1855); *Payne* v. *Tancil,* 98 Va. 262 (1900).

No matter how morally bad or disgraceful the act may be, it is not actionable unless it be also a crime, indictable as such, *Shepherd* v. *Piper,* 98 Maine 384 (1903), accusation of double voting at town meeting called not for action but merely to give expression to local opinion; *Pollard* v. *Lyon,* 91 U. S. 225 (1875), charge of adultery in the District of Columbia where adultery is not a punishable crime, *Lodge* v. *O'Toole,* 20 R. I. 405 (1898), plaintiff accused of drunkenness, punishable only under local ordinance, *Greene* v. *Murdock,* 1 Cal. App. 136 (1905). For cases where words were held not actionable *per se* because the offense charged, while indictable, did not involve moral turpitude, see *Ludlum* v. *McCuen,* 17 N. J. L. 12 (1839), and *Baxter* v. *Mohr,* 76 N. Y. S. 982 (1902).

As to what is meant by moral turpitude see Newell on Defamation, 2nd Ed., § 12, quoted in *Baxter* v. *Mohr,* 76 N. Y. S. 982 (1902), but cf. *Brooker* v. *Coffin, post,* and see for criticism of the rule on the ground of its uncertainty, *Birch* v. *Benton,* 26 Mo. 153 (1858).

In most American Jurisdictions it is necessary that the offense alleged should be indictable. See cases cited in note. In Massachusetts and Connecticut and Minnesota it is, however, enough that the offense be one punishable criminally—with the additional requirement in first state, that the punishment for such an offense, though not infamous, will involve disgrace, *Miller* v. *Parish,* 8 Pick. 384 (1829); *Brown* v. *Nickerson,* 5 Gray 1 (Mass. 1855), in the two latter, that the offense should involve moral turpitude, *Page* v. *Merwin,* 54 Conn. 426 (1887); *Reitan* v. *Goebel,* 33 Minn. 151 (1885); but see *West* v. *Hanrahan,* 28 Minn. 385 (1881), and see also, *Ranger* v. *Goodrich,* 17 Wis. 78 (1863); *Mayer* v. *Sleichter,* 29 Wis. 646 (1872); *Geary* v. *Bennett,* 53 Wis. 444 (1881), and *Shepherd* v. *Piper,* 98 Maine 384 (1903), with which compare *Buck* v. *Hersey,* 31 Maine 558 (1850).

or other infamous crime or misdemeanor. But in *Brown* v. *Lamberton*, 2 Binn. 34, the crime charged was adultery, and in *Walton* v. *Singleton*, 7 S. & R. 449, it was fornication merely.[1] No special damage was laid in either case, and it was held that the words were actionable. To the same effect are *Beirer* v. *Bushfield*, 1 W. 23; *Vanderlip* v. *Roe*, 23 Pa. 82; *Klumph* v. *Dunn*, 66 Pa. 141; *Rhoads* v. *Anderson*, 12 Cent. R. 727, 13 Atl. 823. To call a woman a whore or an adulteress is actionable, the punishment is not infamous, but it is actionable, because it is a charge of impurity, depravity, and moral turpitude.

In *Andres* v. *Koppenheafer*, 3 S. & R. 254, the slanderous words spoken charged the publication of a libel, an indictable offence at the common law, now punishable with fine and imprisonment. Chief Justice Tilghman, delivering the opinion of this court, said: "But, supposing the words to imply an indictable offence, it is contended that still they are not actionable, because there is nothing infamous in the crime of libel. It is laid down by some elementary authors that all words are actionable which import an offence for which one is indictable and punishable by fine and imprisonment. I incline to think that this is carrying the matter rather too far. To say that a man has committed an assault and battery, is charging him with an offence punishable by fine and imprisonment, but yet no action of slander has been sustained for such words. It seems that there should be something in the offence of an infamous or disgraceful nature; either a felony or a misdemeanor which affects one's reputation." Mr. Justice Gibson, in the same case said: "In England the law is broadly laid down that words charging an offence that would subject the party to punishment by indictment are actionable in themselves. In *Brooker* v. *Coffin*, 5 Johns. 188, the rule is restrained to a charge that would, if true, subject the party to an

[1] The accusations were held actionable because they imputed unchastity of a kind made indictable offenses by statute; see *Frisbie* v. *Fowler*, note 1 ante. In other states where it is only necessary that the offenses imputed shall be punishable, certain charges of unchastity which, while not indictable, are punishable by fine, are held actionable per se, *Page* v. *Merwin*, 54 Conn. 426 (1887); *Miller* v. *Parish*, 8 Pick. 384 (1829); *Griebel* v. *Reitan; Mayer* v. *Schleichter*, 29 Wis. 646 (1872), ante n. 1. Imputations of unchastity which are neither indictable nor otherwise criminally punishable are, in the absence of express statutes making them actionable, generally held not to be actionable per se, *Pollard* v. *Lyon*, 91 U. S. 225 (1875); *Elliott* v. *Ailsberry*, 2 Bibb 473 (Ky. 1811); *Smith* v. *Gifford*, 31 Ala. 45 (1857); *Ledlie* v. *Wallen*, 17 Mont. 150 (1895). In *Cleveland* v. *Detweiler*, 18 Iowa 299 (1865); *Cushing* v. *Hederman*, 117 Iowa 637 (1902); *Barnett* v. *Ward*, 36 Ohio St. 107 (1880), and *Smith* v. *Minor*, 1 N. J. L. 16 (1790), it is held that such accusations are actionable irrespective of whether the particular offense is punishable or not.

In many states imputations of unchastity made against women are by statute actionable *per se*, *Hitchcock* v. *Caruthers*, 82 Cal. 523 (1890); *Dexter* v. *Harrison*, 146 Ill. 169 (1893); *Waugh* v. *Waugh*, 47 Ind. 580 (1874); *Nicholson* v. *Merritt*, 109 Ky. 369 (1900); *Cairnes* v. *Pelton*, 103 Md. 40 (1906); *Stieber* v. *Wensel*, 19 Mo. 513 (1854); *Brown* v. *Wintsch*, 110 Mo. App. 264 (1904); *Hemmens* v. *Nelson*, 138 N. Y. 517 (1893); *McBrayer* v. *Hill*, 26 N. Car. 136 (1843); *Hackett* v. *Brown*, 2 Heisk. 264 (Tenn. 1871); *Stewart* v. *Major*, 17 Wash. 238 (1897).

indictment for a crime involving moral turpitude, or that would draw after it an infamous punishment. This distinction appears to me a sound one, and to be founded in reason and good sense. There is a variety of misdemeanors, to the commission of which not even the shadow of disgrace is attached by the world, and to be accused of which would not be likely to induce the vexation of a prosecution, if the accused were innocent, and, if guilty, he ought not to complain. I think it unreasonable that a charge of having committed an nuisance, assault and battery, and the like, should be held actionable. We have quoted extensively from this case of *Andres* v. *Koppenheafer* because it seems to be the leading case in Pennsylvania, and contains an exposition of the law which has been followed in the later cases."

In *Todd* v. *Rough,* 10 S. & R. 18, it was held to be actionable, in a conversation concerning certain boundary trees and allowed landmarks, to say of the plaintiff that he moved the line and made a new line; for, said this court, in a conviction of this offence, "Not only would the plaintiff be subject to pecuniary loss, but to loss of character. The removal of boundaries has always been held in execration: the curse of God was denounced against it by the Mosaic law; the Romans considered it the infamous offence, and all civilized nations have been of the same opinion. The reason of this general detestation is evident; without certainty of boundary, there is no certainty of property in land." In *Beck* v. *Stitzel,* 21 Pa. 524, the plaintiff was or had been one of the administrators of Adam Stitzel, deceased, but had settled his final account some sixteen years before the words complained of were spoken. The defendant charged that the plaintiff, when administrator, "had a room in which were two beds, and both beds were full of leather which he had smuggled away at the time of the appraisement." No special damage was averred in the narr, and none was proved; it was held that the words were actionable. In the opinion, this court said: "Where the charge is of an offence, it is usually said that it must involve moral turpitude and danger of punishment. This element of moral turpitude is necessarily adaptive; for it is itself defined by the state of public morals, and thus far fits the action to be at all times accommodated to the common sense of the community."

From this reference to a few of the cases, it is clear that when Mr. Justice CHURCH, in *Gosling* v. *Morgan,* 32 Pa. 273, said that the undisturbed authority of the leading cases of *Shaffer* v. *Kintzer,* 1 Binn. 537; *McClurg* v. *Ross,* 5 Binn. 218, and *Andres* v. *Koppenheafer,* 3 S. & R. 255, establishes the principle, that words spoken of a private person are only actionable when they contain a plain imputation, not merely of some indictable offence, but one of an infamous character or subject to an infamous and disgraceful punishment, the word "infamous" could not have been used in its technical, but rather in its popular sense. The only crimes which work infamy and consequent incompetency as a witness, are treason, felony, and every species of the crime falsi, such as forgery, perjury, subornation of perjury, attaint of false verdict, and other offences of like

description, which involve the charge of falsehood and affect the public administration of justice: *Commonwealth* v. *Shaver,* 3 W. & S. 342; *Schuylkill Co.* v. *Copley,* 67 Pa. 390. The profession would certainly be greatly surprised to learn that slanderous words are, in Pennsylvania, actionable only when they impute a crime of this class. Our books are full of cases to the contrary.

The English rule is spoken words, which impute that the plaintiff has been guilty of a crime punishable with imprisonment, are actionable, without proof of special damages: Odger on Sland. & L. 54, and cases there cited. But, in the American cases, importance is attached to the inherent nature of the indictable act, and also to the punishment which the law assigns to it, upon the principle that social degradation may result from either.

The plaintiff in this case was charged with burning his own mill, to defraud the insurance companies. The offence involves moral turpitude; it is of a base, and in a popular sense infamous character. It is punishable by separate and solitary confinement at labor in the penitentiary, for a period not exceeding seven years, which is a disgraceful punishment, inflicted on infamous offences. The words alleged to have been spoken were therefore, without doubt, actionable per se, and upon this ground.

The judgment is reversed, and a venire facias de novo awarded.

KLUMPH *v.* DUNN.

Supreme Court of Pennsylvania, 1870. *66 Penna.* 141.

October 17th, 1870. Before THOMPSON, C. J., READ, AGNEW, SHARSWOOD and WILLIAMS, J. J.

Error to the Court of Common Pleas of Crawford county, No. 144, to October and November Term 1868.

This was an action of slander brought June 28th, 1865, by James L. Dunn against Lester R. Klumph.

The declaration was:—

"That whereas, he, the said James L. Dunn (a practising physician and married man), is a good, true, faithful and honest citizen of Pennsylvania, and from the time of his nativity hitherto hath been held, esteemed and reputed of good name, &c., and from drunkenness, adultery and all other acts of a degrading character free, &c. Nevertheless the aforesaid Lester R. Klumph not being ignorant of the premises, but maliciously intending the said James L. Dunn of his good name, &c., to deprive, and also the said James L. Dunn unto danger of the laws against such offences made, to bring, on or about the —— day of June 1865, at the county aforesaid, these false, feigned and scandalous words following of and concerning said James L. Dunn, in presence and hearing of divers citizens of said Commonwealth, maliciously, falsely and unjustly did say, speak and publish, to wit: 'That Dr. Dunn is —— —— —— ——. He lay drunk all the time he was in the army; had a

negro wench for his waiter and slept with her every night (meaning thereby that he committed adultery with said negro wench), and had one of his own townsmen put in the guard-house for speaking to her. This he could prove.' "

The case was tried January 3d, 1868, before Johnson P. J. The plaintiff gave evidence, by a number of witnesses, that in June 1866, at a store, in the presence of a number of bystanders, the plaintiff not being present, the defendant used the words laid in the declaration, accompanied with other gross and profane expressions; also that the plaintiff had been a surgeon in the army and continued so during all the war of the rebellion. F. A. Temple, a witness for plaintiff, on cross-examination said that he "took it for granted that the conversation was about Sherman's march to the sea-coast." The plaintiff gave evidence also that he had lived in Conneautville ten years; had four children, of whom three were daughters; he was a physician.

The defendant gave evidence that in his declarations he had said that the conduct of the defendant of which he spoke was "while he was with Sherman at Atlanta." He gave evidence also that the words were spoken in an excited altercation which he had had with Temple, one of plaintiff's witnesses, in which Temple mentioned the plaintiff as authority to establish something which witness had stated, and that defendant said that he had been told what he stated by a soldier.

The defendant's points and the judge's answers were:—

"1. All the words laid in the narr, are not actionable.

"2. If they were spoken of the plaintiff with reference to his acts while in the South, or outside of Pennsylvania, it must be shown that they were there criminal, and in violation of law, and unless so shown the plaintiff cannot recover."

"Answers: 1. We have no hesitation in saying that the words are actionable.

"2. That if the evidence had shown that the crime alluded to had been charged to have been committed in a particular place, and it had been proven that the alleged offence was not a crime indictable as such at that place, we think the charge would not, per se, be actionable here where uttered; but this question does not legitimately arise, because no venue is given, either in the narr or in the evidence, to the crime imputed."

The verdict was for plaintiff for $700.

The defendant took a writ of error, and assigned for error the answers to his points and that part of the charge given above.

SHARSWOOD, J.—It is not necessary that all the words laid in the declaration should be actionable. It is sufficient if some of them are. The court below, therefore, were not required either to affirm or deny the defendant's first point as presented: "that all the words charged were not actionable." They answer correctly that the words laid were actionable without saying whether all were. It is true that a general judgment in slander, where some of the counts set out words which are actionable, is erroneous; but non sequitur that

a count in which non-actionable words are laid with those which are actionable is therefore bad. All the words spoken at the time may properly be stated and given in evidence; for they explain and show the animus of the principal charge.

The court below may have erred in their answer to the defendant's second point, in saying that the question whether the words would be actionable if the offence was charged to have been committed in another state without showing that it would be criminal there, did not arise, because no venue was given either in the narr or in the evidence to the crime imputed: and also in the charge that the evidence did not show where the offence was stated to have been committed. These form the second and third errors assigned. It must be conceded that there was evidence from which the jury might legitimately have inferred that the conversation to which the defendant's witnesses had testified was the same conversation as that referred to by the plaintiff's witnesses, and that taking the whole together the defendant meant to confine his accusation to what had occurred in the South while the plaintiff was with Sherman at Atlanta, or from Atlanta to Savannah. Even Temple, the witness of the plaintiff, testified on his cross-examination that he took it for granted that the conversation was about Sherman's march to the sea-coast. If this was a material question in the cause it was for the jury to decide, and it was error in the court to withhold it from them. But if it was immaterial it did the defendant no injury. The court, as often happens, gave a wrong reason for a right decision.

The case of *Barclay* v. *Thompson,* 2 Penna. R. 148, decides that an action will not lie for words spoken in another state when the offence charged is not indictable in that state, although it may be indictable here. To the same effect are *Stout* v. *Wood,* 1 Blackford 71; *Offut* v. *Earlywine,* 4 Id. 460; *Linville* v. *Earlywine,* Id. 469; *Langdon* v. *Young,* 33 Vt. 126. The reason is a very plain one. The defendant committed no legal wrong where the words were spoken. No action lay there, and therefore not in any other state in which the defendant might afterwards be found and sued. In this case, however, the words were spoken in this state. It has often been held that where the words imputed a common-law offence to have been committed in another state it need not be affirmatively proved that such offence is indictable there. The presumption is, that the common law of a sister state is similar to our own, and in one case it is intimated, though not decided, that if the offence charged derives its quality as a crime from the statute alone, the rule would be otherwise: *Johnson* v. *Dickens,* 25 Miss. 580; *Van Ankin* v. *Westfall,* 14 Johns. 233; *Poe* v. *Green,* 3 Sneed 664; *Montgomery* v. *Dealey,* 3 Wis. 709. But after a careful search, I find no case which directly holds that words charging an offence of moral turpitude, and indictable by the statute law of the country where they are uttered, are not actionable per se, because they state the offence to have been committed in another country. The opinions in some of the cases cited seem to rely upon the liability of the defendant to extradition under the Constitution of the United

States, or treaties with foreign states. But that surely is not the true ratio decidendi. Nothing seems to be better settled than that liability to prosecution or punishment is not the criterion. Both ancient and modern cases agree in this.

In *Carpenter* v. *Tarrant,* Ridg. temp. Hardw. 339, the words were: "Robert Carpenter was in Winchester gaol and tried for his life and would have been hanged had it not been for Leggat, for breaking open the granary of Farmer A. and stealing his bacon." Here the words necessarily imported that the plaintiff had been tried and acquitted, and therefore could never be convicted of the same offence. In *Gainford* v. *Tuke,* Cro. Jac. 536, the words were: "Thou wast in Launceston gaol for coining." The plaintiff replied: "If I was there, I answered it well." "Yea," said the defendant, "you were burnt in the hand for it." Here the words clearly meant that the plaintiff had been tried, convicted, pleaded his clergy and been burnt in the hand, and of course could not be again punished for the same offence. So, in *Baston* v. *Tatham,* Cro. Jac. 622, it was held to be no defence to prove that the offence charged was within the terms of a general pardon, for the court remarked that although the pardon might discharge of punishment, yet the scandal of the offence remained.[1] It may be said that in these cases there was liability to indictment on the charge, though the plaintiff by pleading could prevent conviction and punishment. It is to be remarked, however, that in all of them the slander carried its antidote with it as far as risk of indictment was concerned. They are distinguishable in this respect from that class of decisions where the corpus delicto is shown never to have existed; as where the words were "you have killed Bob Waters; you have poisoned him, and I can prove it," and it appeared by the plaintiff's witnesses that at the time when the words were spoken, Bob Waters was alive in a distant part of the country: *Eckert* v. *Wilson,* 10 S. & R. 44; *Deford* v. *Miller,* 3 Penn. R. 103; *Colbert* v. *Caldwell,* 3 Grant 181. There are other cases, however, in which there could be no pretence of risk of prosecution. In *Fowler* v. *Dowdney,* 2 Moo. & R. 119, Lord Denman rules these words to be actionable: "He is a returned convict," as importing that the punishment had been suffered, but the infamy remained. There was here no charge that the plaintiff had been guilty of any particular offence, so that it could not be said that he ran any risk in consequence of the slander of being subjected to another prosecution. Such was the determination of this court in *Smith* v. *Stewart,* 5 Barr 372, in which the words were: "that man was in the penitentiary of Ohio." Here there was neither lia-

[1] *Accord: Shipp* v. *McCraw,* 7 N. Car. 463 (N. Car. 1819). So an action lies for charging a crime barred from prosecution by the statute of limitations, *Webb* v. *Fitch,* 1 Root 544 (Conn. 1793); *Van Ankin* v. *Westfall,* 14 Johns. 233 (N. Y. 1817), or an act made a crime by a statute since repealed, *French* v. *Creath,* 1 Ill. (Breese) 12 (1820), or where for any reason, such as tender years, the person charged could not be held criminally responsible for it. *Stewart* v. *Howe,* 17 Ill. 71 (1855), aliter where the charge is of committing a penitentiary offense while insane, *Abrams* v. *Smith,* 8 Blackf. 95 (Ind. 1846).

bility to punishment nor prosecution growing out of the charge, which was that the plaintiff had committed some crime for which he had already been punished in the penitentiary; yet the words were held to be actionable per se.[2]

What then is the criterion? Mr. Starkie, after an elaborate review of the cases, comes to the conclusion that as it is necessary to have some clear and certain rule by which the line of demarcation between actionable and non-actionable words can be drawn, none could be adopted more convenient than that which refers the question to the criminal law, and confirms the action to imputations of offences of moral turpitude, punishable in the temporal courts: 1 Starkie on Slander 27.

But to what law are the courts to refer to ascertain whether the offence charged is of this character? Upon every principle of reason and policy the answer seems to be the law of the country where the words are spoken. That law is the exponent of the moral sense of that community—of the estimation in which they hold offences against the moral law, and words which accuse a man of crime, condemned and subjected to infamous punishment by that law, expose him in that community to obloquy and contempt. The moral character of the act cannot be affected by the place where it is committed. What matters it to those to whom the words are addressed, or in whose hearing they are spoken, that the crime is charged to have been committed in a state or country where such actions are not subject to punishment? Even if they are to be presumed to know that the act was not a crime punishable by the law of the country where it was alleged to have been committed, would it any the less injure the moral character and standing of the party charged? Is it possible that a man living in Pennsylvania can be accused of having committed the crime inter Christianos non nominandum upon some uninhabited coast or island where there is no government and no law, or among some barbarous people where such practices may be, as they have been, tolerated? Is such a plaintiff to be turned out of court unless he can prove some special damage? This may be an extreme case, but nevertheless it tests the principle. If the criminal code laid its heavy hand upon such calumniators, there might be some good reason for requiring special damage to be shown in all actions of slander, but we know that it does not, and unless the lash is placed in the hands of the injured party they must go "unwhipped of injustice."

If the evidence of the plaintiff's witnesses was to be believed, the defendant below charged him in a public store, in the presence of many persons in the grossest terms with open and continued criminal connection with a negro wench, and asserted with an oath that he could prove it. By the laws of Pennsylvania, from 1705 to the present time, adultery has always been an indictable offence, and of its moral turpitude there can be no question. The plaintiff

[2] *Accord: Krebs* v. *Oliver,* 12 Gray 239 (Mass. 1858); *Wiley* v. *Campbell,* 5 T. B. Mon. 396 (Ky. 1827).

was a married man—the defendant knew him to be so, and meant to charge him with this offence, and in language which was designed to convey his own sense of its detestable character, especially no doubt in view of the race and color of the party who was alleged to have been a partaker in the crime. We are of the opinion that the words were actionable per se, whether they were limited to the state of Georgia or were general; and that the plaintiff in error has no just ground of complaint with the answer and charge of the court below in this respect.

The 4th error assigned remains to be noticed. It is true, as decided in *Chubb* v. *Gsell*, 10 Casey 115, that in an action of slander the plaintiff cannot introduce evidence as to his good character until it has been attacked by the defendant; for until then the law presumes it to be good, and the defendant admits it. Surely the jury may weigh the fact that the character and standing of the plaintiff is unimpeached in estimating the damages. But the court told the jury that they might also take into consideration that the plaintiff was a practising physician, although the declaration did not allege his professional character as an inducement, nor charge that the damage resulted to it. The position in life and the family of the plaintiff are always important circumstances as bearing upon the question of damages, and have always been held to be admissible in evidence for that purpose: *Beehler* v. *Steever*, 2 Whart. 313. It was not necessary that they should be specially laid as the ground of recovery in the declaration. Evidence of these particulars was given without objection, and it would have been error to have instructed the jury that they ought to disregard them.

Judgment affirmed.[a]

(b) Words imputing certain diseases.

BRUCE *v.* SOULE.

Supreme Court of Maine, 1879. *69 Maine* 562.

LIBBEY, J. An action will lie, without proof of special damage, for speaking words charging the plaintiff with having a loathsome or contagious disease, the effect of which imputation, if believed, would be to exclude him from society. Stark. Slan. 97. *Chaddock* v. *Briggs*, 13 Mass. 248. *Joannes* v. *Burt*, 6 Allen 236.[1]

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[a] *Accord: Wimberly* v. *Metcalf*, 10 Ky. L. 353 (1888), charge made in Kentucky that plaintiff had two wives, one in Missouri and one in Arkansas. Contra *Bundy* v. *Hart*, 46 Mo. 460 (1870).

[1] *Brook* v. *Wise*, Cro. Eliz. 878 (1601); *Davies* v. *Taylor*, *ib.* 648 (1598); *Garford* v. *Clerk*, 44 *ib.* 857 (1601), all accusations of pox or syphilis; *Taylor* v. *Perkins*, Cro. Jac. 144 (1607), leprosy; *Bloodworth* v. *Gray*, 7 M. & G. 334 (1844), pox; *Watson* v. *McCarthy*, 2 Ga. (2 Kelly) 57 (1847), gonorrhea; *Nichols* v. *Guy*, 2 Ind. (2 Cart.) 82 (1850), *semble*, gonorrhea; *McDonald* v. *Nugent*, 122 Iowa 651 (1904), syphilis; *Golderman* v. *Stearns*, 7 Gray 181

"The ground of the action being the presumption of the plaintiff's exclusion from society, no action will lie for an imputation in the past tense, since such an assertion does not represent the plaintiff, at the time of speaking, as unfit for society, and therefore the substance of the action is wanting." Stark. Slan. 98. *Carslake* v. *Mapledoram*, 2 T. R. 473.

In the declaration the words alleged to have been spoken by the defendant, without the innuendoes, are as follows: "He has not been able to do any work for the last three or four years; that he was about dead with the bad disorder, and that his wife died with it." These words are included in quotation marks, and are set out as the precise words spoken by the defendant. They do not charge the plaintiff with having the "bad disorder" at the time of speaking, but that "he was," in the past tense, about dead with it. We think they are not, therefore, actionable.[2]

(c) Words injurious to the plaintiff's reputation in his trade, business, profession or office.

LUMBY *v.* ALLDAY.

Court of Exchequer, 1831. 1 *Crompton & Jervis Reports*, 301.

BAYLEY, B. This case came before the Court upon a rule *nisi* to enter a nonsuit. The ground of motion was, that the words (in slander) proved upon the trial were not actionable.

Two points were discussed upon the motion: one, whether the words were actionable or not—and the other, whether this was properly a ground of nonsuit.[1]

The declaration stated that the plaintiff was clerk to an incorporated company, called the Birmingham and Staffordshire Gas

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(73 Mass. 1856), venereal disease, kind not specified; *Kaucher* v. *Blinn*, 29 Ohio St. 62 (1875), same; *Williams* v. *Holdredge*, 22 Barb. 396 (N. Y. 1854), gonorrhea; *Hewit* v. *Mason*, 24 How. Pr. 366 (1863), pox; *Upton* v. *Upton*, 51 Hun 184 (N. Y. 1889), "bad disease"; *Irons* v. *Field*, 9 R. I. 216 (1869), pox.

In *Watkins* v. *Hall*, L. R. 3 Q. B. 396 (1868), p. 399, Blackburn, J., expresses the opinion that the spoken accusation of any contagious disease is actionable, but in *Villers* v. *Monsley*, 2 Wils. 403 (1769), Gould, J., says that such an accusation of the itch is not *per se* actionable, Bathurst, J., *dub.* In *"George, the Count Joannes"* v. *Burt*, 6 Allen 336 (Mass. 1863), the oral imputation of insanity is held not to be actionable *per se*.

[2] *Taylor* v. *Hall*, 2 Strange 1189 (1743); *Nichols* v. *Guy*, 2 Ind. (2 Cart.) 82 (1850); *Pike* v. *Van Wormer*, 5 How. Pr. 171 (1857); *Irons* v. *Field*, 9 R. I. 216 (1869).

[1] A part of the opinion is omitted holding that, as a matter of pleading, the proper mode to bring the legal effect of the facts stated in the declaration is, before trial, to demur; after trial, to move in arrest of judgment and not after issue joined and trial thereon, to move for a rule to enter a nonsuit. The parties, however, acquiesced in the judgment of the Court and the matter ended.

Light Company, and had behaved himself as such with great propriety, and thereby acquired and was daily acquiring great gains; but that the defendant, to cause it to be believed that he was unfit to hold his situation, and an improper person to be employed by the company, and to cause him to be deprived of his situation, spoke the words complained of in the declaration.

The objection to maintaining an action upon these words is, that it is only on the ground of the plaintiff being clerk to the company that they can be actionable; that it is not alleged that they are spoken of him in reference to his character or conduct as clerk; that they do not, from their tenor, import that they were spoken with any such reference; that they do not impute to him the want of any qualification such as clerk ought to have, or any misconduct which would make him unfit to discharge faithfully and correctly all the duties of such a clerk.

The plaintiff relied on the rule laid down by DE GREY, C. J., in *Onslow* v. *Horne*, 3 Wils. 186, "that words are actionable when spoken of one in an office of profit, which may *probably* occasion the loss of his office; or when spoken of persons touching their respective professions, trades and business, and do or may probably tend to their damage."[2] The same case occurs in Sir Wm. Bla. Rep. 753, and there the rule is expressed to be, "if the words be of probable ill consequence to a person in a trade or profession, or an office."

The objection to the rule, as expressed in both reports, appears to me to be, that the words "probably" and "probable" are too indefinite and loose, and unless they are considered as equivalent to *"having a natural tendency to,"* and are confined within the limits, I have expressed in stating the defendant's objections, of showing the want of some necessary qualification, or some misconduct in the office, it goes beyond what the authorities warrant.

Every authority which I have been able to find, either shows the want of some general requisite, as honesty, capacity, fidelity, &c., or connects the imputation with the plaintiff's office, trade, or business. As at present advised, therefore, I am of opinion, that the charge proved in this case is not actionable, because the imputation it contains does not imply the want of any of these qualities

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[2] This includes every trade, profession or business, "be it ever so base" (base being used in the sense of lowly, not illegal or improper), *Terry* v. *Hooper*, 1 Levinz 115 (15 Car. II); but see the early cases of *Jones* v. *Joice*, Viners Abr., Action on Words U a 7; *Wharton* v. *Brook*, 1 Vent. 21 (21 Car. II), per Twisden, J.; and *Bell* v. *Thatcher*, 1 Vent. 275 (27 C. II), per Hale, J., holding or intimating that the callings of livery stable keepers, school mistresses, postmen and domestic servants were too humble to be capable of being scandalized.

No one can recover for words touching him in an illegal trade, *Hunt* v. *Bell*, 1 Bing. 1 (1822), keeper of rooms for prize-fights; *Morris* v. *Langdale*, 2 B. & P. 284 (1800), illegal stock jobbing; *Hargan* v. *Purdy*, 93 Ky. 424 (1892), person practicing medicine without right; *Marsh* v. *Davison*, 9 Paige 580 (N. Y. 1842); *Johnson* v. *Simonton*, 43 Cal. 242 (1872), action of libel touching illegal trade.

which a clerk ought to possess, and because the imputation has no reference to his conduct as clerk.

Rule discharged.[8]

IRELAND *v.* McGARVISH.

Superior Court of the City of New York, 1847. 1 *Sandford* 155.

Action of slander.

VANDERPOEL, J. It cannot be pretended that the words proved to have been spoken by the defendant, are actionable, *per se;* but it is contended, that they convey an imputation affecting the business

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[8] So it has been held that to say of a staymaker that he was supported not by his trade but by the prostitution of his female assistant, was not actionable, *Brayne* v. *Cooper,* 5 M. & W. 249 (1839). In *Ayre* v. *Craven,* 2 A. & E. 2 (1834), a charge of adultery against a physician, unconnected with the practice of his profession, was held not actionable; but see Alderson, B. arguendo in *Gallwey* v. *Marshall,* 9 Exch. 294 (1853), p. 297, "There are certain professions, the proper exercise of which depends on morality, and except for the case of *Ayre* v. *Craven,* I should have thought the profession of a physician was one of them;" and *Morasse* v. *Brochu,* 151 Mass. 567 (1890), where a Catholic priest, having stated from the pulpit the circumstances of a physician's remarriage, excommunicated him from the church and said that any members of the church employing him would forfeit the ministrations and sacraments of the church in case of their illness, it was held that it was for the jury to say whether these statements touched the plaintiff in his profession; so in *Connors* v. *Justice,* 13 Ir. C. L. 451 (1862), chastity was held to be so essential in a female servant, that a charge that she was debauched and had a miscarriage while in service was held to be actionable *per se.*

To charge a clergyman or minister with drunkenness is actionable *per se, McMillan* v. *Birch,* 1 Binn. 178 (Pa. 1806); *Hayner* v. *Cowden,* 27 Ohio St. 292 (1875); *Tighe* v. *Wicks,* 33 Upper Can. Q. B. 479 (1873) *contra;* or even with a single act of serious drunkenness, *Chaddock* v. *Briggs,* 13 Mass. 248 (1816); or to charge a schoolmaster with habitual drunkenness, though not with being drunk on a single occasion, 1 Vict. L. R. 306 (1875); see *Bray* v. *Callihan,* 155 Mo. 43 (1900). Where the plaintiff's business requires strict sobriety, as that of a master of a vessel, or general manager of a railroad, it is actionable to accuse him of habitual drunkenness or of specific acts of drunkenness while on duty; *Irwin* v. *Brandwood,* 2 H. & C. 960 (1864); *Hamon* v. *Falle,* L. R. 4 A. C. 247 (1879); *Kelly* v. *Huffington,* 3 Cranch C. C. 81 (D. C. 1827); *Broughton* v. *McGrew,* 39 Fed. 672 (C. C. 1889); *Gottbehuet* v. *Hubachek,* 36 Wis. 515 (1875), Chief of Fire Department accused of being drunk at a fire.

The law in regard to priests, clergymen, licensed ministers and preachers is peculiar. As late as Eliz. 38, 39, it was held that to accuse a parson of adultery, though a cause of deprivation if true, was a slander examinable only in the spiritual courts, but see *Nicholson* v. *Lyne,* Cro. Eliz. 94 (1587), but in 1648 it was held a slander cognizable in the King's Courts to accuse a parson of being a whoremaster, *Dod* v. *Robinson,* Aleyn 63; *Accord. Demarest* v. *Haring,* 6 Cow. 76 (N. Y. 1826); *Ritchie* v. *Widdemer,* 59 N. J. L. 290 (1896), or any conduct which would unfit him for his office or be ground for deprivation, *Pemberton* v. *Colls,* 10 Q. B. 461 (1847), accusation that the plaintiff, a clergyman, had drugged the defendant's wine and so fraudulently induced him to sign a bill of exchange, *Philip* v. *Badby* (1582), cited in 4 Rep. 19, preaching seditious sermons; *Cranden* v. *Walden,* 3 Lev. 17 (1681), preaching lies and malice; in *Gallwey* v. *Marshall,* 9 Exch. 294 (1853), it

of the plaintiff, and are, therefore, actionable. It is a well established rule, that words are actionable, which directly tend to the prejudice of any one, in his office, trade, business, or means of getting a livelihood. (*Onslow* v. *Horne*, 3 Wilson 186; Stark. on Sland. 180.) The words, to be actionable, because they injure one in his business, must have a direct tendency to produce this effect. They must relate to his business character. In *Dorley* v. *Roberts* (3 Bing. N. C. 835), it was said of an attorney, "he has defrauded his creditors, and has been horsewhipped off the course at Doncaster." The jury found that the words tended to injure the plaintiff morally and professionally, but they also found they were not spoken of him in his business of an attorney; and for that reason, the court ordered a nonsuit. Tindal, Ch. J., said, the words, though spoken of an attorney, do not touch him in his profession, any more than they would touch a person in any other trade or profession. So here, though the words were spoken of a man, who happened to keep a public garden and house of entertainment, they did not touch or affect him, more than they would have touched or affected a person in any other business or profession.[1] In *Southam* v. *Allen* (3 Salk. 327; Raym. 231) the plaintiff declared that he was a keeper of a livery stable, and of the Bell Savage Inn, and that the defendant had other stables there, and that W. R., coming thither with a wagon, inquired of the defendant, which was the Bell Savage Inn, who replied, "this is Bell Savage Inn, deal not with Southam (the plaintiff), for he is broke, and there is neither entertainment for man or horse." After verdict for the plaintiff, the judgment was affirmed. This was a charge that came directly home to the business of the plaintiff. But to say of a man, "I am afraid to go to his house alone." "He is a desperate man." "He is a dangerous man." "I am afraid of my life;" is no more calculated, directly to

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was held that a charge of incontinency against one in holy orders was actionable slander in the temporal courts if, and only if, he held some benefice or clerical post of profit, otherwise the slander was cognizable only in the spiritual courts; but see *McMillan* v. *Birch*, *supra*, where the plaintiff was allowed to recover, though ordained only in the Scottish church and not entitled to exercise his profession without a license from the local church; *Skinner* v. *Grant*, 12 Vt. 456 (1840), charge of heresy which in England is cognizable only in the spiritual courts.

As to the status in England and its colonies of dissenting preachers, see *Hartley* v. *Herring*, 8 T. R. 130 (1799), when special damage was alleged; and *Hopword* v. *Thorn*, 8 C. B. 293 (1849), where the charge was of dishonesty occurring before the plaintiff entered the ministry; and *Breese* v. *Sails*, 23 U. C. Q. B. 94 (1863), where the rule in *Ayre* v. *Craven* was carried to the ridiculous extreme of holding that a Methodist preacher, actually deriving profit from his calling, could not recover without proof of special damage against one who had accused him of keeping company with a prostitute; see also *Tighe* v. *Wicks*, 33 U. C. Q. B. 479 (1873), where a charge of drunkenness against a clergyman of the Church of England was held not to be actionable.

[1] So as to say of a keeper of a restaurant, "you are an infernal rogue and swindler" was held not to be actionable in *Brady* v. *Youlden*, Kerford & Box's Digest of Victoria Cases 709, for as the court remarked, "in fact there might be very successful restaurant keepers, who were both rogues and swindlers."

affect his business as keeper of a house of entertainment, than to prejudice his business as a merchant, a baker, or a blacksmith. All general imputations upon the morality or integrity of men, if believed by those who hear them, may possibly prejudice the business interests of those of whom they are spoken; but the law has not yet been so prolific of slander suits, as to say, that such general ebullitions, charging no crime, and pointing to no profession or means of livelihood, shall form the legitimate foundation of an action for defamation. Words, to be actionable, as affecting the plaintiff's business, must charge some delinquency in connection with such business. In the late case of *Van Tassel* v. *Capron* (1 Denio 250), it was expressly held, that where words are actionable, only on account of the official or professional character of the plaintiff; it is not enough that they tend to injure him in his office or calling, but they must relate to his official or business character, and impute misconduct to him in that character. As the words here are not actionable in themselves, and do not relate to the business of the plaintiff, the nonsuit was properly granted.[2]

VAN TASSEL *v.* CAPRON.

Supreme Court of New York, 1845. 1 *Denio* 250.

Declaration for verbal slander.

BRONSON, CH. J. It is not necessary to consider the questions of form which have been made; for I am of the opinion that the declaration is bad in substance. It is the privilege of the vulgar to use coarse and abusive language; and no action will lie for calling a man such opprobrious names as liar, cheat, rascal, swindler,

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[2] It is not actionable to say of a livery stable keeper, "you are a prover under bankruptcies," since it does not impugn his fitness for his calling or the possession of any quality specially required therein, *Angle* v. *Alexander*, 7 Bing. 119 (1830); nor to say of a stay maker that he gets his living not from his trade but from the prostitution of his shopwoman, *Brayne* v. *Cooper*, 5 M. & W. 249 (1839); nor to say of a stone mason that he is the ring leader of the nine-hour system, *Miller* v. *David*, L. R. 9 C. P. 118 (1874); nor to say of a barnman, that he left his landlord's house owing a month's rent, *Speake* v. *Hughes*, L. R. 1904 1 K. B. 138; or to inform the owner of a business that his manager will not pay a debt, *Standard* v. *Wilcox, etc., Co.*, 118 Md. 151 (1912), 42 L. R. A. (N. S.) 515, with note, and *Nichols* v. *Daily Rep. Co.*, 30 Utah 74 (1905); or to call a justice of the peace a rogue, *Dole* v. *Van Rensselaer*, 1 Johns. Cases 330 (N. Y. 1800); or to say of a lawyer that his wife procured a miscarriage upon herself, *Wellman* v. *Sun Printing Co.*, 66 Hun 331 (N. Y. 1892); or that he has sent out "an enticing article" asking subscriptions to a business corporation organized by him, *Keene* v. *Tribune Assn.*, 76 Hun 488 (N. Y. 1894); or to speak of a white clergyman in a slave state as a free negro, *McDowell* v. *Bowles*, 53 N. Car. 184 (1860); or to accuse a lawyer of not paying a debt not stated to be owing to a client, *Van Epps* v. *Jones*, 50 Ga. 238 (1873); or to accuse a physician of being a "white capper", *i. e.* one who posts anonymous defamatory placards in public places, *Divens* v. *Meredith*, 147 Ind. 693 (1896). In *James* v. *Brook*, 9 Q. B. (A. & E. N. S.) 7 (1846), it was held that a statement that "a member of the Leeds police force" (meaning the plaintiff, the superintendent

blackleg and the like. Nor will such words be actionable though spoken of one who holds an office, or exercises some trade or profession, unless they are spoken of, and touch him in his office or calling. It is not enough that the words may tend to injure him in his office or calling, unless they are spoken of him in his official or business character. In *Oakley* v. *Farrington* (1 John. Cas. 129), the plaintiff was a justice of the peace, and the words were, "Squire Oakley is a damned rogue." The plaintiff was nonsuited on the ground, that although the words were spoken of a magistrate, they had no relation to his official character or conduct. In *Ayre* v. *Craven* (2 Ad. & Ellis, 2) the words were said to have been spoken of the plaintiff in his profession as a physician, and imputed adultery. After verdict for the plaintiff, the judgment was arrested. The court said, that after full examination of the authorities, they thought the declaration ought not merely to state that such scandalous conduct was imputed to the plaintiff in his profession, but also to set forth in what manner it was connected by the speaker with that profession. Chief Baron Comyn says, "Words not actionable in themselves, are not actionable when spoken of one in an office, profession or trade, unless they touch him in his office," &c. (Action upon the case for Defa. D. 27) This doctrine was fully approved in *Dorley* v. *Roberts,* (2 Bing. N. C. 835,) where it was said of an attorney, that "he has defrauded his creditors, and has been horsewhipped off the course at Doncaster." The jury found that the words had a tendency to injure the plaintiff morally and professionally; but they also found that the words were not spoken of him in his business of an attorney. And for that reason the court ordered a nonsuit. Tindal, C. J., said, the words, though spoken of an attorney, do not touch him in his profession, any more than they would touch a person in any other trade or profession. In *Dole* v. *Van Rensselaer,* (1 John. Cas. 330,) the words were spoken of the plaintiff in his office of sheriff, and affected him in his official character.

Now what is this case? The words do not charge the plaintiff with doing any act whatever—either good or bad—as a justice of the peace. Nor do they impute to him the neglect or refusal to perform any duty incumbent upon him as such officer. Saying that "there is a combined company here to cheat strangers, and Squire

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thereof) had been guilty of conduct unfit for publication, was not actionable. See also, *Oram* v. *Franklin,* 5 Blackf. 42 (Ind. 1838), where it was held not to be actionable to accuse a justice of the peace of corruption in a trial held by him in a matter over which he had legally no jurisdiction.

In actions of slander for accusations touching the plaintiff in his business, trade or profession, great precision in pleading is required. The declaration must especially aver that the plaintiff is carrying on the business, etc., *Cassavoy* v. *Pattison,* 93 App. Div. (N. Y.) 370 (1904), and that the alleged slanderous words were spoken in relation thereto, *Buck* v. *Hersey,* 31 Maine 558 (1850), and where the business or trade is not a usual one, so that the court may take judicial notice of the qualities required for its successful prosecution, it must set these forth so that it may appear how the accusation impugns the plaintiff's fitness for such business or trade, *Foulger* v. *Newcomb,* L. R. 2 Ex. 327 (1867).

Van Tassel has a hand in it," does not impute this misconduct to him as a magistrate; but only as a man. "Squire" is merely a description of the person. It means no more than would be signified by the use of the plaintiff's baptismal name in the same place. In *Oakley* v. *Farrington*, the plaintiff was a justice of the peace, and the words were, "Squire Oakley is a damned rogue;" and yet it was held that the action would not lie, because the words did not relate to his official character or conduct.

What other delinquency is charged upon the plaintiff? The words are, "I don't see why Squire Van Tassel did not tell me that the execution had not been returned in time, so that I could sue the constable and his bail." It can hardly be said that these words impute the neglect of any moral or social duty; for it is not charged that the plaintiff had ever been requested to give information on the subject, or that there had been any opportunity to give it. Indeed, it does not appear that the plaintiff had any information to impart. But if the words contain an implied censure on the plaintiff as a man, they do not touch him in his official character. They do not impute to him the neglect of any duty pertaining to, or imposed by his office. The word "Squire" in this connection means no more than it did when speaking of the "combined company to cheat strangers." It is merely a *descriptio personae*. I do not see how this action can be maintained.

Judgment for defendant.[1]

CAMP *v.* MARTIN.

Supreme Court of Connecticut, 1854. *23 Conn. Reports*, 86.

The plaintiff, who was a physician, brought his action of slander, against the defendant, which was tried at the term of the superior court holden at Litchfield, in November, 1853.

The declaration contained two counts. In the first, the plaintiff averred that the defendant, falsely, wickedly and maliciously, spoke, of and concerning the plaintiff, in his profession of a physician, and of and concerning his treatment, and professional attendance, the false, scandalous and malicious words following, *viz.*: "If Dr. C.

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[1] *Accord: Gilbert* v. *Field*, 3 Caines 329 (N. Y. 1805); *VanEpps v. Jones*, 50 Ga. 238 (1873); statement that plaintiff, a lawyer, had refused to pay a draft, the fact that the draft was drawn on him by a client for money collected for him not being mentioned; *Curry* v. *Collins*, 37 Mo. 324 (1866); *McCallum* v. *Lambie*, 145 Mass. 234 (1887), *semble;* and see *Smedley* v. *Soule*, 125 Mich. 192 (1900); and *Cassavoy* v. *Pattison*, 93 App. Div. (N. Y.) 370 (1904).

Even imputations of insolvency or of other matters seriously affecting his credit spoken of a trader, are held in *Redway* v. *Gray*, 31 Vt. 292 (1858); *Barnes* v. *Trundy*, 31 Maine 321 (1850); and *Dallavo* v. *Snider*, 143 Mich. 542 (1906), not to be actionable *per se*, unless it was alleged and proved that they were spoken of and concerning the plaintiff in relation to his business, though in the last case it is intimated that similar written statements might be libels upon the plaintiff's business reputation.

had continued to treat her, she would have been in her grave before this time; his treatment of her was rascally;" meaning, "that the plaintiff's professional treatment to the said Sarah M. was such that, had it been continued, it would have caused her death prematurely, from the ignorance, corruption and unskillfulness of the plaintiff."

The alleged slanderous words in the second count were, "Your treatment of her was rascally;" with an innuendo that "the defendant meant to charge the plaintiff with being guilty of base, dishonest, and vile conduct towards the said Sarah M. in his treatment of her, as her physician aforesaid, and that the plaintiff was a low, vile person, and unworthy of public confidence."

The defendant pleaded the general issue, with notice.

The jury having rendered a verdict in favor of the plaintiff, the defendant moved for an arrest of judgment, for the insufficiency of the declaration.

STORRS, J. The question, on the motion in arrest of judgment in this case, is, whether the declaration is sufficient, and that depends on the question, whether the words alleged to have been spoken by the defendant, fall within the rule which renders words actionable, that tend to the prejudice of a person, in his profession, trade, or business. No special damage to the plaintiff is alleged in the declaration, and the enquiry therefore is, whether the words laid are actionable, in themselves.

On an examination of the authorities, we think it is clear, that, to charge a physician merely with mismanagement in the treatment of a particular case, is not, of itself, actionable. Such a charge implies nothing more than ignorance or unskillfulness in that case, and does not materially affect his reputation, as it respects his general competency to practice in his profession. The most eminent physician may mistake the symptoms or treatment of a particular case, without detracting from his general professional skill or learning. To say of him, therefore, that he was mistaken in that case, would not be calculated to impair the confidence of the community in his general professional competency. In the language of the Supreme Court of New York, in *Foot* v. *Brown*, 8 Johns. (N. Y.) 64, "To carry the right of action so far as to sustain a suit for words, charging a professional man with ignorance in a particular case, would be unnecessary for the protection of any profession, and would be an unreasonable check upon the freedom of discussion." In that case, the court say, that there is not an instance, in the books which they have met with, of a suit sustained for such a charge. Our investigation has led us to the same conclusion. It has, however, been strenuously urged, by the plaintiff's counsel, that the rule on this subject was extended in the case of *Sumner* v. *Utley*, 7 Conn. 257, so as to render a charge of ignorance or unskillfulness in a particular case, actionable. We think that the court, in that case, so far from varying the rule, as we have given it, clearly intended to sanction it; and that that case was decided for the plaintiff, not on the ground, that the words charged imputed to him merely igno-

rance or a want of skill, in the particular case respecting which they were spoken, but that, by a fair construction of them, they amounted to an imputation upon him, of a want of general professional knowledge and skill. That a charge of the latter description would be, in itself, actionable, there was not any question. The division between the members of the court did not arise from any difference of opinion, as to the principles of the law of slander, but only as to the application of those principles to the words laid in that case. The question on which they differed was, whether the words there charged, imputed to the plaintiff's general incompetency, or only ignorance or unskillfulness, in the particular case alluded to. All the judges admitted, that the words were actionable, or not, according as they did, or did not, impute to the plaintiff, ignorance or incompetency generally, in his profession. The dissenting judge thought, that they did not amount to such an imputation, and on this point only, differed from the majority of the court. That there was no diversity of opinion, as to the legal principles applicable to the case, it is quite obvious, from the language of Hosmer, C. J., in expressing the opinion of the court. He says, "I readily admit, that falsehood may be spoken of a physician's practice in a particular case, ascribing to him only such want of information and good management as is compatible with great general knowledge and skill in his profession, and that, when such a case arises, unless some special damage exists, his character will be considered as unhurt, and no damages will be presumed. But, on the other hand, it is indisputably clear, that a calumnious report concerning a physician, in a particular case, may imply gross ignorance and unskillfulness, and do him irreparable damage. A physician may mistake the symptoms of a patient, or may misjudge as to the nature of his disease, and even as to the power of a medicine; and yet his error may be that of a pardonable kind, that will do him no essential prejudice, because it is rather a proof of human imperfection, than of culpable ignorance or unskillfulness. On the contrary, a single act or omission of his, may evince gross ignorance, and such a deficiency of skill, as will not fail to injure his reputation, and deprive him of general confidence." And, after noticing the cases cited by the defendant's counsel, he examines the words charged to have been spoken by the defendant, and shows that in their fair import, they impute to the plaintiff, such monstrous and culpable ignorance and mismanagement, that every person of sense and reflection, who should believe the imputations cast upon him, would consider him generally as a man of ignorance and unskillfulness, and unworthy of confidence, and not merely, that there was that want of knowledge or skill which would arise from the common imperfections of humanity. We think, therefore, that no new principle is established, in that case, and that the court meant only to decide that, while words imputing to a physician merely professional ignorance or mismanagement in a particular case, are not actionable in themselves, they become so, if, in addition to that, they convey the charge of general professional ignorance or incompetency.

The declaration in this case, after alleging, that the plaintiff was a practicing physician, and, as such, had been called to, and visited and prescribed for, Sarah M., states that the words laid were, by the defendant, falsely and maliciously spoken, of and concerning the plaintiff, and his professional treatment in her case, and they must be deemed to have been so spoken. If, however, these words are not in themselves actionable, it is obviously immaterial, that they were spoken falsely and maliciously, since their falsity, or the motive with which they were uttered, would not, in that case, make them slanderous, and there is no averment of any special damage, to render them so. It does not appear, from the declaration, that the words were spoken with any meaning, which was peculiar or different from their ordinary signification. The *innuendo* in the first count does indeed state that, by the expression of the defendant, that the plaintiff's treatment of the person mentioned was rascally, the defendant meant, that the plaintiff's treatment of her was such that, if it had been continued, it would have caused her death prematurely, from the ignorance, corruption and unskillfulness of the plaintiff; and, in the second count, that, by that expression he meant that the plaintiff was guilty of base, dishonest and vile conduct towards her in his treatment of her, as her physician, and that the plaintiff was a low, vile person, and unworthy of public confidence. But it is well settled, that the meaning of the words laid cannot be extended by the *innuendo,* the office of which is merely explanatory of those words. Looking then, as we must, at the words laid in the first count, in their ordinary signification, we are of opinion, that it appears, that they were spoken only with reference to the particular case in which it is stated the plaintiff was employed, and that they do not necessarily, naturally or fairly, impute to him general ignorance or unskillfulness, or corruption, or a want of integrity, either generally or in the treatment of that case. But for the last expression of the defendant, that the plaintiff's treatment of the said Sarah M. was rascally, it would not be susceptible of a doubt, that the words laid conveyed no imputation on the plaintiff, not compatible with his being a practitioner of skill and learning generally, and perfect integrity. That expression, as connected with the previous words, certainly implies, that there was mismanagement of some kind, on the part of the plaintiff, in the treatment of that case. But it does not appear, from the language used, or any averment in the declaration, what constituted that mismanagement, or whether it consisted of negligence or inattention to his patient, in that case, or of some other conduct, which would indicate a want of integrity or general capacity. If the words spoken imputed to the plaintiff the former only, they would not, in our opinion, be slanderous; and we do not think that we should be warranted in giving them a more extended meaning. With respect to the second count, the words laid therein consist merely of the single expression above recited; and the considerations to which we have adverted, in regard to that expression, as constituting a part of the words laid in the first count, are applicable to this count, and show that the words laid in it are not in themselves slanderous.

The declaration being insufficient, it is unnecessary to consider the questions arising on the motion for a new trial.

The superior court is advised, that the judgment should be arrested.

Judgment arrested.[1]

JONES *v.* LITTLER.

Court of Exchequer, 1841. *7 Meeson & Welsby's Reports*, 422.

Action of Slander.—The declaration stated, that the plaintiff was a brewer, and that the defendant falsely and maliciously spoke and published of and concerning him in the way of his trade as a brewer, the false, scandalous, malicious, and defamatory words fol-

[1] *Accord: Jones* v. *Diver*, 22 Ind. 184 (1864); *Gauvreau* v. *Superior Publishing Co.*, 62 Wis. 403 (1885); *Foster* v. *Scripps*, 39 Mich. 376 (1878); *Pratt* v. *Pioneer-Press Co.*, 35 Minn. 251 (1886), accusation that a physician had left the decomposing body of a dead infant to remain for several days in the room with its ill mother, held to accuse him of a "reckless disregard of the life and health of the patient. The common sense of any man will tell him that the natural, and indeed necessary effect of such a charge against a physician, if believed, would be to injure his professional reputation"; Mitchell, J., p. 255; *Secor* v. *Harris*, 18 Barb. 425 (N. Y. 1854), accusation that physician had killed defendant's children by giving teaspoonful doses of calomel; *Johnson* v. *Robertson*, 8 Porter 486 (Ala. 1839), similar accusation; *Garr* v. *Selden*, 6 Barb. (N. Y.) 416 (1848), unprofessional conduct in a particular suit imputed to attorney; *Tutty* v. *Alewin*, 11 Mod. 221 (1709); *contra*, *Poe* v. *Mondford*, Cro. Eliz. 620 (1597), accusation that physician killed a patient with physic, a case decided when every alleged slander was construed *mitiori sensu; Foot* v. *Brown*, 8 Johns. 64 (N. Y. 1811), accusation that attorney knew nothing about a particular suit. When the words used, such as "malpractice", on their face import unprofessional or illegal conduct, even on a single occasion, they are actionable, *Rodgers* v. *Kline*, 56 Miss. 808 (1879). In *Manire* v. *Hubbard*, 110 Ky. 311 (1901), the charge in regard to the plaintiff's conduct on the one occasion in question was held not to impute general incompetency or unprofessional conduct; see also, *Lynde* v. *Johnson*, 39 Hun 12 (N. Y. 1886). The allegation of a single specific act of dishonesty or improper conduct on the part of a trader is generally held actionable, see cases cited in note to *Jones* v. *Littler*, *ante*. It is universally held that general charges of ignorance or incompetence or unprofessional conduct on the part of either a physician, barrister or attorney, are actionable *per se; Flower's* Case, Cro. Car. 211 (1631), midwife; *Swift* v. *Dickerman*, 31 Conn. 285 (1863); *De Pew* v. *Robinson*, 95 Ind. 109 (1884); *Tarlton* v. *Lagarde*, 46 La. Ann. 1368 (1894); *Carroll* v. *White*, 33 Barb. 615 (1861); *Cruikshank* v. *Gorden*, 118 N. Y. 178 (1890), all accusations against physicians, *White* v. *Carroll*, 42 N. Y. 161 (1870), calling a physician a "quack"; *Peard* v. *Jones*, Cro. Car 382 (1635); *Baker* v. *Morfue*, Sid. 327 (1667); *Riggs* v. *Denniston*, 3 John. Cas. 198 (N. Y. 1802); *Chipman* v. *Cook*, 2 Tyler 456 (Vt. 1803); *Clemmons* v. *Danforth*, 67 Vt. 617 (1895); *Rush* v. *Cavenaugh*, 2 Pa. St. 187 (1846), and so are accusations against a public officer of gross ignorance of his duties, *Spiering* v. *Andrae*, 45 Wis. 330 (1878). It has been held actionable *per se*, to say of a physician that he was no scholar, *Cawdrey* v. *Highley*, Cro. Car. 270 (1632); or that he has bought his diploma, *Bergold* v. *Puchta*, 2 Thomp. & C. 532 (N. Y. 1874), but see *Foster* v. *Small*, 3 Wharton 138 (Pa. 1837), where it was held not actionable to say that a physician had no diploma, a college training being at that time neither required by law or readily obtainable; or to say of an attorney that he has never been admitted to the bar, *Goldrick* v. *Levy*, 8 Ohio Dec. 146 (1881).

lowing: "I'll (meaning that he, the defendant would) bet £5 to £1, that Mr. Jones (meaning the plaintiff) was in a sponging-house for debt within the last fortnight, and I can produce the man who locked him up; the man told me so himself;" whereupon the said Henry Pye then asked the defendant, "Do you mean to say, that Mr. Jones, brewer, of Rosehill (meaning and describing the plaintiff,) has been in a sponging-house within the last fortnight for debt?" and thereupon the defendant then replied to the said Henry Pye, and the said other persons then present, "Yes, I do."

The cause was tried before Rolfe, B., at the last Liverpool assizes, when, no special damage having been proved, it was objected, on the authority of *Ayer* v. *Craven,* 2 Ad. & Ell. 2, 4 N. & M. 220, that the words could not be considered as spoken of the plaintiff in the way of his trade, and therefore that he ought to be nonsuited. The learned judge refused to nonsuit, and the jury returned a verdict for the plaintiff.

PARKE, B. It is quite clear that this rule ought to be discharged for the only ground on which it was granted has failed, inasmuch as the learned judge did leave the question to the jury, whether the words were spoken of the plaintiff in his trade; and, indeed, it is plain that the words were so used, from the fact, that in the conversation in question, the plaintiff was spoken of as a brewer. Independently of that, however, and even if they were spoken of him in his private character, I think the case of *Stanton* v. *Smith* is an authority to show that the words would have been actionable, because they must necessarily affect him in his trade. It is there said, "We are all of opinion that such words spoken of a tradesman must greatly lessen the credit of a tradesman, and be very prejudicial to him, and therefore that they were actionable." That case is distinguishable from *Ayre* v. *Craven* and *Doyley* v. *Roberts.* In the latter of those cases, the words were not spoken of the plaintiff in his business of an attorney; and in the former it did not appear in what manner the immorality was connected with the plaintiff's profession of a physician; and it was possible that such imputations of incorrect conduct, out of the line of their respective professions, might not injure their professional characters. But this case is distinguishable, because here the imputation is that of insolvency, which must be injurious; for if a tradesman be incapable of paying all his debts, whether in or out of trade, his credit as a tradesman, which depends on his general solvency, must be injured. The case of *Stanton* v. *Smith,* as it appears to me, is good law, notwithstanding the observations of Coltman, J., in *D'Oyley* v. *Roberts.*

ALDERSON, B., and ROLFE, B., concurred.

Rule discharged.[1]

[1] *Accord: Stanton* v. *Smith,* 2 Ld. Raym. 1480 (13 Geo. 1), "he compounded his debts at five shillings in the pound" held actionable without colloquium; *Davis* v. *Ruff,* Cheves 17 (S. Car. 1839), when words are such as to affect a man's credit, then it is not necessary to aver nor to prove that they were spoken in reference to the particular trade or business which the party was pursuing."

See Andrews, J. in *Sanderson* v. *Caldwell,* 45 N. Y. 398 (1871), p. 404-5; "In general, words of mere opprobrium, or charging general immorality not amounting to crime, are not actionable *per se,* and the rule cited states the exception which has been uniformly recognized; but there is some confusion in the cases upon the point whether the words used must, in terms, be applied by the speaker to the office, business or profession of the person who claims to recover by reason of them, and whether, if not so expressly applied, they can be said to touch him in the special character named. The rule derived from the authorities, and with which most of the cases can be reconciled, seems to be this: When the words spoken have such a relation to the profession or occupation of the plaintiff that they directly tend to injure him in respect to it, or to impair confidence in his character or ability, when, from the nature of the business, great confidence must necessarily be reposed, they are actionable, although not applied by the speaker to the profession or occupation of the plaintiff; but when they convey only a general imputation upon his character, equally injurious to any one of whom they might be spoken, they are not actionable, unless such application be made. (*Cawdrey* v. *Highley,* Cro. Car. 270; *Chaddock* v. *Briggs,* 13 Mass. 248 (1816); *Davis* v. *Ruff,* Cheves 17 (S. Car. 1839); *Ayre* v. *Craven,* 2 Ad & El. 2 (1834); *D'Oyley* v. *Roberts,* 3 Bing. N. C. 835; *Jones* v. *Littler,* 7 M. & W. 423; Starkie on Slander, 118; 1 New Lead. Cas. 124.)"

So in *Cawdrey* v. *Highley,* Cro. Car. 270 (1632), it was held actionable to say to a physician that he was no scholar without any colloquium as to his profession. And in *Chaddock* v. *Briggs,* 13 Mass. 248 (1816), an accusation of drunkenness made against a minister of the gospel as a man and not as a minister, was held actionable.

Accusations of insolvency directed against a merchant or trader, no matter how lowly, to whom credit is essential as such, *Ostrom* v. *Calkins,* 5 Wend. 263 (N. Y. 1830), have from the earliest times been held to be actionable, if spoken of him as a merchant or trader; *Johnson* v. *Lemmon,* 2 Rolles Rep. 144 (17 Jac. 1); *Davis* v. *Lewis,* 7 T. R. 17 (1796); *Drake* v. *Hill,* Sir T. Raym. 184 (1645), *Barnes* v. *Holloway,* 8 T. R. 150 (1799), statement that a farmer could not pay his laborers; *Whittington* v. *Gladwin,* 5 B. & C. 180 (1826), insolvency charged to an innkeeper, though at the time innkeepers were not subject to the bankruptcy laws; *Lewis* v. *Hawley,* 2 Day 495 (Conn. 1807), bankruptcy imputed to a drover; *Hays* v. *Mather,* 15 Ill. App. 30 (1884), statement that plaintiff was under age and not legally responsible for his contracts, concluding "a word to the wise is sufficient" held actionable; *Simons* v. *Burnham,* 102 Mich. 189 (1894); *Mott* v. *Comstock, 7* Cow. 654 (N. Y. 1827); *Phillips* v. *Hoefer,* 1 Pa. St. 62 (1845); *Davis* v. *Ruff,* Cheves 17 (S. Car. 1839).

Accusations of trade dishonesty or dishonest dealings in the course of trade "be it ever so base", *Terry* v. *Hooper,* 1 Lev. 115 (1663), are equally actionable *per se; Crawfoot* v. *Dale,* 1 Vent. 263 (1694), keeping false books; *Backus* v. *Richardson,* 5 Johns. 476 (N. Y. 1809), *acc.,* but see *Rathbun* v. *Emigh,* 6 Wend. 407 (N. Y. 1831), to the effect that this is so only if the principal and general business of the plaintiff necessarily requires the keeping of the books and not where they are kept by a farmer, in the course of a collateral undertaking of buying and selling lumber of and to a few persons; *Griffith* v. *Lewis,* 7 Q. B. 61 (1845), using false weights; *Joralemon* v. *Pomeroy,* 22 N. J. L. 271 (1849), *acc.; Jesson* v. *Hayes,* Roll. Abr. 63 (1636), adulteration; *Babonneau* v. *Farrell,* 15 C. B. 360 (1854), use by contractor of old material in a piece of work, in which the contract required new; *Surman* v. *Shelleto,* 3 Burr. 1688 (1765), specific act of cheating; *Freisinger* v. *Moore,* 65 N. J. L. 286 (1900), *acc.; Thomas* v. *Jackson,* 3 Bing. 104 (1825); *Bryant* v. *Loxton,* 11 Moore 344 (1826); *Gross Coal Co.* v. *Rose,* 126 Wis. 24 (1905), an extreme case in which it was held slander *per se,* to accuse, during a political speech, a coal company of avarice and of refusing to sell coal during a famine except at an extortionate price.

Statements that the plaintiff is a "cheat" or "rogue" in his trade are actionable, *Terry* v. *Hooper,* 1 Lev. 115 (1663); *Surman* v. *Shelleto,* 3 Burr. 1688 (1765); *Marshall* v. *Addison,* 4 Harr. & McH. 537 (Md. 1773); *Mills* v. *Taylor,* 3 Bibb 469 (Ky. 1814); *Harris* v. *Burley,* 8 N. H. 256 (1836); *Nelson* v.

Brockenaus, 52 Ill. 236 (1869); *Freisinger* v. *Moore,* 65 N. J. L. 286 (1900); *Fred* v. *Traylor,* 115 Ky. 94 (1903). To accuse a trader of cheating or of other improper conduct as such on one specific occasion, is actionable, *Surman* v. *Shelleto,* 3 Burr. 1688 (1765); *Babonneau* v. *Farrell,* 15 C. B. 360 (1854); *Freisinger* v. *Moore,* 65 N. J. L. 286 (1900). It is however not actionable to call a trader a rogue or a cheat or a swindler unless the accusation refers to his trade, *Cotes* v. *Ketle,* Cro. Jac. 204 (1608); *Davis* v. *Miller,* 2 Str. 1169 (1774). It is actionable to accuse of dishonesty in his calling any one whose calling requires honesty, as a clerk or servant, *Seaman* v. *Bigg,* Cro. Car. 480 (1637); *Reginald's Case, ib.* 563 (1640); *Fowles* v. *Bowen,* 30 N. Y. 20 (1864); see also *Foulger* v. *Newcomb,* L. R. 2 Ex. 327 (1867), where it was held slander *per se* to accuse a gamekeeper of trapping foxes.

It is not a slander of a trader, as such, to disparage the quality of the goods which he sells, the statement must be personal to him and impute to him dishonesty or incompetency, otherwise the proper action is not slander but an action for trade libel cognate to slander of title, *Tobias* v. *Harland,* 4 Wend. 537 (N. Y. 1830), so it is not actionable to say that a butcher has sold a diseased animal unless it is alleged and proved that he knew it to be so, *Stevens* v. *Hartwell,* 11 Metc. 542 (Mass. 1846), or that the article sold is such that he must have known it to be improper for sale, *Singer* v. *Bender,* 64 Wis. 169 (1885), see *Young* v. *Kuhn,* 71 Tex. 645 (1888); and *Henkel* v. *Schaub,* 94 Mich. 542 (1893).

ALEXANDER *v.* JENKINS.

Court of Appeal, 1892. *Law Reports,* 1 *Queen's Bench.*

Action for slander.

LORD HERSCHELL. This action raises a question of some novelty, and not without importance. The action was brought by the plaintiff, who had been elected town councillor, and is an action of slander, in which the defendants are charged with having said that the plaintiff was "never sober, and not a fit man for the council." The verdict passed for the plaintiff, and the jury must be taken to have found that those words were in fact used. But the defendant's appeal against the judgment which was entered for the plaintiff, on the ground that, assuming these words to have been used, under the circumstances in which they are alleged to have been used, an action of slander will not lie. Now, I think it must be taken that those words were not mere words of abuse, but that they do impute to the plaintiff, who had been elected a town councillor, that he was an habitual drunkard, and that, as an habitual drunkard, he was not a fit man to discharge the duties of a town councillor. The question is whether, in respect of such an imputation, an action will lie. It is quite clear that as regards a man's business, or profession, or office, if it be an office of profit, the mere imputation of want of ability to discharge the duties of that office is sufficient to support an action. It is not necessary that there should be imputation of immoral or disgraceful conduct. It must be either something said of him in his office or business which may damage him in that office or business, or it must relate to some quality which would show that he is a man who, by reason of his want of ability or honesty, is unfit to hold the office. So much with regard to offices of profit; the reason being that in all those cases

the court will presume, or perhaps I should rather say the law presumes, such a probability of pecuniary loss from such imputation, in that office, or employment, or profession, that it will not require special damage to be shewn. It may be said to be an arbitrary rule. Be it so; but the rule is, at all events, laid down, and seems to me to rest on that basis. But when you come to offices that are not offices of profit, the loss of which, therefore, would not involve necessarily a pecuniary loss, the law has been differently laid down, and it is quite clear that the mere imputation of want of ability or capacity, which would be actionable if made in the case of a person holding an office of profit, is not actionable in the case of a person holding an office which has been called an office of credit or an office of honor. In his work on the law of libel, Mr. Starkie points out that the distinction which has been drawn is not by any means satisfactory. I think nobody can read the cases without feeling this to be so. The ground upon which Holt, C. J., puts it is, that a man cannot make himself wiser or more able than he is—he cannot add to his ability—but he may make himself a better man, *How* v. *Prinn*, 2 Salk. 694; Holt, 652. That is not a very satisfactory foundation on which to rest a legal distinction; but, however it may be, there it is. Now, it having been held that there is a distinction between that which is actionable, in the case of offices of honor or credit as compared with the case of an office of profit, the ground upon which the action has been said to be maintainable in the former case, certainly in some of the authorities, would seem to be this, that the language used has been such as, if true, would shew that the man ought to be deprived of his office, and therefore involves a risk of exclusion from that office.

LINDLEY, L. J. I am of the same opinion. It is not open to us to remodel the law of slander, and I do not think that it is desirable that we should extend the limits within which actions will lie for words which are merely spoken. We are not dealing with libel; we are dealing with mere slander. Not mere abuse; the defendants have gone beyond the limits of mere abuse. They have deliberately charged the plaintiff with intemperance, such habits of drunkenness as unfit him to be a town councillor. That is the slander complained of, and that is the slander proved. Now the cases, when looked at, are not based on very logical principles, but they are based upon working rules which are intelligible enough, and are to a certain extent reasonable enough. What the plaintiff complains of here is a slander which is to the effect that, by reason of his drunkenness, he is unfit for the office which he aspires to fill, and to which he has been elected. He is not charged with any malversation in his office; we have not to consider that. He is charged simply with being so often drunk as not to be fit to be a town councillor. Now, the first thing, to my mind, which we have to find out is this: whether he can be removed from the office of councillor because he is often drunk. I can find nothing in the statutes relating to borough councillors which enables anybody to be removed by reason of drunkenness. That being so, we have to

face decisions which shew that when a person is merely accused of unfitness for an office of honor (not of profit, with which we are not dealing), that unfitness must be one which would expose him to the risk of removal from the office which he fills, or seeks to fill. That this is the law was settled at least as early as *Onslow* v. *Horne*, 2 W. Bl. 750, when De Grey, C. J., reviewed some previous decisions, and I can find no doubt thrown on that doctrine in any case which has been decided since.

Appeal allowed.

FORWARD *v.* ADAMS.

Supreme Court of New York, 1831. *7 Wendell* 205.

Demurrer to declaration. The action is slander. The declaration, after stating by way of inducement that on the 23d of May, 1826, the plaintiff was appointed by the president of the United States a *commissioner* on the part and behalf of the United States, as the general protector of the Indian tribes, to attend a *treaty* to be held between the proprietors of the pre-emption right to certain lands held by Indians in the state of New York, and those Indians under the sanction of the government of the United States, for the extinguishment of the right of the Indians to the occupancy of such lands, with instructions to exercise a sound discretion in the business, and if satisfied of the fairness of the propositions of the proprietors, to afford them such co-operation in effecting the object of the treaty as he might judge proper; and that having accepted the appointment, the plaintiff, on the 31st of August, 1826, attended a treaty at Buffalo, and being satisfied of the fairness of the propositions of the proprietors, he sanctioned, approved and recommended a treaty there made between the Indians and proprietors for the extinguishment of the right of the Indians to the occupancy of the lands, the subject of the treaty; charges the defendant with uttering, in a discourse had on the 1st June, 1828, of and concerning the plaintiff, and of and concerning his conduct as such commissioner, and in relation to the treaty which had been concluded, the following words, alleged to be false, scandalous and defamatory, viz.: "He *bribed* some of the Indians to sign the treaty; he *hired* some of the Indians to sign the treaty; he was *guilty* of *hiring* or *bribing* some of the Indians to sign the treaty; he was *dishonest* with the Indians;" *innuendo,* that the plaintiff had misdemeaned himself in his appointment, had perverted his office, and corruptly exercised his influence with the Indians, by means of bribery and corruption. The defendant demurred.

SUTHERLAND, J. The demurrer is well taken. It is conceded that the words do not impute an indictable offence; if true, the plaintiff would not be subjected by them to a criminal prosecution.

The action is put distinctly on the ground that the words were spoken of the plaintiff as a public officer, and tended to his injury

and disparagement in that character. The fatal objection to the action on this ground is, that it appears on the face of the declaration that the plaintiff was not in office when the words were spoken; but that the office itself being a special trust, and temporary in its nature, had expired about two years before the uttering of the slanderous words. In *Sir Lionel Walden* v. *Mitchell* (2 Ventr. 265), the following dictum is imputed to the chief justice: "That where a man *had* been in an office of trust, to say that he behaved himself corruptly in it, as it imported great scandal, *so it might prevent his coming into that, or the like office again, and therefore was actionable.*" The observation was not called for by the case, as the action was sustained on an entirely different ground. Also, in Yelverton, 153, it appears to have been held that an action could be maintained for the words, *"When thou wert a justice, thou wert a bribing justice,"* for the same reason assigned in Ventris. Ch. J. De Grey, in delivering the opinion of the court in *Onslow* v. *Horne* (3 Wils. 188), said: "I know of no case where an action for words was ever grounded upon eventual damages which may possibly happen to a man in a future situation, notwithstanding what the chief justice throws out in 2 *Ventr.* 266. I think the chief justice went too far." The authority of Chief Justice De Grey effectually disposes of these cases. But he is also supported by many analogous decisions. Thus, where an action is brought for words (not actionable in themselves) spoken of a person in a particular calling, or profession, or employment, it must appear that he followed such profession or employment when the words were spoken. In *Gibbs* v. *Price* (Styles' R. 231), the judgment was arrested because it was not averred that the plaintiff was a barrister at the time of the bringing of his action, the words having been spoken of him in his professional character. In *King* v. *Lake* (2 Ventris 28) (which was also a case of words spoken of the plaintiff as a lawyer), it was expressly stated that the plaintiff was bred up to the law, and practised it, and had many persons for his clients, and thereby got money and maintained his family, &c. (1 Vent. 50.) Upon the strength of these and other cases, it is laid down in treatises upon this subject, that where an action is brought for words spoken of a *barrister* or *physician,* it must appear that he practised as such at the time the words were spoken; for otherwise, the words could not have affected him professionally. (Starkie on Slander, 105. Bacon's Abr. tit. Slander, 212, 13, 14, 15.) So, if an action be brought for publishing words of a tradesman, concerning his trade, it must be averred that at the time of publishing them he was in trade; for if he were not at that time in trade, his credit could not be hurt by the words. (*Collins* v. *Malin,* Croke's Ch. 382. Croke Eliz. 273. Croke J. 222.) These cases all admit this principle; for although the court in some of them refused to arrest the judgment, it was upon the ground, that after verdict they would intend, from the general averment (that the plaintiff had, for a long time preceding the day on which the words were laid, exercised the trade), that he continued to exercise on the day the words were published.

The ground of action in these cases is, that the party is disgraced, or injured in his profession or trade, or exposed to the hazard of losing his office, in consequence of the slanderous words; not that his general reputation and standing in the community are affected by them. It will be recollected that the words spoken, in this class of cases, are not actionable of themselves, but that they become so in consequence of the special character of the party of whom they are spoken. The fact of his sustaining that general character, therefore, lies at the very foundation of the action. On this ground, therefore, the declaration is bad.

It may be questionable, also, whether the words necessarily convey a charge of official misconduct. The terms *bribing* and *hiring* the Indians to sign the treaty, are evidently synonymous, and were intended to convey the same idea: and if the treaty which they were by these means induced to sign, was a fair and advantageous one for them, it may not have been a violation of the official duty of the plaintiff (when the peculiar character of the Indians is considered), to have resorted to presents, or pecuniary inducements, to procure their assent to it. It is unnecessary, however, to express any opinion upon this point.

Judgment for defendant upon demurrer.[1]

(d) Defamatory words causing actual harm, other than the mere impairment of the plaintiff's reputation.

TERWILLIGER *v.* WANDS.

New York Court of Appeals, 1858. 17 *N. Y.* 54.

Appeal from the Supreme Court. The action was for slander, in charging that the plaintiff had been guilty of lewd and unchaste conduct, alleging special damage.

At the trial plaintiff proved by Lafayette Wands that the defendant had made statements to the witness imputing that the plaintiff had intercourse with a Mrs. Fuller, and that the defendant had on another occasion told the witness that he would do all he could to keep Mrs. Fuller's husband in the penitentiary so that he could have free access to her.

Another witness, one Neiper, testified that the defendant had made similar statements to him. Neiper had married a sister of Mrs. Fuller and was an intimate friend of the plaintiff's, and repeated to the plaintiff what the defendant had told him, Neiper, which had been spread by Wands all over the countryside. He further testified that the plaintiff thereupon threw down his hoe and

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[1] *Accord: Bellamy* v. *Burch,* 16 M. & W. 590 (1847); *Russell* v. *Anthony,* 21 Kans. 450 (1879); *McKee* v. *Wilson,* 87 N. Car. 300 (1882); but imputations of past offenses injuriously affecting one holding office at the time when they are published, are actionable, *Sillars* v. *Collier,* 151 Mass. 50 (1890).

left the field. There was evidence that after that time the plaintiff slept badly and grew ill and unable to work.

Dr. Price, the plaintiff's physician, testified that the plaintiff was suffering from debility brought on by mental trouble.

The plaintiff having rested the defendant moved for a nonsuit on the grounds: First. That the words were not spoken by Wands to the plaintiff, nor authorized by him to be communicated to the plaintiff; Second. That there was no evidence that the damages, if any, proved, were occasioned by the speaking of the words by the defendant. The court sustained the motion, and judgment having been entered against the plaintiff he appealed. At the general term in the fifth district the judgment was affirmed, and from the latter judgment an appeal was taken to this court.

STRONG, J. The words spoken by the defendant not being actionable of themselves, it was necessary in order to maintain the action to prove that they occasioned special damages to the plaintiff. *The special damages must have been the natural, immediate and legal consequence of the words.*[1] (Stark. on Sland., by Wend., 2d ed., 203; 2 id., 62, 64; *Beach* v. *Ranney*, 2 Hill 309; *Crain* v. *Petrie*, 6 id. 523; *Kendall* v. *Stone*, 1 Seld. 14.) Where words are spoken to one person and he repeats them to another, in consequence of which the party of whom they are spoken sustains damages, the repetition is, as a general rule, a wrongful act, rendering the person repeating them liable in like manner as if he alone had uttered them. The special damages in such a case are not a natural, legal consequence of the first speaking of the words, but of the wrongful act of repeating them, and would not have occurred but for the repetition; and the party who repeats them is alone liable for the damages. (*Ward* v. *Weeks*, 7 Bing. 211; *Hastings* v. *Palmer*, 20 Wend. 225; *Keenholts* v. *Becker*, 3 Denio 346; *Stevens* v. *Hartwell*, 11 Metc. 542.)[2] These views dispose of this case as to the right of action in

[1] As to this see *Vickars* v. *Wilcocks*, *ante*.

It is not necessary that the person, whose injurious action is caused by the defendant's statements, should believe the accusations, *Knight* v. *Gibbs*, 1 A. & E. 43 (1834), the defendant, the landlord of the plaintiff's employer, complained of the latter's conduct, the employer, while not believing the charge, was afraid of offending her landlord and dismissed the plaintiff. "It may often happen that a person may not believe what is told, and yet not have courage to keep the individual who labors under the imputation", per Denman, C. J., p. 48; *Gillett* v. *Bullivant*, 7 L. J. (O. S.) 490 (1846) note 3, but see *contra Wilson* v. *Goit*, 17 N. Y. 442 (1858), *semble;* and Anon. 60 N. Y. 262 (1875), where in consequence of a foul slander of his daughter, a father, though not believing it to be true, refused to give her some promised presents. In the last case the action of the father seems to have been altogether due to his personal idiosyncrasy, and so not to have been the natural result of the defendant's act; (see *Lynch* v. *Knight*, *ante*) *Weldon* v. *De Bathe*, 54 L. J. Q. B. 113 (1884); *Dwyer* v. *Meehan*, 18 L. R. (Ir.) 138 (1886); *Miller* v. *David*, L. R. 9 C. P. 118 (1874); and *Speake* v. *Hughes*, L. R. 1904, 1 K. B. 138.

[2] *Accord: Holwood* v. *Hopkins*, Cro. Eliz. 787 (1600); *Tunnicliffe* v. *Moss*, 3 C. & K. 83 (1850); *Dixon* v. *Smith*, 5 H. & N. 450 (1860); *Parkins* v. *Scott*, 1 H. & C. 153 (1862), plaintiff herself repeated the defendant's statements to her husband, who in consequence left her; *Clarke* v. *Morgan*, 38 L. T. (N. S.) 354 (1877); *Speight* v. *Gosnay*, 60 L. J. Q. B. 231 (1891), imputation of

respect to all the words but those spoken to the witness Neiper, as none of them were spoken by the defendant in the presence of the plaintiff, or communicated to the plaintiff by the witnesses to whom they were spoken by the defendant in the presence of the plaintiff, or communicated to the plaintiff by the witnesses to whom they were spoken by the defendant; and there is no proof as to the circumstances under which they were repeated by those witnesses. In the absence of evidence of those circumstances, the general rule, that a repetition of slanderous words is wrongful, applies; hence any damages which resulted from repeating them are a consequence of that wrong, and not a natural, immediate and legal effect of the original speaking of the words by the defendant.

In regard to the words spoken by the defendant to Neiper, it is proved that they were communicated by the latter to the plaintiff, and that Neiper was at the time an intimate friend of the plaintiff. This friendly action, it is claimed on the part of the plaintiff, rendered the communication of Neiper to him proper; and, being so, it is insisted that the defendant is responsible for the consequences, in the same manner as if the words had been spoken directly to the plaintiff. There are several cases in which it is suggested that circumstances may exist which will justify the repetition of slanderous words, and that when repeated under such circumstances, and damages ensue, the first speaker may be liable in like manner as he would be if the injury had arisen from the words without the repetition. (*Ward* v. *Weeks*, 7 Bing. 211; *Keenholts* v. *Becker*, 3 Denio 346; *Olmsted* v. *Brown*, 12 Barb. 657; *McPherson* v. *Daniels*, 10 Barn. & Cress. 263.) Occasions may doubtless occur where the communication of slanderous words by a person who heard them will be innocent; and it is certainly reasonable that when repeated on such an occasion and damages result, the first speaker

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unchastity made to plaintiff's mother, communicated by her to plaintiff and by her to her betrothed, who broke off the engagement; *Bassell* v. *Elmore*, 48 N. Y. 561 (1872); *Stevens* v. *Hartwell*, 11 Metc. 542 (Mass. 1846); *Knight* v. *Blackford*, 3 Mackey 177, 51 Am. Rep. 772 (D. C. 1884); *Cameron* v. *Cockrane*, 2 Marv. 166 (Del. 1895), nor can the damages recoverable for words actionable *per se* be enhanced by reason of the harm caused by their unauthorized repetition. In *Gough* v. *Goldsmith*, 44 Wis. 262 (1878), the same rule was applied in an action for written words which were held not to be *per se* actionable. In *Davis* v. *Starrett*, 97 Maine 568 (1903), the originator of a slander is held to be responsible for the injurious consequences of such repetitions as are the natural and necessary consequences of his act; and see *Hardin* v. *Harshfield*, 11 Ky. L. 638, 12 S. W. 779 (Ky. 1890).

One publishing an actionable *libel* is generally held answerable for the damage done by such repetition as naturally results from its publication, *Miller* v. *Butler*, 6 Cush. 71 (Mass. 1850); *Zier* v. *Hofflin*, 33 Minn. 66 (1885), newspaper clipping sent by a third person to the plaintiff's fiancee; *Merchants' Insurance Company* v. *Buckner*, 98 Fed. 222, 39 C. C. A. 19 (1899); *King* v. *Patterson*, 49 N. J. L. 417 (1887); but see *Konkle* v. *Haven*, 140 Mich. 472 (1905).

One making an oral statement to the reporter of a newspaper, intending it to be published, is of course liable for the consequences of its publication, *Bond* v. *Douglas*, 7 C. & P. 626 (1836), *aliter*, if he merely makes the statement in the presence of reporters, who, without any request by him, publish it, *Schoepflin* v. *Coffey*, 162 N. Y. 12 (1900).

should be held responsible for the damages, as flowing directly and naturally from his own wrong.[3]

But there is another ground upon which the judgment must be affirmed. The special damages relied upon are not of such a nature as will support the action. The action for slander is given by the law as a remedy for "injuries affecting a man's reputation or good name by malicious, scandalous and slanderous words, tending to his damage and derogation." (3 Bl. Com., 123; Stark. on Sland., Prelim. Obs., 22-29; 1 id., 17, 18.) It is injuries affecting the reputation only which are the subject of the action. In the case of slanderous words actionable *per se*, the law, from their natural and immediate tendency to produce injury, adjudges them to be injurious, though no special loss or damage can be proved. "But with regard to words that do not apparently and upon the face of them import such defamation as will of course be injurious, it is necessary that the plaintiff should aver some particular damage to have happened." (3 Bl. Com., 124.) As to what constitutes special damages, Starkie mentions the loss of a marriage,[4] loss of hospitable gratuitous entertainment,[5] preventing a servant or bailiff from getting a place,[6] the loss of customers by a tradesman;[7] and says that

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[3] *Gillett* v. *Bullivant*, 7 L. T. (O. S.) 490 (1846), defendant told the father of the plaintiff, a governess, that she had had a child by her employer —the father went to the employer and told him what defendant had said— the employer though of course knowing the report to be false, dismissed her for fear of scandal—defendant was held liable; *Derry* v. *Handley*, 16 L. T. 263 (1867), defendant told the husband of a customer of the plaintiff, a dressmaker, that the latter was a woman of immoral character. The husband told his wife, who ceased to employ the plaintiff; and see *Kendillon* v. *Maltby*, 1 Car. & Marsh. 402 (1842); and *Bree* v. *Masrescaux*, L. R. 7 Q. B. D. 434 (1881); *Fowles* v. *Bowen*, 30 N. Y. 20 (1864), repetition by one partner to another of statements affecting the honesty of a clerk; *Olmsted* v. *Brown*, 12 Barb. 657 (1852), *semble*.

[4] This whether the loser of the marriage is a woman, *Davies* v. *Gardiner*, 4 Coke Rep. 16 b., Poph. 36 (1593); *Moody* v. *Baker*, 5 Cow. 351 (N. Y. 1826), or a man, *Matthew* v. *Crass*, Cro. Jac. 323 (1613); see for a successful action on the case against one falsely asserting the plaintiff to be contracted to him, for the purpose of preventing her marriage with another, *Sheppard* v. *Wakeman*, 1 Lev. 53 (1662). As to the loss of the chance of marriage with a suitor, there being no engagement of marriage, see *Weaver* v. *Ritter*, 3 Pa. Dist. R. 419 (1894).

[5] *Moore* v. *Meagher*, 1 Taunt. 39 (1807); *Davies* v. *Solomon*, L. R. 7 Q. B. 112 (1871); but not the mere loss of the esteem and society of one's neighbors and friends, if no gratuitous entertainment is thus lost, *Barnes* v. *Prudlin and Bruddel*, 1 Lev. 261, 1 Sid. 396 (1664); nor exclusion from a religious society, church or club, *Roberts* v. *Roberts*, 5 B. & S. 384 (1864); *Chamberlain* v. *Boyd*, L. R. 11 Q. B. D. 407 (1883); but see *Barnabas* v. *Traunter*, 1 Vin. Abr. 396 (1641); *Dwyer* v. *Meehan*, 18 L. R. (Ir.) 138 (1886).

[6] This applies whether the plaintiff is discharged from his situation or fails to obtain one, *Martin* v. *Strong*, 5 A. & E. 535 (1836); *Payne* v. *Beaumorris*, 1 Lev. 248 (1664); *Sterry* v. *Forman*, 2 C. & P. 592 (1827), but see *Chamberlain* v. *Boyd*, L. R. 11 Q. B. D. 407 (1883), *supra* n. 5.

[7] *Davies* v. *Gardiner*, 4 Coke Rep. 16 b; in *Storey* v. *Challands*, 8 C. & P. 234 (1837), the loss of a prospective customer of very doubtful solvency was held sufficient damage. Where the words are not spoken of the plaintiff in respect to his trade or profession, it seems that it is not enough to aver and

in general whenever a person is prevented by the slander from receiving that which would otherwise be conferred upon him, though gratuitously,[8] it is sufficient. (1 Stark. on Sland., 195, 202; Cooks Law of Def., 22-24.) In *Olmsted* v. *Miller* (1 Wend. 506), it was held that the refusal of civil entertainment at a public house was sufficient special damage. So in *Williams* v. *Hill,* (19 Wend. 305), was the fact that the plaintiff was turned away from the house of her uncle and was told not to return until she had cleared up her character. So in *Beach* v. *Ranney,*[9] was the circumstance that persons, who had been in the habit of doing so, refused longer to provide fuel, clothing, &c. (2 Stark. on Ev., 872, 873.) These instances are sufficient to illustrate the kind of special damage that must result from defamatory words not otherwise actionable to make them so; they are damages produced by, or through, impairing the reputation.

It would be highly impolitic to hold all language, wounding the feelings and affecting unfavorably the health and ability to labor, of another, a ground of action; for that would be to make the right of action depend often upon whether the sensibilities of a person spoken of are easily excited or otherwise; his strength of mind to disregard abusive, insulting remarks concerning him; and his physical strength and ability to bear them. Words which would make hardly an impression on most persons, and would be thought by them, and should be by all, undeserving of notice, might be exceedingly painful to some, occasioning sickness and an interruption of ability to attend to their ordinary avocations. There must be some limit to liability for words not actionable *per se,* both as to the words and the

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prove a general loss of custom or entertainment or the payment of money. The plaintiff must show the particulars, whose custom or entertainment was lost, or why he was forced to pay the money, *Barnes* v. *Prudlin,* 1 Sid. 396 (1669); *Hopgood* v. *Thorn,* 8 C. B. 293 (1849); *Pettibone* v. *Simpson,* 66 Barb. 492 (N. Y. 1873); *Cook* v. *Cook,* 100 Mass. 194 (1868); *Pollard* v. *Lyon,* 91 U. S. 225 (1875), though it is not necessary to do more than to show that customers, whose names cannot be ascertained, have been driven away, *Hargrave* v. *LeBreton,* 4 Burr., p. 2422 (1769), auction broken up by defendant's statements; but see *contra, Brady* v. *Youlden,* Kerford & Box's Dig. of Vict. Cases 709 (1867). When the words are actionable as touching the plaintiff's trade or profession, it is generally held that a general loss of trade may be proved as special damage, *Ratcliffe* v. *Evans,* L. R. 1892, 2 Q. B. 524; *Trenton Mutual Life, etc., Co.* v. *Perrine,* 23 N. J. L. 402 (1852); *Weiss* v. *Whittemore,* 28 Mich. 366 (1873); and see *Morasse* v. *Brochu,* 151 Mass. 567 (1890).

[8] *Corcoran* v. *Corcoran,* 7 Ir. C. L. R. 272 (1857), declaration alleging that in consequence of defendant's statements, plaintiff's brother withdrew his promise to assist her in emigrating to Australia, held good on demurrer.

[9] It was, however, held that the plaintiff being a married woman, for whom her husband was still bound to provide though separated from her, this loss was in law not hers, but her husband's. It was also held that the allegations, that the plaintiff suffered loss of peace of mind and body, that she was turned out of a moral reform society, and that her husband abandoned her, did not show any pecuniary loss or legal damage, and that the act of children throwing missiles into her house and calling her harsh names was too remote a consequence of the slander to be charged to the defendants, citing *Vicars* v. *Wilcocks,* 8 East 1.

kind of damages, and a clear and wise one has been fixed by the law. The words must be defamatory in their nature;[10] and must in fact disparage the character; and this disparagement must be evidenced by some positive loss arising therefrom directly and legitimately as a fair and natural result. In this view of the law words which do not degrade the character, do not injure it, and cannot occasion loss. It necessarily follows from the rule that the words must be disparaging to character, that the special damage to give an action must flow from disparaging it. In the case last cited (*Kelly* v. *Partington,* 5 B. & A. 645) the plaintiff actually suffered damage from the defendant's words by their bringing her into disrepute, but the words were not calculated to produce such a result and therefore the action would not lie. In the present case the words were defamatory, and the illness and physical prostration of the plaintiff may be assumed, so far as this part of the case is concerned, to have been actually produced by the slander, but this consequence was not, in a legal view, a natural, ordinary one, as it does not prove that the plaintiff's character was injured. The slander may not have been credited by or had the slightest influence upon any one unfavorable to the plaintiff; and it does not appear that anybody believed it or treated the plaintiff any different from what they would otherwise have done on account of it. The cause was not adapted to produce the result which is claimed to be special damages. Such an effect may and sometimes does follow from such a cause but not ordinarily; and the rule of law was framed in reference to common and usual effects and not those which are accidental and occasional.

It is true that this element of the action for slander in the case of words not actionable of themselves—that the special damages must flow from impaired reputation—has been overlooked in several modern cases, and loss of health and consequent incapacity to attend to business held sufficient special damage. (*Bradt* v. *Towsley,* 13 Wend. 253; *Fuller* v. *Fenner,* 16 Barb. 333); but these cases are a departure from principle and should not be followed.

Where there is no proof that the character has suffered from the words, if sickness results it must be attributed to apprehension of loss of character, and such fear of harm to character, with resulting sickness and bodily prostration, cannot be such special damage as the law requires for the action.[11] The loss of character must be a substantive loss, one which has actually taken place.

Judgment affirmed.

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[10] *Accord: Kelly* v. *Partington,* 4 B. & A. 700 (1833), as to which see the interesting note in Bower on Actionable Defamation 447; *Sheahan* v. *Ahearn,* Ir. R. 9 C. L. 412 (1875); *Legg* v. *Dunlevy,* 10 Mo. App. 461 (1881); but see *Ratcliffe* v. *Evans, post,* and *Hardin* v. *Harshfield,* 11 Ky. L. 638, 12 S. W. 779 (Ky. 1890).

[11] In *Allsop* v. *Allsop,* 5 H. & N. 534 (1860), in which the declaration, held bad on demurrer, alleged that in consequence of the defendant's accusations, plaintiff's friends and neighbors refused to associate with her and she was brought into public scandal and disgrace, by reason of which she became ill, etc. *Accord: Wilson* v. *Goit,* 17 N. Y. 442 (1858). *A fortiori,* mere loss of peace of mind is not sufficient damage to support an action for words not

SECTION 2.

Libel.

THORLEY *v.* LORD KERRY.

Court of Common Pleas, 1812. 4 *Taunton's Reports,* 355.

MANSFIELD, C. J. This is a writ of error, brought to reverse a judgment of the Court of King's Bench, in which there was no argument. It was an action on a libel published in a letter, (wherein Lord Kerry was charged with being a hypocrite, and using the cloak of religion for unworthy purposes,) which the bearer of the letter happened to open. There is no doubt that this was libel, for which the plaintiff in error might have been indicted and punished; because, though the words impute no punishable crimes, they contain that sort of imputation which is calculated to vilify a man, and bring him, as the books say, into hatred, contempt, and ridicule; for all words of that description an indictment lies; and I should have thought that the peace and good name of individuals was sufficiently guarded by the terror of this criminal proceeding in such cases. The words, if merely spoken, would not be of themselves sufficient to support an action. But the question now is, whether an action will lie for these words so written, notwithstanding that such an action would not lie for them if spoken; and I am very sorry it was not discussed in the Court of King's Bench, that we might have had the opinion of all the twelve judges on the point, whether there be any distinction as to the right of action, between written and parol scandal; for myself, after having heard it extremely well argued, and especially in this case, by Mr. Barnewall, I cannot, upon principle, make any difference between words written and words spoken, as to the right which arises on them of bringing an action. For the plaintiff in error it has been truly urged, that in the old books and abridgments no distinction is taken between words written and spoken. But the distinction has been made between written and spoken slander as far back as Charles the Second's time,[1] and the difference has been recognized by the courts for at least a century back. It does not appear to me that the rights of parties to a good character are insufficiently defended by the criminal remedies which the law gives, and the law gives a very ample field for retribution by action for words spoken in the cases of special damage, of words spoken of a man in his trade or profession, of a man in office, of a magistrate or officer; for all these an action lies. But for mere general abuse spoken no action lies. In the arguments both of the

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slanderous *per se*, *Woodbury* v. *Thompson*, 3 N. H. 194 (1825), though if they be so actionable, it should, if proved, be considered in assessing the damages, *Adams* v. *Smith*, 58 Ill. 417 (1871).

[1] *King* v. *Lake*, Hardres 470 (1690).

judges and counsel, in almost all of the cases in which the question has been, whether what is contained in a writing is the subject of an action or not, it has been considered, whether the words, if spoken, would maintain an action. It is curious that they have also adverted to the question, whether it tends to produce a breach of the peace: but that is wholly irrelevant, and is no ground for recovering damages. So it has been argued that writing shews more deliberate malignity;[2] but the same answer suffices, that the action is not maintainable upon the ground of the malignity, but for the damage sustained. So, it is argued that written scandal is more generally diffused than words spoken, and is therefore actionable;[3] but an assertion made in a public place, as upon the Royal Exchange, concerning a merchant in London, may be much more extensively diffused than a few printed papers dispersed, or a private letter: it is true that a newspaper may be very generally read, but that is all casual. These are the arguments which prevail on my mind to repudiate the distinction between written and spoken scandal; but that distinction has been established by some of the greatest names known to the law, Lord Hardwicke, Hale, I believe, Holt, C. J., and others. Lord Hardwicke, C. J., especially has laid it down that an action for a libel may be brought on words written, when the words, if spoken, would not sustain it. Co. Dig. tit. Libel, referring to the case in Fitzg. 122, 253, says, there is a distinction between written and spoken scandal, by his putting it down there as he does, as being the law, without making any query or doubt upon it, we are led to suppose that he was of the same opinion. I do not now recapitulate the cases, but we cannot, in opposition to them, venture to lay down at this day, that no action can be maintained for any words written, for which an action could not be maintained if they were spoken: upon these grounds we think the judgment of the Court of King's Bench must be affirmed. The purpose of this action is to recover a compensation for some damage supposed to be sustained by the plaintiff by reason of the libel. The tendency of the libel to provoke a breach of the peace, or the degree of malignity which actuates the writer, has nothing to do with the question. If the matter were for the first time to be decided at this day, I should have no hesitation in saying, that no action could be maintained for written scandal which could not be maintained for the words if they had been spoken.

Judgment affirmed.[4]

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[2] See Hale, C. J., in *King* v. *Lake*, Hardres 470 (1690).

[3] In *Harman* v. *Delany*, Fitzgibbon 253 (1763); it was said "that words published in writing will be actionable, though not when *barely* spoken." The italics are the editor's.

[4] *Accord: McCorkle* v. *Binns*, 5 Binney 340 (Pa. 1812), "any malicious printed slander, which tends to expose a man to ridicule, contempt, hatred or degradation of character, is a libel", per Tilghman, C. J., p. 348; *Adams* v. *Lawson*, 17 Grat. 250 (Va. 1867): *Miller* v. *Butler*, 6 Cush. 71 (Mass. 1850); *Bradley* v. *Cramer*, 59 Wis. 309 (1884); *Merchants' Insurance Co.* v. *Buckner*, 98 Fed. 222 (C. C. A. 1899), and cases cited, p. 227; see also Odgers, Slander and Libel, 3rd ed., pp. 3 & 4; Townsend on Slander and Libel, 4th ed., pp. 11 & 12; and cases given in 32 Am. Dig., Cent. Ed., 1854 to 1859.

PECK *v.* TRIBUNE COMPANY.

Supreme Court of the United States, 1909. 214 *U. S.* 185.

HOLMES, J. This is an action on the case for a libel. The libel alleged is found in an advertisement printed in the defendant's newspaper, The Chicago Sunday Tribune, and so far as is material is as follows: "Nurses and Patients Praise Duffy's—Mrs. A. Schuman, One of Chicago's Most Capable and Experienced Nurses, Pays an Eloquent Tribute to the Great Invigorating, Life-Giving and Curative Properties of Duffy's Pure Malt Whiskey * * *" Then followed a portrait of the plaintiff, with the words "Mrs. A. Schuman" under it. Then, in quotation marks, "After years of constant use of your Pure Malt Whiskey, both by myself and as given to patients in my capacity as nurse, I have no hesitation in recommending it as the very best tonic and stimulant for all weak and rundown conditions," &c., with the words "Mrs. A. Schuman, 1576 Mozart St., Chicago, Ill.," at the end, not in quotation marks, but conveying the notion of a signature, or at least that the words were hers. The declaration alleged that the plaintiff was not Mrs. Schuman, was not a nurse, and was a total abstainer from whisky and all spirituous liquors. There was also a count for publishing the plaintiff's likeness without leave. The defendant pleaded not guilty. At the trial, subject to exceptions, the judge concluded the plaintiff's testimony in support of her allegations just stated, and directed a verdict for the defendant. His action was sustained by the Circuit Court of Appeals. 154 Fed. 330, 83 C. C. A. 202.

Of course the insertion of the plaintiff's picture in the place and with the concomitants that we have described imported that she was the nurse and made the statements set forth, as rightly was decided in *Wandt* v. *Hearst's Chicago American,* 129 Wisconsin 419-421. *Morrison* v. *Smith,* 177 N. Y. 366. Therefore the publication was of and concerning the plaintiff, notwithstanding the presence of another fact, the name of the real signer of the certificate, if that was Mrs. Schuman, that was inconsistent, when all the facts were known, with the plaintiff's having signed or adopted it. Many might recognize the plaintiff's face without knowing her name, and those who did know it might be led to infer that she had sanctioned the publication under an alias. There was some suggestion that the defendant published the portrait by mistake, and without knowledge that it was the plaintiff's portrait or was not what it purported to be. But the fact, if it was one, was no excuse. If the publication was libellous the defendant took the risk. As was said of such matters by Lord Mansfield, "Whatever a man publishes he publishes at his peril." *The*

Louisiana refuses to follow the common-law distinction between written and spoken defamation; *Miller* v. *Holstein,* 16 La. 395 (1840); *Tarleton* v. *Lagarde,* 46 La. Ann. 1368 (1894).

Some American courts hold, following Townsend on Slander and Libel, § 180, that written language affecting the plaintiff solely in his trade or profession is governed by the same rules as spoken words, see *Standard* v. *Wilcox*

King v. *Woodfall,* Lofft, 776, 781. See further, *Hearne* v. *Stowell,* 12 A. & E. 719, 726; *Shepheard* v. *Whitaker,* L. R. 10 C. P. 502; *Clark* v. *North American Co.,* 203 Pa. St. 346, 351, 352. The reason is plain. A libel is harmful on its face. If a man sees fit to publish manifestly hurtful statements concerning an individual, without other justification than exists for an advertisement or a piece of news, the usual principles of tort will make him liable, if the statements are false or are true only of some one else. See *Morasse* v. *Brochu,* 151 Massachusetts, 567, 575.

The question, then, is whether the publication was a libel. It was held by the Circuit Court of Appeals not to be, or at most to entitle the plaintiff only to nominal damages, no special damage being alleged. It was pointed out that there was no general consensus of opinion that to drink whisky is wrong or that to be a nurse is discreditable. It might have been added that very possibly giving a certificate and the use of one's portrait in aid of an advertisement would be regarded with irony, or a stronger feeling, only by a few. But it appears to us that such inquiries are beside the point. It may be that the action for libel is of little use, but while it is maintained it should be governed by the general principles of tort. If the advertisement obviously would hurt the plaintiff in the estimation of an important and respectable part of the community, liability is not a question of a majority vote.

We know of no decision in which this matter is discussed upon principle. But obviously an unprivileged falsehood need not entail universal hatred to constitute a cause of action. No falsehood is thought about or even known by all the world. No conduct is hated by all. That it will be known by a large number and will lead an appreciable fraction of that number to regard the plaintiff with contempt is enough to do her practical harm. Thus if a doctor were represented as advertising, the fact that it would affect his standing

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and *Nichols* v. *Daily Rep. Co.,* note 2 to *Ireland* v. *McGarvish, ante;* but see as to this *Merchants' Insurance Co.* v. *Buckner,* 98 Fed. 222 (C. C. A. 1899); *Weiss* v. *Whittemore,* 28 Mich. 366 (1873), per Christiancy, J., p. 377; *Dallavo* v. *Snider,* 143 Mich. 542 (1906).

In a very learned and interesting essay on the History of the Law of Defamation, 3 Select Essays on Anglo-American Legal History, 446, 3 Col. L. R. 546 (1903), Van Vechten Veeder, Esq., sets forth the steps by which the King's Court acquired jurisdiction over slander and libel, the manner in which libel became a criminal offense and the origin of the distinction between spoken and written defamation. He points out that the Roman Law, from which, he says, the Court of Star Chamber took its law of libel, had two actions for defamation, one of the action *de injuria,* a merely civil action for a money penalty, including both punishment and compensation, which lay for defamatory statements made in private, and the action *de libellis famosis,* for accusations, usually anonymous epigrams and scurrilous ballads, publicly sung or scattered about the streets, which were severely punished and in which truth was no justification. He suggests that the English courts lost sight of the Roman law distinction, based on the character of the defamatory matter, the publicity given it and its anonymity, and substituted a distinction based on speech and writing, probably because the earliest cases, analogous to those to which the action *de libellis famosis* applied, were written cases of anonymous and scurrilous political tracts, ballads and pamphlets.

with others of his profession might make the representation actionable, although advertising is not reputed dishonest and even seems to be regarded by many with pride. See *Martin* v. *The Picayune,* 115 Louisiana 979. It seems to us impossible to say that the obvious tendency of what is imputed to the plaintiff by this advertisement is not seriously to hurt her standing with a considerable and respectable class in the community. Therefore it was the plaintiff's right to prove her case and go to the jury, and the defendant would have got all that it could ask if it had been permitted to persuade them, if it could, to take a contrary view. *Culmer* v. *Canby,* 101 Fed. 195, 197; *Twombly* v. *Monroe,* 136 Massachusetts 464, 469. See *Gates* v. *New York Recorder Co.,* 155 N. Y. 228.

It is unnecessary to consider the question whether the publication of the plaintiff's likeness was a tort *per se.* It is enough for the present case that the law should at least be prompt to recognize the injuries that may arise from an unauthorized use in connection with other facts, even if more subtilty is needed to state the wrong than is needed here. In this instance we feel no doubt.

Judgment reversed.[1]

[1] *Accord: Foster-Milburn Co.* v. *Chinn,* 134 Ky. 424 (1909), held to be libel to publish a forged recommendation of patent kidney pills purporting to be signed by the plaintiff, a prominent Kentucky horseman.

A statement may be defamatory if published in one place but not if published in another, since the public in the one may regard the act or attribute imputed to the plaintiff as sufficiently serious to hurt his standing in the community, while in the other, public opinion may regard it as a trivial fault or even as meritorious, so a charge of killing foxes was held actionable if published in a hunting county of England, *Foulger* v. *Newcomb,* L. R. 2 Exch. 327 (1867), and see the diversity of decision as to the libelous character of words. So an act which at one period was regarded as innocent or even meritorious may be condemned by public opinion of another, and the meaning of words notoriously change from time to time and differ in one place and another, *Row* v. *Clargis,* T. Raymond, 482 (1682), statement made in time of Charles II that the plaintiff, a deputy lieutenant, was a "papist". Compare the cases of *Collins* v. *Carnegie,* 1 A. & E. 695 (1834), and *Dakhyl* v. *Labouchere,* L. R. 1908, 2 K. B. 325 n., the one holding that the word "quack" was not libelous, the other that it was; and on the whole subject, see Bower, Code of Actionable Defamation, pp. 288-292.

So, at least in the southern states of the United States, it is held libelous to accuse a person of being a negro or of negro blood, *Upton* v. *Times-Democrat Publishing Co.,* 104 La. 141 (1900), where by a typographical error a statement that the plaintiff was a "cultured gentleman" was printed to read a "colored gentleman"; *Flood* v. *News & Courier Co.,* 71 S. Car. 112 (1904); and in the days of negro slavery it was held in some cases that such statements were even slanderous without proof of special damage, *Eden* v. *Legare,* 1 Bay 171 (S. Car. 1791); *Dobard* v. *Nunez,* 6 La. Ann. 294 (1851); *contra, Barrett* v. *Jarvis,* 1 Tapp. 244, note (Ohio 1817); *Johnson* v. *Brown,* 4 Cranch C. C. 235 (D. C. 1833); *McDowell* v. *Bowles,* 53 N. Car. 184 (N. Car. 1860); *Williams* v. *Riddle,* 145 Ky. 459 (1911), 36 L. R. A. (N. S.) 974, with valuable note.

The relationship between two parties may be such that an accusation against the one necessarily affects the personal character of the other, *Vicars* v. *Worth,* 1 Strange 471 (1722), and *Hodgkins* v. *Corbet,* 1 Strange 545 (1723), where it was held that to call a married man a cuckold was tantamount to calling the wife a whore; *Maxwell* v. *Allison,* 11 S. & R. 343 (Pa. 1824), *semble; Huckle* v. *Reynolds,* 7 C. B. (N. S.) 114 (1859), accusation that the house of the plaintiff's wife was a bawdy-house was actionable,

SCHULTZ *v.* FRANKFORT MARINE, ACCIDENT & PLATE GLASS INSURANCE CO.

Supreme Court of Wisconsin, 1913. 151 *Wisconsin Reports,* 537.

The plaintiff brought an action of conspiracy against the Frankfort Insurance Co., the manager of the Riemer Detective Bureau, and against John Paczkowski, a detective in the employ of the said detective bureau, alleging conspiracy for the purpose of annoying, harassing and intimidating the plaintiff in order to get him to leave the city of Milwaukee and refrain from testifying as a witness in an action then pending against the insurance company. On the part of the plaintiff evidence was introduced tending to show that the insurance company employed the detective agency to shadow and watch the plaintiff. It was shown that the detective agency advised a rough and open shadowing of the plaintiff, and that this kind of shadowing was employed to the knowledge of all the defendants and with their consent. The evidence also tended to show that the defendant was openly and persistently followed by two detectives, who called the attention of all the plaintiff's neighbors to the fact that he was being watched, and who made themselves unnecessarily conspicuous in their surveillance of him.

TIMLIN, J.[1] Omitting for the present all alleged acts of trespass or eavesdropping and all alleged threats and slanderous words and all alleged restraint of plaintiff's liberty, is any personal right

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since, if true, he, as her husband, would be indictable as the keeper thereof; and see *Ryalls* v. *Leader,* L. R. 1 Exch. 296 (1866), defamatory statements as to the financial standing and conduct of the plaintiff's partner; but see Loring, J., in *Merrill* v. *Post Publishing Co.,* 197 Mass. 185 (1908), intimating that the plaintiff to recover must be mentioned by name. On the other hand no one has a right to sue for slander or libel defamatory of another whether living or dead, no matter how close the relationship between them, *Subbaiyar* v. *Kristnaiyar,* Ind. L. R. 1 Madras 383, brother suing for libel on living sister; *Sorensen* v. *Balaban,* 11 App. Div. (N. Y.) 164 (1896), mother suing for slanderous statements in regard to her deceased daughter. In *Merrill* v. *Post Publishing Co.,* 197 Mass. 185 (1908), it is however held that if the plaintiff's name is mentioned as the brother of the person falsely accused, he may maintain an action.

It is not necessary that the statement should impute personal misconduct to the plaintiff, so it is libelous to publish of a woman that she is illegitimate, *Shelby* v. *Sun Printing Co.,* 38 Hun 474 (N. Y. 1886), affirmed 109 N. Y. 611 (1886); *Maxwell* v. *Allison,* 11 S. & R. 343 (Pa. 1824), *semble,* to call one a bastard is actionable slander if damage be shown to have followed; but see *Rocky Mountain News Co.* v. *Fridborn,* 46 Colo. 440 (1909), a newspaper stated that the plaintiff, who had been ravished eight months before, had become a mother, the statement, though false, was held not to be libelous, but see the terms of the Colorado Statute defining libel.

As to what imputations are libelous, always a matter for the jury, see Odgers, 3rd Ed., 18 to 32; Townsend, 4th Ed., 203 to 221; 32 Am. Dig., Cent. Ed., 1855 to 1866. It is for the court to say whether the words are susceptible of a libelous construction, for the jury to say whether they are libelous.

[1] Only so much of the opinion is given as relates to the defamatory character of the defendant's conduct.

violated by openly and publicly following and watching one? To publish of and concerning a person words, pictures, or signs which have a tendency to bring the person into public disrepute or into public ridicule, contempt, and disesteem is an actionable wrong to his reputation. *Bradley* v. *Cramer,* 59 Wis. 309, 18 N. W. 268; *Moley* v. *Barager,* 77 Wis. 43, 45 N. W. 1082; *Solverson* v. *Peterson,* 64 Wis. 198, 25 N. W. 14; *Wandt* v. *Hearst's Chicago American,* 129 Wis. 419, 109 N. W. 70.[2] It can scarcely be doubted that the publication of a cartoon showing the plaintiff followed and watched by detectives, who pursue and watch him by day and stand guard on the sidewalk in front of his house at night, would, within the principle of the foregoing cases, be an actionable libel—an injury to plaintiff's reputation. How then can it be said that the acts which the picture represents, accompanied with equal publicity, do not constitute an injury to reputation? Can we say they are actionable when represented by picture but nonactionable when actually committed? It must be conceded to publicly proclaim one suspect, to publicly charge that he deserves watching and that he is being followed and watched, does subject him to public disrepute, ridicule, and contempt. If so, the acts here complained of are the analogue of libel except the writing, printing, and passing around. But these elements are supplied by the public, notorious, and continued character of the surveillance. We must hold that rough or open shadowing as here described and defined is an unlawful act resulting in legal injury to the reputation of the person who is the object of such attentions. Actual pursuit and public surveillance of person and home are suggestive of criminality fatal to public esteem and productive of public contempt or ridicule. So, without taking up the question of secret surveillance, which is not before us, we are impelled to hold that on this ground a case was made for the jury. A conspiracy to libel the plaintiff or to commit any other wrong to his person, reputation, or property may, when damage follows, be the subject of a civil action. *White* v. *White,* 140 Wis. 538, 122 N. W. 1051; *Jones* v. *Monson,* 137 Wis. 478, 119 N. W. 179; *Fisher* v. *Schuri,* 73 Wis. 370, 41 N. W. 527; *Smith* v. *Nippert,* 76 Wis. 86, 44 N. W. 846.[3]

[2] Any expression of defamatory imputations by pictures, caricatures, effigies or marks upon his house, is a libel, *Du Bost* v. *Beresford,* 2 Camp. 511 (1810); *Levi* v. *Milne,* 4 Bing. 195 (1827); see *Corelli* v. *Wall,* 22 Times L. R. 532 (1906), picture postcards of fictitious incidents in the life of a well-known novelist; *Monson* v. *Tussaud,* 1 Q. B. 671 (1894); *Jefferies* v. *Duncombe,* 11 East 226 (1809), lamp, such as is usual in front of brothels, placed in front of plaintiff's house; *Mortimer* v. *McCallan,* 6 M. & W. 58 (1840), per Abinger, C. B., p. 68; Case "De Libellis Famosis," 5 Coke 125 a (1605); *Steele* v. *Southwick,* 9 Johns. 214 (N. Y. 1812).

So there may be a slander by a wink, a nod, a smile, or any other transient gesture obviously calculated to convey a defamatory imputation, see Campbell, L. C., in *Walters* v. *Morgan,* 3 De G. F. & J. 718 (1861), p. 734, and Ellenborough, C. J., in 3 M. & S. 110 (1814), p. 114.

[3] See the cases of *Mingey* v. *Moody* and *Sir William Bolton* v. *Deane,* mentioned in *Austin* v. *Culpepper,* 2 Shower 313 (1684), one a case of "riding Skimmington", the other of "carrying a fellow about with horns and bowing at his (the plaintiff's) door"; see also the intervention of the Lord Chamberlain to prohibit actors "making up" as prominent public men, and Sir

SECTION 3.

Publication.

BRODERICK *v.* JAMES.

Court of Common Pleas City of New York, 1871. 3 *Daly's Common Pleas Reports,* 481.

DALY, C. J. The words relied upon as defamatory, were spoken by the defendant, Mrs. James, to the plaintiff, and there is nothing in the case to show that they were heard by any one but the plaintiff. We must assume, in accordance with the judge's finding, who was the one to judge of their respective credibility, that Mrs. James said what the plaintiff testified to. There being no evidence, however, that it was heard by any one, except the plaintiff, the point is presented, whether it was a publication. Being *res nova,* it is to be determined by ascertaining with some preciseness the nature of the injury, for which an action of this description will lie, and what is a publication, that being essential to the cause of action. (*Craft* v. *Boite,* 1 Saund. 242, n. 1.)

The foundation of the action for defamation, whether libel or slander, is an injury done to reputation; that is, that the person is injured thereby in the estimation of others (*Lyle* v. *Clason,* 1 Caines 583). It is said by March, the writer of the earliest English treatise on the law of defamation, that where a man's reputation, which is dearer to him than life, is endangered by scandalous words, the offender should be enforced by action to make composition (March on Actions of Slander, First Part, Edition of 1655, p. 4); a passage showing very plainly that it is the injury done to the reputation which is the ground of the action. Now, no injury is done to a person's reputation unless the offensive words are uttered to, or in the presence and hearing of, a third person, and it is this which the law calls a publication.

Before March's book was written, it was decided, in an action for oral defamation, that the averment for the cause of action must be, or the language used by the pleader must imply, that the words were spoken *in praesentia et auditu aliorum,* (*Taylor* v. *How,* Cro. Eliz. 861),[1] from which it follows that if uttered only to the party

Henry Irving's successful appeal to the criminal law to punish an offensive stage burlesque upon him—cited in Bower on Actionable Defamation, p. 23; and *Eyre* v. *Garlick,* 42 Justice of the Peace 68 (Eng. 1878), burning in effigy. As to whether such merely transient defamatory conduct should be deemed slander or libel, see Bower on Actionable Defamation, pp. 22-23.

[1] It was decided in that case that it was enough to aver that it was *in praesentia diversorum,* "for it shall be necessarily presumed that it was *in auditu,*" *acc., Brown* v. *Brashier,* 2 P. & W. 114 (Pa. 1830). It is not necessary that the speaker shall be in the sight of the auditor, it is enough that he being in another room hears the words "and knows who speaks, what he speaks and of whom he speaks", *Desmond* v. *Brown,* 33 Iowa 13 (1871).

himself, and not in the hearing of others, there is no publication; for no injury can arise thereby to the party's reputation, unless it is produced by his communicating to others that which was said respecting him. Indeed, the general word which is employed both for libel and slander, "defamation," is of itself sufficiently explanatory, being derived from two Latin words—*de*, of, and *fama*, the talk of the multitude.

In Hick's Case (Hob. 215), it was held that no action would lie for sending a sealed letter containing scandalous matter to the person to whom it applied, and to whom the letter was addressed, upon the ground that this was not a publication; though it was an act for which an indictment would lie, as tending to stir up strife, produce quarrels and lead to a breach of the peace, (*Rex* v. *Wegener*, 2 Starkie N. P. 245; 2 Hawkins' P. C. 356, § 11; March on Actions of Slander, 24). In *Philips* v. *Jansen* (2 Esp. R. 625), Lord Kenyon held that, to make a private letter a libel, it must be addressed to a third person, not to the party himself, and the letter in that case having been sent by the defendant to the plaintiff, the plaintiff was nonsuited.

It has frequently been held that if the words were uttered in a foreign language, in the presence and hearing of others, it is necessary to show that they understood the language, or otherwise there is no publication, or, to express it in the language of Hobart, "Slanderous words in Welsh bear no action, except you affirm that they were spoken in the hearing of them that understood the Welsh tongue." (*Fleetwood* v. *Curley*, Hob. Rep. 268a; *Gibs* v. *Jenkins*, Id. 191a; *Gibs* v. *Davie*, Id. 8; *Jones* v. *Davers*, Cro. Eliz. 496; *Wormouth* v. *Cramer*, 3 Wend. 394; *Amann* v. *Damm*, 8 Com. B. N. S. 597; Danver's Amb. 146, pp. 1, 2; Viner's Abm. Action for Words, A. G.)[2] These authorities show that to constitute a publication in an action for oral defamation, the words must be heard and understood by some person other than the one to whom they were addressed. There was no proof in this case that the words were heard by any one but the plaintiff, and the judgment should, therefore, have been given for the defendant.[3]

ADAMS *v.* LAWSON.

Court of Appeals of Virginia, 1867. 17 *Grattan* 250.

JOYNES, J. The next question is, whether the evidence set forth in the first bill of exceptions was properly admitted. After proving that the defendant delivered the letter to a witness, folded up and

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[2] *Accord: Price* v. *Jenkings*, Cro. Eliz. 865 (1591); *Kiene* v. *Ruff*, 1 Iowa 482 (1855); *Rich* v. *Scalio*, 115 Ill. App. 166 (1904); *Mielenz* v. *Quasdorf*, 68 Iowa 726 (1886). But the presumption is that a local newspaper printed in a foreign language is understood by its local readers, *Steketee* v. *Kimm*, 48 Mich. 322 (1882), though in *Price* v. *Jenkings*, Cro. Eliz. 865 (1591), the court did not presume that residents of Monmouthshire, originally a part of Wales, understood Welsh.

[3] *Accord: Frank* v. *Kaminsky*, 109 Ill. 26 (1884); *Sheffill* v. *Van Deu-*

sealed, and requested him to deliver it to the plaintiff, which he did; and after the letter had been read to the jury, the plaintiff introduced another witness, who testified that the defendant stated to him, in the presence of other persons, that he had sent a letter to the plaintiff; that he had got Thomas B. Woolwine to write the letter for him, and that he (the defendant) had signed his own name to it, and kept a copy; and that the defendant, at the same time, stated to the witness the contents of the letter, but without producing it, or a copy of it. Evidence was introduced tending to show that the letter thus referred to was the one on which the action is founded.

This evidence was, of course, offered to prove the publication of the libel, and the question is whether it was admissible for that purpose. To constitute a publication it is not necessary that the contents of the writing should be made known to the public generally. It is enough, it is said, if they are made known to a single person. Holroyd, J., 6 Eng. C. L. R. 375. They were made known to Woolwine, who wrote the letter at the request of the defendant. The defendant adopted and sanctioned what Woolwine wrote at his instance and request, and if the defendant's signature to the letter was necessary to render the act complete, there was evidence from which the jury might have inferred that the signature was attached in the presence of Woolwine. My impression is that there was a sufficient publication to Woolwine stated in this evidence to maintain the action. The subsequent repetition of the contents of the letter was undoubtedly a publication. In the case *de libellis famosis*, 5 Rep. 125, it is said that publication may be "*verbis aut cantilenis*, as when the libel is maliciously repeated or sung in the presence of others." In Lamb's case, 9 Rep. 59, it is said, that if any one who has read a libel, or heard it read, repeats it, or any part of it, in the hearing of others, that is a publication.[1] In Bac. Abr. Libel B. this is laid down as undisputed law. The court did not err, therefore, in receiving the evidence.[2]

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sen, 13 Gray 304 (Mass. 1859); *Comerford* v. *West End R. Co.*, 164 Mass. 13 (1895).

[1] To call attention to a libelous placard written by another has been held publication, *Hird* v. *Wood*, 38 Sol. Journ. 234 (Eng. 1894).

[2] The same rule applies in slander, *Marble* v. *Chapin*, 132 Mass. 225 (1882), and it is immaterial that the auditor knows the words to be false, being in fact the woman with whom the defendant accused the plaintiff of having committed adultery, *Marble* v. *Chapin*, 132 Mass. 225 (1882), or are members of the plaintiff's family, *Miller* v. *Johnson*, 79 Ill. 58 (1875). In *Hammond* v. *Stewart*, 72 Ill. App. 512 (1897), it was held a publication to call a woman "a whore" in the presence of her children, all under six years of age.

To address a letter or to speak to a wife words defamatory of her husband is sufficient publication, *Wenman* v. *Ash*, 13 C. B. 836 (1853); such an act "is an attempt to poison the fountain of domestic peace, conjugal affection and filial obedience at its very source", *Schenck* v. *Schenck*, 20 N. J. L. 208 (1843); *Wilcox* v. *Moon*, 61 Vt. 484 (1889); *Luick* v. *Driscoll*, 13 Ind. App. 279 (1895), and though there are no decisions in point, a similar communication to a husband in regard to his wife would seem equally a publication, though see Jervis, C. J., in *Wenman* v. *Ash*, 13 C. B. 836 (1853). On the other hand for a defendant to communicate to her husband or his wife matter

THOMAS M. RUMNEY *v.* DANIEL E. WORTHLEY.

Supreme Judicial Court of Massachusetts, 1905. 186 *Massachusetts Reports* 144.

KNOWLTON, C. J. The only question reserved in this report is whether there was any evidence of publication of the libels, or either of them, contained in the two letters addressed by the defendant to the plaintiff. These letters were sent by mail in the ordinary way, addressed to the plaintiff at No. 12 Burtt Street, Lowell, which was his place of residence. His wife conducted a grocery store which was attached to the dwelling-house at No. 14 Burtt Street, she having filed a certificate, under the provisions of the Pub. Sts. chap. 147, § 11, that she was doing business as a married woman. The plaintiff acted as her agent in conducting the business, and his daughter, twenty-three years of age, was a clerk in the store.

Sending a libellous letter through the mail to the person libelled, with no reason to suppose that it will be opened and read by any one else before he has received and read it, is not a publication which will support a civil action for libel. *Clutterbuck* v. *Chaffers*, 1 Stark. 471. *Delacroix* v. *Thevenot*, 2 Stark. 63. *Robinson* v. *Jones*, 4 L. R. (Ir.) 391. *Fonville* v. *M'Nease*, Dudley (S. Car.) 303. *Fry* v. *McCord*, 95 Tenn. 678. *Sylvis* v. *Miller*, 96 Tenn. 94. *Spaits* v. *Poundstone*, 87 Ind. 522. *McIntosh* v. *Matherly*, 9 B. Mon. 119. *Warnock* v. *Mitchell*, 43 Fed. 428. In criminal prosecutions for libel, the rule is generally held differently. The ques-

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defamatory to the plaintiff is not a publication, either because such communications are sacred, per Manisty, J., in *Wennhak* v. *Morgan*, L. R. 20 Q. B. D. 635 (1888); *Sesler* v. *Montgomery*, 78 Cal. 486 (1889), or because the two are regarded in law as one person. In *State* v. *Shoemaker*, 101 N. Car. 690 (1888), was held that this did not hold when the words were not spoken in confidence between the two but were addressed in a loud tone to a third party by the one in the presence of the other; and see *Jones* v. *Thomas*, 34 W. R. 104.

Where a letter-press copy is made by a copying clerk, which is a purely mechanical process, there is not necessarily any publication, it depends upon whether the clerk knew the contents, Odgers on Libel and Slander, 3rd ed. 174; *Western Union Tel. Co.* v. *Cashman*, 149 Fed. 367 (1906), *semble*. On the other hand dictation to a stenographer is held to be a publication in *Pullman* v. *Hill*, L. R. 1891, 1 Q. B. D. 524; *Gambrill* v. *Schooley*, 93 Md. 48 (1901); and *Ferdon* v. *Dickens*, 161 Ala. 181 (1909), p. 187, *semble*; but see *Owen* v. *Ogilvie Pub. Co.*, 32 App. Div. (N. Y.) 465 (1895), where it was held that a dictation by the general manager of a corporation to a stenographer employed by it of a libelous letter in reference to business, was not a publication by the corporation, since the two were but servants jointly engaged in the single act of producing the letter.

The writing of a telegraphic message and its delivery to a telegraph clerk for transmission is a publication. *Williamson* v. *Freer*, L. R. 9 C. P. 393 (1874); *Peterson* v. *Western Union Tel. Co.*, 65 Minn. 18 (1896), 72 Minn. 41 (1898), even though the transmission is by ear; *Monson* v. *Lathrop*, 96 Wis. 386 (1897); or sending a post-card, *Robinson* v. *Jones*, 4 L. R. Ir. 391 (1879), or having defamatory matter printed, though it never be distributed, since the compositor must read it; *Baldwin* v. *Elphinstone*, 2 W. Bl. 1037 (1775).

tion in this case is whether there was any evidence which would have warranted the jury in finding that the defendant believed or had good reason to believe, that the letters might be opened and read by the plaintiff's daughter in his absence, and that she was authorized to open her father's letters. The question of difficulty is whether there was evidence that the defendant was aware that she was accustomed or authorized to read such letters, addressed to her father. On this point the testimony is very unsatisfactory. She testified that she had known the defendant for five years; that he came to the store a great many times for the purpose of selling goods; that during the year immediately prior to the receipt of these letters he had seen her at least two or three times receive mail addressed to her father and open it in his presence; that she knew this had happened several times; and that she could not state the exact number of times; that he had seen her, after opening the letters, walk with them to her father and show him the contents of them. Without repeating her testimony on this point, which was of considerable length, we are of opinion that the jury fairly might have inferred from it that, as clerk in the store which was owned by her mother and conducted by her father, she was accustomed to open letters addressed to him, at least if they looked like letters pertaining to the business, and that the defendant knew it. Printed on the face of the libellous letters were these words: "In five days return to D. E. Worthley, 27 Canada Street, Lowell, Mass." This was the defendant's business address. We infer that the letters appeared externally like the ordinary business letters of the defendant. We do not attach much importance to the fact that they were addressed to No. 12 Burtt Street instead of No. 14 Burtt Street, for the dwelling-house and store were connected. If the case stood upon the testimony in direct examination, we should think the jury well might infer knowledge on the part of the defendant that the plaintiff's daughter was accustomed to open letters which looked like these, and, with considerable hesitation, we are inclined to think that the cross-examination, taken in connection with the direct examination, would warrant the jury in coming to the same conclusion. If he sent the letters, having good reason to believe that they were likely to be opened by an authorized person other than the plaintiff, his sending them by mail was a publication.[1]

Verdict set aside.

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[1] *Accord: Delacroix* v. *Thevenot*, 2 Stark. 56 (1817), letter addressed to plaintiff's business address and not marked private opened by his clerk; *Pullman* v. *Hill*, L. R. 1891, 1 Q. B. D. 524, letter addressed to plaintiffs as a firm instead of as individuals opened by a clerk; *Allen* v. *Wortham*, 89 Ky. 485 (1890), letters written to persons known to be illiterate, read for them by others; *Schmuck* v. *Hill*, 2 Nebr. (Unof.) 79, 96 N. W. 158 (1901), see also, *Thorley* v. *Kerry*, *ante*. But the author of a libel is not answerable for its dissemination by others without his consent, *Weir* v. *Hoss*, 6 Ala. 881 (1844); nor for publicity given to it by the plaintiff after he receives it, *Barrow* v. *Lewellin*, Hob. 62 (1615); *Fonville* v. *McNease*, Dudley 303 (S. Car. 1838), though the defendant may have recklessly thrown the letter into a vacant lot; *Wilcox* v. *Moon*, 64 Vt. 484 (1889), letter addressed to husband, opened by him and read by himself and wife together.

The case of *Callan* v. *Gaylord*, 3 Watts 321 (Pa. 1834), intimates that

FOX *v.* BRODERICK.

Court of Queen's Bench of Ireland, 1864. 14 *Ir. C. L. R.* 453.

FITZGERALD, B.

Action of libel. The defendants wrote to the plaintiff a letter containing defamatory statements. By mistake it was addressed to and opened and read by one Keevil.

A defence pleaded to the action, states certain facts by which the defendant was induced to believe, and did believe, the truth of the charge. It avers that the publication complained of was in the form of a letter, written by the defendant, and intended by the defendant to be transmitted through the post to the plaintiff only, and to be read by him only. That the letter was written bona fide for the sole purpose of enforcing a settlement or explanation from the plaintiff. That it was published on the honest and bona fide belief of the truth of the charge, and without malice. That the letter when written was enclosed in an envelope securely sealed, and so that it could not be read without forcing open the envelope. That the defendant unwittingly, and by honest oversight and mistake, and not otherwise, instead of directing the letter to the plaintiff at Keevil's address, directed it to Keevil at such address, and so posted it. That the error so committed was an honest and bona fide mistake or oversight of the defendant, and was not made nor occasioned designedly, or from or by reason of any indirect motive or design, or wilful neglect or default of the defendants. That the publication complained of was the delivery, through the Post-Office, to Keevil of the letter intended for the plaintiff solely, but so erroneously addressed to Keevil, by whom it was opened.

There is then an averment, that the mistake committed by the defendant was not discovered by him till after the letter had been so delivered and published.

To this defence there is a demurrer, and the question for our consideration is, whether the pleading can be sustained.

The decision of Lord Campbell, in the case of *Harrison* v. *Bush* (5 B. & E. 344), was also referred to, on which that learned judge declines to express any opinion whether or not an action could be sustained, if one, asked by letter for the character of a servant, should bona fide write an answer, stating acts of dishonesty and immorality committed by the servant, and, by mistake, address it to another person different from the inquirer, although of the same name.

I am of the opinion that the defendant's pleading cannot be sustained.

The vice of the defendant's argument appears to me to consist

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one who posts a libelous letter to one other than the plaintiff is liable no matter who takes it out and gives it publicity; if the defendant throws a libelous letter, though sealed, into a vacant lot he would be liable if the curiosity of the finder led him to open it; *Fonville* v. *McNease*, Dudley 303 (S. Car. 1838), p. 312, per Richardson, J.

in supposing, either that a voluntary and intentional publication of defamatory matter, to the party defamed alone, is not a publication from which malice may be inferred, because no civil action can be sustained on it, or that the publication to such party alone is a privileged communication.

The matter contained in the letter in question is admittedly defamatory; its publication to the plaintiff was admittedly intended; and with that view the defendant voluntarily and intentionally parted with the possession of the letter and put it out of his own control. Had the publication taken place in the mode intended, the legal inference of malice would, in my opinion, have arisen as in a criminal prosecution for a libel so published; and the only reason why a civil action could not be sustained is, that such malicious publication would have no tendency to injure the plaintiff's reputation. But the defendant, where his voluntary and malicious act in parting with the possession of the letter is so done, though by accident, as to have that tendency, cannot rely, as rebutting malice, on the absence of intention to give the plaintiff a remedy by civil action.

Again, it is wholly a mistake to suppose that the voluntary publication of defamatory matter, to the party defamed only, is a privileged communication, though it may give no right of civil action, for it may be made a subject of criminal prosecution.

In the case of the *King* v. *Paine,* supposing it correctly reported, the uttering or parting with the possession of the defamatory writing was not voluntary or intentional on the part of the writer; he never intended to put it out of his own control at all.

In the case supposed by Lord Campbell, and in which he expresses no opinion, the occasion of publication would have been a privileged one; and, but for the mistake, the legal inference of malice would have been rebutted.

In the case before us, the publication intended would not have been privileged; and even, though there had been no mistake, the legal inference of malice would have arisen; and what the defendant really relies on is the absence of intention to give the plaintiff a civil remedy for his malicious act.

In my opinion, that cannot avail him; and I think therefore that the demurrer ought to be allowed. I abstain from expressing my opinion on points of form merely.

Hughes, B., concurred.

(a) Repetition and dissemination of defamatory statements of others.

McPHERSON *v.* DANIELS.

Court of Kings Bench, 1829. 10 *Barnewall & Cresswell's Rep.* 263.

An action of slander for imputing that the plaintiff was insolvent. The defendant pleaded that one T. W. Woor had previously spoken the said words and that when he, the defendant, spoke them,

he stated that he had heard and been told them from and by the said Woor. General demurrer and joinder.

LITTLEDALE, J. For the reasons already given by my Brother *Bayley*,[1] I think that the plea is bad; but with reference to the resolution in Lord *Northampton's* case, I will say a few words. That resolution has been frequently referred to within the last thirty years, and though not expressly overruled has been generally disapproved of. The latter part of that resolution is extrajudicial, for it was not necessary to come to any resolution respecting private slander in the Star Chamber. It is somewhat inconsistent with the third resolution, where it is laid down, "that if one hear false and horrible rumors, either of the king or of any of the grandees, it is not lawful for him to relate to others that he heard J. S. say such false and horrible words, for if it should be lawful, by this means *they may be published generally.*" It was resolved then, that in the case of scandalum magnatum it was not lawful to repeat slander, because, if it was, it might circulate generally. Now the same inconvenience, viz. the general publication of slander, though differing in degree, would follow from the repetition of slander in either case. The fourth resolution, however, in terms, perhaps does not go the length of saying that a defendant may justify the repetition of slander generally, but only that he may justify under certain circumstances. Assuming that it imports that a defendant may justify the repetition of slander generally, by shewing that he named his original author, I think that it is not law.

The declaration, which contains a technical statement of the facts necessary to support the action, alleges that the defendant falsely and maliciously published the slander to the plaintiff's damage. In order to maintain such an action, there must be malice in the defendant and a damage to the plaintiff, and the words must be untrue. Where words, falsely and maliciously spoken, as in this case, are actionable in themselves, the law prima facie presumes a consequent damage without proof. In other cases actual damage must be proved. To constitute a good defence, therefore, to such an action, where the publication of the slander is not intended to be denied, the defendant must negative the charge of malice (which in its legal sense denotes a wrongful act done intentionally without just cause or excuse), or shew that the plaintiff is not entitled to recover damages. For the law will not permit a man to recover damages in respect of an injury to a character which he either does not, or ought not, to possess. Now, a defendant, by shewing that he stated at the time when he published slanderous matter of a plaintiff, that he heard it from a third person does not negative the charge of malice, for a man may wrongfully and maliciously repeat that which another person may have uttered upon a justifiable occasion. Such a plea does not show that the slander was published on an occasion, or under circumstances which the law, on grounds of public policy, allows. Nor does it show that the

[1] The opinion of Bayley, J., is omitted, as is a large part of that of Parke, J.

plaintiff has not sustained, or is not entitled in a court of law to recover, damages. As great an injury may accrue from the wrongful repetition, as from the first publication of slander, the first utterer may have been a person insane, or of bad character. The person who repeats it gives greater weight to the slander. A party is not the less entitled to recover damages in a court of law for injurious matter published concerning him, because another person previously published it. That shews not that the plaintiff has been guilty of any misconduct which renders it unfit that he should recover damages in a court of law, but that he has been wronged by another person as well as the defendant; and may, consequently, if the slander was not published by the first utterer on a lawful occasion, have an action for damages against that person as well as the defendant. It seems to me, therefore, that such a plea is not an answer to an action for slander, because it does not negative the charge of malice, nor does it shew that the plaintiff is not entitled to recover damages.

PARKE, J. I am of opinion that the latter part of the fourth resolution in Lord *Northampton's* case cannot be law. In the first place, the 12 Rep. is not a book of any great authority. It is said by Mr. *Hargrave,* 11 St. Tr. 30, to be of small authority, being not only posthumous, but apparently nothing more than a collection from papers neither digested nor intended for the press by the writer. And Mr. Serjeant *Hill,* in his copy refers to fo. 18, 19, as showing that the 12 Rep. was not fit to be allowed. And *Holroyd,* J., in *Lewis* v. *Walter,* 4 B. & A. 614, gives an opinion unfavorable to its accuracy. It is to be observed also, that the expressions used in the fourth resolution are equivocal. It is not said in distinct terms, that if the defendant gives a cause of action against another, it will in all cases be an answer to an action for slander: and if it be taken to import a general position, that the repetition of slander is universally lawful, if the party at the time he repeats it mentions the name of the author, I think, that upon no principle can such a position be supported, nor can any satisfactory distinction be made in this respect between oral and written slander. A man's reputation is entitled to the protection of the law, against those slanders which it considers to be injurious; and as every one who publishes such a slander injures that reputation, he is guilty of a wrongful act, and upon principle is liable in a civil action for any damage arising to another by reason of that wrongful act. I agree with what is said by Lord Chief Justice *Best* in *De Crespigny* v. *Wellesley,* 5 Bingh. 404; "because one man does an unlawful act to any person another is not to be permitted to do a similar act to the same person. Wrong is not to be justified, or even excused, by wrong." A man does a wrong by, and is therefore liable to an action for, every repetition of slander; and if that be so, is the repeating of the slander less a wrong because the person who repeats it is not the same who first uttered it? There may be a great difference in the degree of injury committed, arising from the character or condition of the party who utters the slander, or the number of persons in whose presence it

is uttered. The person who first uttered the slander may be a person of no character, or may have been in a state of intoxication at the time when he uttered it. Slander uttered by such a person, or under such circumstances, would not receive much attention; but if a person of good character, and in a sound state of mind, were afterwards to repeat that slander, he would thereby not only circulate it more widely, but he would give credit to it by the mere repetition of it, although he stated at the time that he heard it from another. Every wrong to property is the subject of a civil action. Upon what principle can it then be said that a wrong done to the good name and reputation of another is not equally so? It is clear that a wrong to property cannot be justified by alleging that another person has before committed a similar wrong. In this case, too, the plaintiff alleges, that in consequence of the words spoken by the defendant, he sustained a special damage, by the loss of a customer, and non constat, that any such special damage would have arisen from the words originally spoken if they had not been repeated by the defendant. It is therefore clear that the plea is bad, and the judgment of the court must be for the plaintiff.

Judgment for plaintiff.[2]

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[2] *Accord: Kenney* v. *McLaughlen*, 71 Mass. 3 (1855), the defendant did not express disbelief in the story which he repeated; *Burt* v. *McBain*, 29 Mich. 260 (1874), the defendant held liable though he stated that he did not believe the story he repeated (as to this see *Bishop* v. *Journal Co.*, 168 Mass. 327 (1897), an action of libel); *Haines* v. *Welling*, 7 Ohio 253 (1835); *Fowler* v. *Chichester*, 26 Ohio St. 9 (1874); *Skinner* v. *Grant*, 12 Vt. 456 (1840); all actions of slander.

Probably by analogy to the Statutes *De Scandalo Magnatum*, 3 Edw. I, Stat. Weston, 1 cap. 34 to 12 Rich. II, cap. 11, which provided that one "telling false news" concerning any "magnate" should be imprisoned till he disclosed "the first author of the tale", it was held in Lord Northampton's Case, 12 Coke Rep. 132, that the revelation of the original source of the scandal was a good plea in justification in an action of either libel or slander. As to the authority of the 12th part of Coke's Reports, see the criticisms of all the justices, especially Parke and Littledale, in *McPherson* v. *Daniels*. But departing from the analogy of the above statute, it was held that the name of the author must be given at the time of repetition and not afterwards, *Davis* v. *Lewis*, 7 T. R. 17 (1796). Again, the words must have been so accurately repeated that a good declaration against the author could be framed upon them and must have been stated to have been spoken maliciously and not under circumstances which would make them privileged, *Maitland* v. *Goldney*, 2 East 426 (1802); see *Johnson* v. *St. Louis Despatch Co.*, 65 Mo. 539 (1877). The rule in Lord Northampton's Case was repudiated as to libel in *De Crespigny* v. *Wellesley*, 5 Bing. 392 (Feb. 9, 1829), and as to slander in the principal case decided in the Michaelmas Term of the same year.

While American cases universally held that one publishing written defamation could not escape liability by giving, even at the time of publication, the name of the author of the scandal, *Dole* v. *Lyon*, 10 Johns. 447 (N. Y. 1813); *Johnston* v. *Lance*, 7 Ire. 448 (N. Car. 1847); *Haynes* v. *Leland*, 29 Maine 233 (1848); *Schenck* v. *Schenck*, 20 N. J. L. 208 (1843); *Folwell* v. *Providence Journal*, 19 R. I. 551 (1896): *Sans* v. *Joerris*, 14 Wis. 663 (1861); in many American jurisdictions the rule was otherwise in actions of slander for spoken repetitions of defamatory matter, apparently owing to the influence of Starkie on Slander, published in 1813, and so laying down the English law as it was before *McPherson* v. *Daniels;* see the cases cited *supra*, *Binns* v. *McCorkle*, 2 Browne 79 (1811 Pa., Dist. Ct. of Phila.); *Cummer-*

VIZETELLY *v.* MUDIE'S SELECT LIBRARY.

Court of Appeals, 1900. *L. R.* 1900 2 *Q. B.* 170.

APPLICATION for judgment or a new trial in an action tried before Grantham, J., with a jury.

A. L. SMITH, L. J. The action was for a libel contained in a book, copies of which had been circulated and sold by the defendants, who were the proprietors of a circulating library with a very extensive business. The defendants in their defence stated that, if they sold or lent the book in question, they did so without negligence, and in the ordinary course of their business as a large circulating library; that they did not know, nor ought they to have known, that it contained the libel complained of; that they did not know and had no ground for supposing that it was likely to contain libellous matter; and that under the circumstances so stated they contended that they did not publish the libel.

What are the special circumstances of this case with regard to the question whether the defendants took due and reasonable care in the conduct of their business in this respect? It appears from the evidence of Mr. Mudie, one of the defendant's directors, that there was no one in the establishment to exercise any supervision over the books besides himself and his co-director, and the books were too numerous for them to examine to see if they contained libels. He admitted that they had had books on one or two occasions which contained libels, but they had never before had an action brought against them for libel, and that they did not employ readers because it was cheaper for them to run the risk, i. e., of publishing

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ford v. *McAvoy,* 15 Ill. 311 (1853); *Church* v. *Bridgman,* 6 Mo. 190 (1839); *Trabue* v. *Mays,* 3 Dana 138 (Ky. 1835); *Miller* v. *Kerr,* 2 McCord 285 (S. Car. 1822); *Kelley* v. *Dillon,* 5 Ind. 426 (1854); *Tatlow* v. *Jacquett,* 1 Harr. 333 (Del. 1834).

In *Johnson* v. *Lance,* 7 Ire. 448 (N. Car. 1847), the repetition is held only justified if the defendant does not add his own credit or affirm his own belief; in *Haynes* v. *Leland,* 29 Maine 233 (1848); *Church* v. *Bridgeman,* 6 Mo. 190 (1839); *Cummerford* v. *McAvoy,* 15 Ill. 311 (1853), and *Miller* v. *Kerr,* 2 McCord 285 (S. Car. 1822), the *"quo animo"* of the defendant determines his liability. The *"animus"* in question is indicated in *Haynes* v. *Leland* to be an intention to injure, the immunity being granted only to one who for "purposes necessary to society without affirmation of the fact states what he has heard from another"; as so put this seems hardly more than a statement that the repetition of a scandal may, if the occasion be proper, be a "privileged communication"; see *Jarnigan* v. *Fleming,* 43 Miss. 710 (1871).

In many of these jurisdictions the later cases have followed the rule in the principal case; *Hotchkiss* v. *Oliphant,* 2 Hill 510 (N. Y. 1842); *Smith* v. *Stewart,* 5 Pa. St. 372 (1847); *Stepp* v. *Croft,* 18 Pa. Super. Ct. 101 (1901); *Nicholson* v. *Rust,* 21 Ky. L. 645 (1899); *Cates* v. *Kellogg,* 9 Ind. 506 (1857).

In all jurisdictions it is held that spoken or written repetitions of anonymous or general rumors are actionable, *Walkin* v. *Hall,* L. R. 3 A. B. 396 (1868); *Republican Pub. Co.* v. *Miner,* 3 Colo. App. 568 (1893); *Wheeler* v. *Shields,* 2 Scammon 348 (1840); *Hampton* v. *Wilson,* 15 N. Car. 468 (1834), even though the defendant says at the time that he does not believe the rumor which he spreads, *Finch* v. *Finch,* 21 S. Car. 342 (1884).

libels and being sued for those libels, of having actions brought against them, than to do so. Is it surprising that, after admissions of this kind, a jury should come to the conclusion that the defendants did not exercise due care to see that the books circulated by them did not contain libels, and that they did not get from the jury findings such as those in *Emmens* v. *Pottle?* It seems to me that out of the mouth of Mr. Mudie there was sufficient evidence to justify the jury in coming to the conclusion that the defendants had failed to prove their defence, and that it was through negligence on their part that they did not find out that the book contained a libel on the plaintiff.

ROMER, L. J. The law of libel is in some respects a very hard one. In the remarks which I am about to make I propose to deal only with communications which are not privileged. For many years it has been well settled law that a man who publishes a libel is liable to an action, although he is really innocent in the matter, and guilty of no negligence. That rule has been so long established as to be incapable of being altered or modified, and the courts, in endeavoring to mitigate the hardship resulting from it in many cases, have only been able to do so by holding that, under the circumstances of cases before them, there had been no publication of the libel by the defendant. The result, in my opinion, has been that the decisions on the subject have not been altogether logical or satisfactory on principle. The decisions in some of the earlier cases with which the courts had to deal are easy to understand. Those were cases in which mere carriers of documents containing libels, who had nothing to do with and were ignorant of the contents of what they carried, have been held not to have published libels.[1] Then we have the case of *Emmens* v. *Pottle,* in which vendors of newspapers in the ordinary course of their business sold a newspaper which contained a libel. It was clear that selling a document which contained a libel was prima facie a publication of it, but the Court there held that there was no publication of the libel under the circumstances which appeared from the special findings of the jury, those findings being (1) that the defendants did not know that the newspapers at the

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[1] L. R. 16 Q. B. D. 354 (1885). So the carriage and delivery of a sealed, libelous letter in ignorance of its contents is not a publication, *Layton* v. *Harris,* 3 Harrington 406 (Del. 1842), but even in such case, one so acting is *prima facie* liable and is called upon to show his ignorance of the contents, *Day* v. *Bream,* 2 Moody & Rob. 54 (1837); and see *Chubb* v. *Flannagan,* 6 C. & P. 431 (1834).

A telegraph company which receives and transmits a libelous telegram is not guilty of publishing the same if the message on its face does not indicate to a person of ordinary intelligence that it is defamatory, *Nye* v. *Western Union Tel. Co.,* 104 Fed. 628 (1900); *Stockham* v. *Western Union Tel. Co.,* 10 Kans. App. 580 (1901); *Grisham* v. *Western Union Tel. Co.,* 238 Mo. 480 (1911), *aliter* when the message is manifestly libelous on its face; *Peterson* v. *Western Union Tel. Co.,* 65 Minn. 18 (1896), 72 Minn. 41 (1898); *Gt. N. W. Tel. Co.* v. *Archambault,* 30 Lower Canada Jur. 221 (1886); *Whitfield* v. *S. E. R. Co.,* Ellis, B. & E. 115 (1858); *Dominion Tel. Co.* v. *Silver,* 10 Can. S. C. 238 (1882); but see *Western Union Tel. Co.* v. *Cashman,* 149 Fed. 367 (C. C. A. 1906).

time they sold them contained libels on the plaintiff; (2) that it was not by negligence on the defendants' part that they did not know that there was any libel in the newspapers; and (3) that the defendants did not know that the newspaper was of such a character that it was likely to contain libellous matter, nor ought they to have known so. Lord Esher, M. R., in this Court was of opinion that, though the vendors of the newspapers, when they sold them, were prima facie publishers of the libel, yet, when the special findings of the jury were looked at, the result was that there was no publication of the libel by the defendants. Bowen, L. J., put his judgment on the ground that the vendors of the newspapers in that case were really only in the same position as an ordinary carrier of a work containing a libel. That case was followed by other cases, more or less similar to it, namely, *Ridgway* v. *Smith & Son*, *Mallon* v. *W. H. Smith & Son*, and *Martin* v. *Trustees of the British Museum*. The result of the cases is I think that, as regards a person who is not the printer or the first or main publisher of a work which contains a libel, but has only taken, what I may call, a subordinate part in disseminating it, in considering whether there has been publication of it by him, the particular circumstances under which he disseminated the work must be considered. If he did it in the ordinary way of his business, the nature of the business and the way in which it was conducted must be looked at; and, if he succeeds in shewing (1) that he was innocent of any knowledge of the libel contained in the work disseminated by him, (2) that there was nothing in the work or the circumstances under which it came to him or was disseminated by him which ought to have led him to suppose that it contained a libel, and (3) that, when the work was disseminated by him, it was not by any negligence on his part that he did not know that it contained the libel, then, although the dissemination of the work by him was prima facie publication of it, he may nevertheless, on proof of the before-mentioned facts, be held not to have published it. But the onus of proving such facts lies on him, and the question of publication or non-publication is in such a case one for the jury. Applying this view of the law to the present case, it appears to me that the jury looking at all the circumstances of the case, have in effect found that the defendants published the libel complained of, and therefore the defendants are liable, unless that verdict is disturbed. Looking at the special circumstances of the case which were brought to the attention of the jury, I cannot say that they could not reasonably find as they did. The only remaining question is whether the summing-up and direction of the learned judge were such as would justify us in sending down the case for a new trial. I find no misdirection in point of law, and though, with great respect to the learned judge, I do not think that all he said was correct, or justified by the evidence, the jury had the facts fully put before them, and on the whole I do not think that there was anything in the summing-up which caused the jury to come to an erroneous conclusion, or which would justify us

in granting a new trial. For these reasons I think the application must be dismissed.

Application dismissed.[2]

(b) Publication of defamatory truths.

CASTLE *v.* HOUSTON.

Supreme Court of Kansas, 1877. 19 *Kansas Reports* 417.

Action to recover damages for libel. The defendant set up for a defense *inter alia* the truth of the facts stated in the alleged libelous publication.

The trial court instructed the jury as follows:

"The fact of the language being true, is not alone an answer to the charge, but can only be shown in mitigation of damages.

"It is not a defense simply to show the truth of the matter published, but the party must go further, and show that it was not only true, but that he acted with good motives and for a justifiable end, and that he had some purpose in view that was justifiable. If that be the case, if he acts honestly for good purposes and for justifiable ends, and what he says is true, then he is to be excused or acquitted."

The jury found a verdict for the plaintiff for $1,250. Upon the defendant's motion a new trial was granted on the ground that the court erred in giving the above instructions to the jury. The plaintiff excepted, and brought this appeal.

HORTON, C. J. It was at one time the rule of the common law, that the truth of the charge, however honorable and praiseworthy the motives of the publisher, could not be given in evidence in a criminal prosecution. Hence originated the familiar maxim, "The greater the truth the greater the libel." This doctrine was based upon the theory, that where it was honestly believed a particular person had committed a crime, it was the duty of him who so believed or so knew, to cause the offender to be prosecuted and brought to justice, as in a settled state of government a party grieved ought to complain for an injury to the settled course of

[2] *Accord:* Clerk in book-stand selling copy of a newspaper containing a libel, held bound to show ignorance of its contents, *Staub* v. *Van Benthuysen*, 36 La. Ann. 467 (1884). In *Morrison* v. *Ritchie*, 39 Scottish Law Reports 432 (1902), 4 Session Cases 5th Series, 645 *semble*, Lord Moncreiff adopting the view of Romer, J., that this only applies to the vendor or disseminater of libelous publications and not to the publisher and printer, holding that the publishers and proprietors of a paper were liable for an advertisement which by reason of facts unknown to them was defamatory, a note of the birth of twin sons to a couple married only a month before. Every sale is a fresh publication. *Staub* v. *Van Benthuysen*, 36 La. Ann. 467 (1884); *Bigelow* v. *Sprague*, 140 Mass. 425 (1886); *Duke of Brunswick* v. *Harmer*, 14 Q. B. 185 (1849), and this though the sale is after the statute of limitations has run against the original publication.

law; and to neglect this duty, and publish the offense to the world, thereby bringing the party published into disgrace or ridicule, without an opportunity to show by the judgment of a court that he was innocent, was libelous; and if the matter charged was in fact true, (thereby insuring social ostracism,) the injury caused by the publication was much greater than where the publication was false. A false publication, it was contended, could be explained and exposed; a true one was difficult to explain away. As an additional reason for this rule, it was also held that such publications, even if true, were provocative of breaches of the peace, and the greater the truth contained therein the greater the liability of hostile meetings therefrom.

While the rule of the common law, as generally applied, was so exacting and rigorous to the defense of justification in criminal prosecutions for libel, a different doctrine was applicable in civil cases. In the case of *King* v. *Root*, 4 Wend. 114, 139, Chancellor Walworth clearly states this difference as follows: "The difficulty which existed in England, previous to Mr. Fox's libel act, was, that in criminal prosecutions the defendant was not permitted to give the truth in evidence; and yet the jury was required to imply malice. But in civil cases, the defendant was permitted to give the truth in evidence as a full justification. Such was declared to be the law by the judges at the time that bill was under discussion in parliament, and there never has been any alteration of the law in England on this subject in civil suits." The case of *King* v. *Root, supra,* was originally tried at one of the circuits in New York before Hon. Samuel R. Betts. The defendants, King and Verplanck, were editors of the New York American, printed in the city of New York in 1824. These editors published concerning one Root, lieutenant-governor of that state, among other things, that in August of that year he addressed the state senate, then in session, "while blind with passion and rum, when he was unwashed, unshaven, haggard, with tobacco-juice trickling from the corners of his mouth, and in a condition outraging all order, decency and forbearance." Root brought a civil action to recover damages for the alleged libel, and the defendants admitted the publication and pleaded the truth as justification. The trial judge instructed the jury, "if the defendants had only published the truth, they had an unquestionable right to do that, and they must be acquitted."

Blackstone, in his Commentaries, asserts that the truth could always be given in civil cases in justification of libel, and seems to consider the defendant's exemption in such instances as extended to him in consideration of his merit in having warned the public against the evil practices of a delinquent. He says that it is *damnum absque injuria,* intimating that the acts of the defendant, who justifies a libelous publication, does not constitute a wrong in its legal sense, and then proceeds to observe that this is agreeable to the reasoning of the civil law. (3 Bl. Com. 125.) This is illogical; and Starkie bases this exemption on the better reason, that in such instances the plaintiff has excluded himself from his right of action

at law by his own misconduct, and not to any merit appertaining to the defendant. When a plaintiff is really guilty of the offense imputed, he does not offer himself to the court as a blameless party, seeking a remedy for a malicious mischief; his original misbehavior taints the whole transaction with which it is connected and precludes him from recovering that compensation to which all innocent persons would be entitled. (Folkard's Starkie on Slander and Libel, Am. ed., § 692.)

There are many good and sufficient reasons why a publisher of a statement, true in fact, yet given to the public with a malicious design to create mischief, should be amenable to the criminal laws, and yet not be liable in a civil action. On general principles no right to damages can be founded on a publication of the truth, from the consideration that the reason for awarding damages in every such case fails. The right to compensation in point of natural justice is founded on deception and fraud which have been practiced by the defendant to the detriment of the plaintiff. If the imputation is true, there is no deception or fraud, and no right to compensation. The criminal action in libel is supported to prevent and restrain the commission of mischief and inconvenience to society.[1] Take the case of two men who agree to engage together in fisticuffs: the law for the protection of the peace of society, and to prevent greater collisions, may arrest and punish both combatants, and yet neither may be able to recover from the other personal damages. Where a person makes the publication solely to disturb the harmony and happiness of society, or to maliciously annoy and injure the feelings of others, or to create misery by exposing the latent and personal defects of associates or acquaintances, the interests of the public require some preventive notwithstanding the truth of the publication. This is furnished by the criminal law. But mere injury to the imagination or feeling, however malicious it may be in its origin, or painful in its consequences, is not properly the subject of remedy by an action for damages. Such offenses being unconnected with any substantive right, are incapable of pecuniary admeasurement and redress. They admit of no exact definition; and, therefore, to extend a remedy to such injuries generally, would be productive of great uncertainty and inconvenience, and open far too wide a field of litigation. Again, it seems to be clear that a party who acquires an advantage by concealing the truth, which he could not have attained to had he divulged it, so far is guilty of fraud in the concealment that he cannot upon any principle claim a right to acquire that benefit, and therefore cannot complain that he is injured by the publication of the truth. (Starkie, id., 35.) In this view the truth hurts no one.

(He then discusses section eleven of the Kansas Bill of Rights which provides that) "The liberty of the press shall be inviolate; and all persons may freely speak, write, or publish their sentiments on all subjects, being responsible for the abuse of such right; and in all civil or criminal actions for libel, the truth may be given in

[1] As to this see Root, C., in *Wertz* v. *Sprecher*, 82 Nebr. 834 (1908).

evidence to the jury, and if it shall appear that the alleged libelous matter was published for justifiable ends, the accused party shall be acquitted."

(And Section 126 of the Civil Code passed to carry it into effect providing that) "In all actions mentioned in the last section, (libel and slander,) the defendant may allege the truth of the matter charged as defamatory, and may prove the same and any mitigating circumstances, to reduce the amount of damages, or he may prove either." (From them he deduces the following principles):

First: In all criminal prosecutions, the truth of the libel is no defense unless it was for public benefit that the matters charged should be published; or in other words, that the alleged libelous matter was true in fact, and was published for justifiable ends; but in all such proceedings the jury have the right to determine at their discretion the law and the fact.

Second: In all civil actions of libel brought by the party claiming to have been defamed, where the defendant alleges and establishes the truth of the matter charged as defamatory, such defendant is justified in law, and exempt from all civil responsibility. In such actions the jury must receive and accept the direction of the court as to the law.

The order of the district court setting aside the verdict of the jury in the case and granting a new trial is affirmed.

All the justices concurring.[2]

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[2] *Accord: Ferdon* v. *Dickens,* 161 Ala. 181 (1909); *Mowry* v. *Raabe,* 89 Cal. 606 (1891); *Swift* v. *Dickerman,* 31 Conn. 285 (1863); *Henderson* v. *Fox,* 83 Ga. 233 (1889); *Becherer* v. *Stock,* 49 Ill. App. 270 (1892); *DeArmond* v. *Armstrong,* 37 Ind. 35 (1871); *Morse* v. *Times-Republican Printing Co.,* 124 Iowa 707 (1904); *Whittaker* v. *McQueen,* 128 Ky. 260 (1908); *Coffin* v. *Brown,* 94 Md. 190 (1901); *Golderman* v. *Stearns,* 7 Gray 181 (Mass. 1856); *Sullings* v. *Shakespeare,* 46 Mich. 408 (1881); *Thompson* v. *Pioneer Press,* 37 Minn. 285 (1887); *Conner* v. *Standard Publishing Co.,* 183 Mass. 474 (1903); *Julian* v. *Kansas City Star Co.,* 209 Mo. 35 (1908); *Merrey* v. *Guardian Printing & Publishing Co.,* 79 N. J. L. 177 (1909); *Holmes* v. *Jones,* 121 N. Y. 461 (1890); *Klinck* v. *Colby,* 46 N. Y. 427 (1871); *Lauder* v. *Jones,* 13 N. Dak. 525 (1904); *Press Co.* v. *Stewart,* 119 Pa. St. 584 (1888); but see Mitchell, cf., in *Burkhart* v. *North American Co.,* 214 Pa. 39 (1906), p. 43, intimating that the defense may be lost when the matter described was a private one with which the defendant or the public had no legitimate concern, or when the manner and style rendered the publication libelous; *Haynes* v. *Spokane Chronicle,* 11 Wash. 503 (1895); *Talmadge* v. *Baker,* 22 Wis. 625 (1868); and see for other cases the very full and valuable note to *Hutchins* v. *Page,* 75 N. H. 215 (1909), where the cases on the whole subject of the justification of truth in slander and libel are collected and classified.

In *Hutchins* v. *Page,* 75 N. H. 215 (1909), it is held that truth is not always a defense to an action to recover damages for the publication of a libel and that the occasion must be lawful and the statement, even if true, published without malice.

It is worthy of note that in 1843 Lords Brougham, Campbell, Denman, and others, composing the committee on the Law of Defamation, in their report to the House of Lords recommended that truth should only be a justification if spoken on a proper occasion. As to the policy of allowing truth to be told without other excuse, see Bower on Actionable Negligence, Appendix X, Section II; and Root, C., in *Werts* v. *Sprecher,* 82 Nebr. 834 (1908), p. 838, in which he says, "It is also true that convictions for criminal

SECTION 4.

Defendant's Intention to Injure the Plaintiff's Reputation.

MORRISON *v.* RITCHIE & COMPANY.

Court of Session, 1902. 39 *Scottish Law Reporter* 432.

This was an action brought by George Morrison and Mary, his wife, against Ritchie & Co., publishers and proprietors of the "Scotsman", in which the pursuers claimed damages for slander therein contained. The pursuers aver that they were married on the 12th of July, 1901, and for some time previous to his marriage George Morrison carried on business at 33 South Back Canongate, Edinburgh, and that he was presently manager of the Caledonian Hotel, Ullapool. That on the 15th of August, 1901, the following notice appeared among the notices of births; "Morrison: At the Caledonian Hotel, Ullapool, on the 11th inst., the wife of George Morrison, of 33 South Back Canongate, of twin sons. Ross-shire

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libel are rare, and that the individual does not control the machinery of the criminal courts. It is a further fact that individuals guilty of impropprieties, indiscretions, or crimes, it may be, can, by subsequent observance of the laws of man and of God, win for themselves the respect and confidence of their associates and of the community. It is repugnant to the crudest ideas of justice to say that, under such circumstances, the truth of a recital of past history ought to entitle a defendant to a verdict in a civil action. If the truth of the article is alleged, it should be received in mitigation of damages without regard to the motives of defendant or the end sought by the publication, but the truth alone ought not to be an absolute bar to recovery."

In many states, statutes provide that truth is a justification in the action of libel but not of slander if the publication be malicious; Maine—*Ellis* v. *Buzzell,* 60 Maine 209 (1872), slander; *Pierce* v. *Rodliff,* 95 Maine 346 (1901), libel; Massachusetts—*Golderman* v. *Stearns,* 7 Gray 181 (Mass. 1856), slander; *Perry* v. *Porter,* 124 Mass. 338 (1878), libel; but the plaintiff must prove affirmatively the defendant's malicious intent, *Connor* v. *Standard Pub. Co.,* 183 Mass. 474 (1903). In Louisiana a statute provides that truth if pleaded is a justification, if published with good motives and for justifiable ends, *Perret* v. *New Orleans Times,* 25 La. Ann. 170 (1873). Similar provisions exist in the constitutions of West Virginia and Nebraska; *Sweeney* v. *Baker,* 13 West Va. 158 (1878); *Wertz* v. *Sprecher,* 82 Nebr. 834 (1908); in New York a somewhat similar provision is construed, as in the principal case, to apply only to criminal prosecutions for libel, *George, the Count Joannes* v. *Jennings,* 4 Hun 66 (N. Y. 1875). In the Mississippi statutory action for insulting words tending to violence, truth is no defense, but merely goes in mitigation of damages, *McLean* v. *Warring,* 13 So. 236 (Miss. 1893).

The truth of the statement must be pleaded to be a defense, otherwise it may only be shown in mitigation of damages, *Ferdon* v. *Dickens,* 161 Ala. 181 (1909); *Merrey* v. *Printing Co.,* 79 N. J. L. 177 (1909); and see cases cited in note to *Hutchins* v. *Page,* 31 L. R. A. (N. S.) 132, and the justification must be as broad as the libel and must allege the truth of the statements in the sense imputed to them by the plaintiff, *Morse* v. *Times-Republican Printing Co.,* 124 Iowa 707 (1904); *Bodine* v. *Times-Journal Pub. Co.,* 26 Okla. 135 (1910); *Tawney* v. *Simonson, etc., Co.,* 109 Minn. 341 (1909).

papers please copy." The same notice also appeared in the "Weekly Scotsman" in the issue of August 17th, 1901.

They further averred that this notice was inserted in consequence of the following letter: "Mrs. Sutherland, 7 Albert Street, would like to insert in the "Scotsman": At the Caledonian Hotel, Ullapool, on the 11th inst., the wife of George Morrison of 33 South Back Canongate, of twin sons. Ross-shire papers please copy."

The pursuers further averred that no such birth had taken place and no such person as Mrs. Sutherland resided at 7 Albert Street, which fact could have been discovered had any inquiry been made as to the genuineness of the notice.

The defenders pleaded, *inter alia,* that the statements complained of not being defamatory, the defenders are entitled to decree of *absolvitor* and that they, having published the statements complained of in good faith in the ordinary course of their business and the statements not being *per se* defamatory, should be assoilzied.

The Lord Ordinary (Kincairney) approved of the following issues proposed for the pursuers, first, whether the pursuers were married as alleged and whether the defenders had published the aforesaid notice on the date in question and "whether the notice is of and concerning the pursuer George Morrison and is false and calumnious."

KINCAIRNEY, LORD ORDINARY. This is an action of damages against the proprietors of a newspaper on account of defamatory advertisements. There can be no doubt that the pursuers have suffered a very cruel wrong, and would doubtless recover exemplary damages from the mean scoundrel who sent the advertisements, if they could discover him and if he were found to be sane and able to pay them. But their action against the newspaper raises a question of much importance and apparently of some novelty, since no precise or very close precedent has been quoted.

I do not inquire whether sufficient vigilance was exercised in the "Scotsman" office before inserting this advertisement. A very slight inquiry would have disclosed the fraud. A telegram to Ullapool would have disclosed it. The instructions were not signed, but bore the name of Mrs. Sutherland, 7 Albert Street, and an examination of the Directory would have disclosed the fact that no such house existed. But these precautions were not taken. I am far from imputing any blame on that account, because I suppose it would be barely possible to make such inquiries about the multitude of such advertisements which reach the "Scotsman". But that is a matter which has no bearing on the question under consideration, because this action is not laid on neglect, but simply upon slander, there being no plea about neglect.

Malice in the ordinary sense, or in any sense which can reasonably be put on the word, is not in the case. It is certain that there has been no malice. There hardly ever is when the action is laid against the proprietors of a newspaper on account of what has appeared in its columns, but the law is that the proprietors of the newspaper represent their correspondent, and are liable for the in-

jurious paragraph as he would have been. I do not think that the law does so strange a thing as to imply malice where it manifestly and certainly does not exist.

The peculiarity of the case seems to be this, that the words complained of have to all appearance no calumnious, insulting, or disparaging meaning whatever, and that there is no possibility of affixing any such meaning on them by any license of innuendo, and yet it appears that, when the facts are known, the words, according to their plain and only meaning and without the least innuendo, turn out to be in the highest degree slanderous and hurtful to character, and extremely reprehensible, so that it will be regrettable if the perpetrator be not discovered and adequately punished.

It appears, then, that the calumnious character of the words does not depend on any secret innuendo but on the other surrounding circumstances; and I think that the question of slander or not must depend on the actual state of the facts and be judged of according to them; and I am of opinion that the pursuers will be entitled to prove these circumstances for the purposes of disclosing the slanderous import of the words used.

There have not been many similar cases, and, so far as I know, none exactly in point. But such cases might occur in other circumstances. For example, if A. said of B. that he had sold goods to a corporation at an exorbitant price, these words would not of themselves be libellous. But if it were shewn that B. was a member of the corporation they would become so—*Christie* v. *Craik*, January 12, 1900, 2 F. 380. In *Winn* v. *Quillan*, December 16, 1899, 2 F. 322, it was held to be libellous to call the pursuer an informer. But it is not clear that it would have been so held had the pursuer not been an Irishman. To take a more general illustration, suppose a person were charged with ignorance of law, that would not be an actionable charge unless he was a practising lawyer, and then it would be actionable."

The defenders moved the court to vary each of the issues by deleting the words "whether the pursuers were married on the 12th of July, 1901," and by inserting the word "malicious" after the word "false."

LORD MONCREIFF. The defenders maintained that this action should be dismissed *de plano* as irrelevant. I am of opinion that the pursuers have stated a relevant case to go to a jury.

The sting of these notices lies in this, that the pursuers were only married on the 12th of July, 1901—that is, about a month before the first notice. There is no doubt that read in the light of the circumstances which the pursuers aver and undertake to prove, the advertisements in question published in the defender's newspaper constitute a gross and cruel libel upon the pursuers.

I should not have said even so much upon this point had it not been that the defender's junior counsel, as I understood him, maintained and pressed upon us that the notices taken by themselves could not bear a defamatory meaning, and that we were not entitled to look at the intrinsic circumstances averred by the pursuers. I

cannot accede to this suggestion. In every case in which the words uttered or written are not *prima facie* defamatory, it is competent to consider the circumstances in which they are said to have been uttered or written. If on consideration of the circumstances averred by the pursuers the Court is of opinion that the words will not bear the construction which the pursuers seek to put upon them an issue will not be allowed, but if they are of opinion in view of the facts stated that the words might bear that meaning the case will be sent to a jury to say whether they do bear that meaning. Now, there is not the slightest doubt that a false notice of birth may in some circumstances be grossly libellous, and as the present case is almost as strong a case as can be figured it is unnecessary to multiply illustrations.

But the defenders maintain that they are not liable, because (1) the notices which were sent to them for insertion were not *prima facie* defamatory, and (2) they had no reason to suppose that they concealed a libel.

I am of opinion that in the admitted circumstances this defense is not relevant. We have been referred to no case in which in judging of the liability of the proprietor, publisher, or printer of a newspaper for the publication of a statement, not privileged, affecting private character, made on the authority of a correspondent, any distinction has ever been made between a statement libellous on its face and one of which the libellous character only becomes apparent in the light of surrounding circumstances or on the words being innuendoed.

The defenders are the proprietors and publishers of the "Scotsman". For their own satisfaction they take what they consider sufficient precautions to insure the genuineness of these advertisements. But these precautions, according to their own statements, only consist in their requiring the name and address of the sender, which may be purely fictitious. No further inquiries are made as to the genuineness of such notices. Looking to the extensive advertisement business carried on by the "Scotsman", it probably would not be practicable, consistently with profit and despatch, to make further inquiry into the genuineness of such advertisements. No doubt it is cheaper to run the risk (apparently not a very great one) of an action for libel, as the defendant Mr. Mudie said in the case of *Vizetelly* v. *Mudie*.

I think the issues approved by the Lord Ordinary are sufficient to try the case.

TAYLOR *v.* HEARST.

Supreme Court of California, 1895. 107 *Cal.* 262.

The defendant was the sole proprietor of the San Francisco Examiner, in which appeared, on January 10, 1892, an article charging "J. W. Taylor," who, it stated, had a contract with the City of San Francisco to supply basalt blocks for paving the streets, and

that he had conspired with a city employé to defraud the city by obtaining fraudulent receipts for 34 loads of blocks not delivered; that he had sworn to and filed a demand for payment on his contract including these 34 loads; that steps had been taken to prosecute him for perjury, but that the man had been sworn to before a clerk not authorized to administer an oath; and the only thing for the city to do was to keep Mr. Taylor's demand until the 34 loads were eliminated from it.

The plaintiff's complaint alleged that he was and had been engaged for ten years in the business of manufacturing and supplying basalt blocks to the city of San Francisco and various other persons.

The defendant's answer admitted the publication of the article but denied that it was "published of or concerning the plaintiff." It alleged that the charges were not made against the plaintiff and were not intended to be considered or understood as charges against him, but were made and intended to be so considered against one J. N. Taylor, and that in the printing of the article the initials of J. N. Taylor were by mistake printed J. W.

The defendant proved at the trial that there was a John N. Taylor who had a contract with the city to furnish basalt blocks and against whom a prosecution for perjury had been begun and dismissed for the reason stated in the article.

The court among other instructions gave instruction (5) which in substance was as follows:

That the publication is libelous and that the plaintiff is entitled to compensatory damages *"provided,* you find that the defendant meant to charge J. W. Taylor, the plaintiff, with the commission of the offenses contained in the publication, and that third persons understood that the person meant was J. W. Taylor, the plaintiff."

The case was tried before a jury and the verdict was in favor of the defendant. Judgment was entered thereon. Plaintiff moved for a new trial which was denied and appealed from the judgment and order.

BELCHER, C. By instruction No. 5 the court told the jury that, the publication being untrue and libelous as to the plaintiff, he was entitled to such compensatory damages as would afford a reparation for all the injury which had naturally and proximately resulted from the publication; *"provided,* that you find that the defendant meant to charge J. W. Taylor, the plaintiff, with the offenses contained in the publication, and that third persons understood that the person meant was J. W. Taylor, the plaintiff." This was in effect telling the jury, and it must have been so understood, that *unless* the defendant meant to charge the plaintiff with the offenses contained in the publication, *and* third persons so understood it, the plaintiff was not entitled to recover compensatory damages for the injury he had sustained.

The proviso attached to the instruction was erroneous. The publication did charge the plaintiff with offenses, and whether it did so by design, or was the result of carelessness in setting type,

was a matter of no consequence, so far as the question of actual damages was involved.

Judgment and order reversed and cause remanded for new trial.[1]

HANSON *v.* GLOBE NEWSPAPER CO.

Supreme Judicial Court of Massachusetts, 1893. 159 *Mass.* 293.

KNOWLTON, J. The defendant published in its newspaper an article describing the conduct of a prisoner brought before the Municipal Court of Boston, and the proceedings of the court in the case, designating him as "H. P. Hanson, a real estate and insurance broker of South Boston." He was, in fact, a real estate and insurance broker in South Boston, and the article was substantially true, except that he should have been called A. P. H. Hanson instead of H. P. Hanson. The plaintiff, H. P. Hanson, is also a real estate and insurance broker in South Boston, and in writing the article the reporter used his name by mistake. The justice of the Superior Court, before whom the case was tried, without a jury, "found as a fact that the alleged libel declared on by the plaintiff was not published by the defendant of or concerning the plaintiff," and the only question in the case is whether this finding was erroneous as matter of law.

In every action of this kind the fundamental question is, What

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[1] *Accord: Clark* v. *North American Co.,* 203 Pa. 346 (1902), the defendant newspaper published an article asserting that John Clark, a city employé, watchman in Starr Garden Park, was implicated in a burglary. The plaintiff, James Clark, was the watchman or superintendent of the park. The plaintiff had a brother John Clark, who had been reported by other papers as having been arrested. Held that, "the proper way to submit it to the jury was to call their attention to the fact that the name used in the article did not refer to the plaintiff, but to one John Clark, a different person, but on the other hand, the description pointed directly to the plaintiff and the jury should consider the whole article and determine from all the evidence, whether, notwithstanding the difference of name, the description was such either intentionally or by want of due care and diligence in ascertaining the true facts, that there would be a natural and reasonable inference that the plaintiff was the person referred to. If there would the defendant was liable"; *Davis* v. *Marxhausen,* 86 Mich. 281 (1891), the plaintiff had the same name as a thief whose arrest the defendant's newspaper intended to report; by some error the plaintiff's address was given as that of the accused; *Butler* v. *Barret,* 130 Fed. 944 (Circ. Ct. 1904), per Archibald, J., p. 947; *McClean* v. *New York Press Co.,* 19 N. Y. S. 262 (1892), a paper, publishing a map showing the disorderly houses in a certain part of New York, by mistake marked as such the plaintiff's house, instead of the house next door, which was the house which was intended to be exposed as disorderly.

Contra: Gray, J., in *Every Evening Printing Company* v. *Butler,* 144 Fed. 916 (C. C. A. 1906), *semble,* though here as in *Butler* v. *Barret,* 130 Fed. 944 (Circ. Ct. 1904)—both actions for several publications of the same article—the statement was undoubtedly intended to be concerning the plaintiff, the mistake being in assuming that a person having a similar name, who had been sentenced in a police court, was the plaintiff; Stephen, J., in *Hutchinson* v. *Robinson,* 21 New South Wales Law 130 (1900).

is the meaning of the author of the alleged libel or slander, conveyed by the words used interpreted in the light of all the circumstances? The reason of this is obvious. Defamatory language is harmful only as it purports to be the expression of the thought of him who uses it. In determining the effect of a slander the questions involved are, what is the thought intended to be expressed, and how much credit should be given to him who expresses it? The essence of the wrong is the expression of what purports to be the knowledge or opinion of him who utters the defamatory words, or of some one else whose language he repeats. His meaning to be ascertained in a proper way, is what gives character to his act, and makes it innocent or wrongful. The damages depend chiefly upon the weight which is to be given to his expression of his meaning, and all the questions relate back to the ascertainment of his meaning.

For the purpose of this case it may be assumed, in favor of the plaintiff, that if the language used in a particular case, interpreted in the light of such events and circumstances attending the publication of it as could readily be ascertained by the public, is free from ambiguity in regard to the person referred to, and points clearly to a well known person, it would be held to have been published concerning that person, although the defendant should show that through some mistake of fact, not easily discoverable by the public, he had designated in his publication a person other than the one whom he had intended to designate.

Whether the defendant should ever be permitted to state his undisclosed intention in regard to the person of whom the words are used, may be doubtful. If language purporting to be used of only one person would refer equally to either of two different persons of the same name, and if there were nothing to indicate that one was meant rather than the other, there is good reason for holding that the defendant's testimony in regard to his secret intention might be received, but perhaps such a case is hardly supposable. Odgers, in his book on Libel and Slander, at page 129, says: "So, if the words spoken or written, though plain in themselves, apply equally well to more persons than one, evidence may be given both of the cause and occasion of publication, and of all the surrounding circumstances affecting the relation between the parties, and also any statement or declaration made by the defendant as to the person referred to." In *Regina* v. *Barnard,* 43 J. P. 127, when it was uncertain whether the libel referred to the complainant or not, and when the language was applicable to him, Lord Chief Justice Cockburn held the affidavit of the writer that he did not mean him, but some one else, to be a sufficient reason for refusing process. In *De Armond* v. *Armstrong,* 37 Ind. 35, evidence was received of what the witnesses understood in regard to the person referred to.

If the defendant's article had contained anything libelous against A. P. H. Hanson, there can have been no doubt that he could have maintained an action against the defendant for this publication. The name used is not conclusive in determining the meaning of the libel in respect to the person referred to; it is but one

fact to be considered with other facts upon the subject. Fictitious names are often used in libels, and names similar to that of the person intended, but differing somewhat from it. A. P. H. Hanson could have shown that the description of him by name, residence, and occupation was perfect, except in the use of the initials "H. P." instead of "A. P. H.," that the article referred to an occasion on which he was present, and gave a description of conduct of a prisoner, and of proceedings in court, which was correct in its application to him and to no one else. The internal evidence when applied to facts well known to the public would have been ample to show that the language referred to him, and not to the person whose name was used.

So, in the present suit, the court had no occasion to rely on the testimony of the writer as to the person to whom the language was intended to apply. The language itself, in connection with the publicly known circumstances under which it was written, showed at once that the article referred to A. P. H. Hanson, and that the name H. P. Hanson was used by mistake. As the evidence showed that the words were published of and concerning A. P. H. Hanson, the finding that they were not published of the plaintiff followed of necessity. The article was of such a kind that it referred, and could refer, to one person only; when that person was ascertained, it might appear that the publication as against him was or was not libelous, and his rights, if he brought a suit, would depend upon the finding in respect to that. No one else would have a cause of action, even if, by reason of identity of name with that used in the publication, he might suffer some harm. For illustration, suppose a libel is written concerning a person described as John Smith of Springfield. Suppose there are five persons in Springfield of that name. The language refers to but one. When we ascertain by legitimate evidence to which one the words are intended to apply, he can maintain an action. The other persons of the same name cannot recover damages for a libel merely because of their misfortune in having a name like that of the person libeled. Or, if the defendant can justify by proving that the words were true, and published without malice, he is not guilty of a libel, even if, written of other persons of the same name of whose existence very likely he was ignorant, the words would be libelous; otherwise, one who has published that which by its terms can refer to but one person, and be a libel on him only, might be responsible for half a dozen libels on as many different persons, and one who has justifiably published the truth of a person might be liable to several persons of the same name of whom the language would be untrue. The law of libel has never been extended, and should not be extended, to include such cases.

Whether there should be a liability founded on negligence in any case when the truth is published of one to whom the words, interpreted in the light of accompanying circumstances easily ascertainable by those who read them, plainly apply; and where, by reason of identity of names, or similarity of names and description, a part of the public might think them applicable to another person

of whom they would be libelous, is a question which does not arise on the pleadings in this case. So far as we are aware, no action for such a cause has ever been maintained. It is ordinarily to be presumed, although it may not always be the fact, that those who are enough interested in a person to be affected by what is said about him, will ascertain, if they easily can, whether libelous words which purport to refer to one of his name were intended to be applied to him or to some one else.

The question in this case, whether the words were published of and concerning the plaintiff, was one of fact on all the evidence. Unless it appears that the matters stated in the report would not warrant a finding for the defendant, there must be judgment for him, even if the finding of fact might have been the other way. We are of opinion that the finding was well warranted, and there must be, *Judgment on the finding.*

HOLMES, J. The article described the subject of it as a prisoner in the criminal dock, and states that he was fined, and this makes it possible to speak of the article as one describing the conduct of a prisoner. But this mode of characterization seems to me misleading. In form it describes the plight and conduct of "H. P. Hanson, a real estate and insurance broker of South Boston." The statement is, "H. P. Hanson, a real estate and insurance broker of South Boston, emerged from the seething mass of humanity that filled the dock," etc. In order to give it any different subject, or to give the subject any further qualifications or description, you have to resort to the predicate, to the very libelous matter itself. It is not necessary to say that this never can be done, but it must be done with great caution. The very substance of the libel complained of is the statement that the plaintiff was a prisoner in the criminal dock and was fined. The object of the article, which is a newspaper criminal court report, is to make that statement. The rest of it amounts to nothing, and is merely an attempt to make the statement amusing. If an article should allege falsely that A. murdered B. with a knife, it would not be a satisfactory answer to an action by A. that it was a description of the conduct of the murderer of B., and was true concerning him. The public, or all except the few who may have been in court on the day in question, or who consult the criminal records, have no way of telling who was the prisoner except by what is stated in the article, and the article states that it was "H. P. Hanson, a real estate and insurance broker of South Boston."

If I am right so far, the words last quoted, and those words alone, describe the subject of the allegation, in substance as well as in form. Those words also describe the plaintiff, and no one else. The only ground, then, on which the matters alleged of and concerning that subject can be found not to be alleged of and concerning the plaintiff, is that the defendant did not intend them to apply to him, and the question is narrowed to whether such a want of intention is enough to warrant the finding, or to constitute a defence, when the inevitable consequence of the defendant's acts is that the

public, or that part of it which knows the plaintiff, will suppose that the defendant did use its language about him.

On general principles of tort, the private intent of the defendant would not exonerate it. It knew that it was publishing statements purporting to be serious, which would be hurtful to a man if applied to him. It knew that it was using as the subject of those statements words which purported to designate a particular man, and would be understood by its readers to designate one. In fact, the words purported to designate, and would be understood by its readers to designate, the plaintiff. If the defendant had supposed that there was no such person, and had intended simply to write an amusing fiction, that would not be a defence, at least unless its belief was justifiable. Without special reason, it would have no right to assume that there was no one within the sphere of its influence to whom the description answered. The case would be very like firing a gun into the street, and, when a man falls, setting up that no one was known to be there. So, when the description which points out the plaintiff is supposed by the defendant to point out another man whom in fact it does not describe, the defendant is equally liable as when the description is supposed to point out nobody. On the general principles of tort, the publication is so manifestly detrimental that the defendant publishes it at the peril of being able to justify it in the sense in which the public will understand it.

But in view of the unfortunate use of the word "malice" in connection with libel and slander, a doubt may be felt whether actions for these causes are governed by general principles. The earliest form of the common law known to me treat slander like any other tort, and say nothing about malice. 4 Seld. Soc. Pub. 40, 48, 61. Probably the word was borrowed at a later, but still early date, from the *malitia* of the canon law. By the canon law, one who maliciously charged another with a grave sin incurred excommunication, *ipso facto*. Lyndw., Provinciale, lib. 5, tit. 17 (De Sent. Excomm. c. 1, Auctoritate Dei). Oughton, Ordo Judiciorum, tit. 261. Naturally *malitia* was defined as *cogitatio maloe mentis*, coming near to conscious malevolence. Lyndw., *ubi supra*, note *f*. Naturally also for a time the common law followed its leader. Three centuries ago it seems to have regarded the malice alleged in slander and libel as meaning the malice of ethics and the spiritual law.

In the famous case where a parson in a sermon repeated, out of Fox's Book of Martyrs, the story "that one Greenwood, being a perjured person, and a great persecutor, had great plagues inflicted upon him, and was killed by the hand of God, whereas in truth he never was so plagued, and was himself present at that sermon," and afterwards sued the parson for the slander, Chief Justice Wray instructed the jury "that, it being delivered but as a story, and not with any malice or intention to slander any, he was not guilty of the words maliciously; and so was found not guilty." *Greenwood* v. *Prick*, stated in *Brook* v. *Montague*, Cro. Jac. 90, 91. See also, *Crawford* v. *Middleton*, 1 Lev. 82, *ad fin.*

But that case is no longer law. *Hearne* v. *Stowell,* 12 A. & E. 719, 726. The law constantly is tending towards consistency of theory. For a long time it has been held that the malice alleged in an action of libel means no more than it does in other actions of tort. *Commonwealth* v. *York,* 9 Metc. 93, 104, 105. *Gassett* v. *Gilbert,* 6 Gray, 94, 97. *Abrath* v. *Northeastern Railway,* 11 App. Cas. 247, 253, 254. See *Commonwealth* v. *Pierce,* 138 Mass. 165, 175 *et seq.; White* v. *Duggan,* 140 Mass. 18, 20. Indeed, one of the earliest cases to state modern views was a case of libel. *Bromage* v. *Prosser,* 4 B. & C. 247, 255. Accordingly, it recently was laid down by this court that the liability was the usual liability in tort for the natural consequences of a manifestly injurious act. *Burt* v. *Advertiser Newspaper Co.,* 154 Mass. 238, 245. A man may be liable civilly, and formerly, at least by the common law of England, even criminally, for publishing a libel without knowing it. *Curtis* v. *Mussey,* 6 Gray 261. *Commonwealth* v. *Morgan,* 107 Mass. 199. *Dunn* v. *Hall,* 1 Ind. 344. *Rex* v. *Walter,* 3 Esp. 21. *Rex* v. *Gutch,* Mood. & Malk. 433. See also, *Rex* v. *Cuthell,* 27 St. Tr. 642. And it seems he might be liable civilly for publishing it by mistake, intending to publish another paper. *Mayne* v. *Fletcher,* 4 Man. & Ry. 311, 312, note. Odgers, Libel and Slander (2d ed.) 5. So, when by mistake the name of the plaintiff's firm was inserted under the head "First Meetings under the Bankruptcy Act," instead of under "Dissolution of Partnerships." *Shepheard* v. *Whitaker,* L. R. 10 C. P. 502. So a man will be liable for a slander spoken in jest, if the bystanders reasonably understand it to be a serious charge. *Donoghue* v. *Hayes,* Hayes, 265. Of course it does not matter that the defendant did not intend to injure the plaintiff, if that was the manifest tendency of his words. *Curtis* v. *Mussey,* 6 Gray, 261, 273. *Haire* v. *Wilson,* 9 B. & C. 643. And to prove a publication concerning the plaintiff, it lies upon him "only to show that this construction, which they've put upon the paper, is such as the generality of readers must take it in, according to the obvious and natural sense of it." *The King* v. *Clerk,* 1 Barnard, 304, 305.

I feel some difficulty in putting my finger upon the precise point of difference between the minority and majority of the court. I understand, however, that a somewhat unwilling assent is yielded to the general views which I have endeavored to justify, and I should gather that the exact issue was to be found in the statement that the article was one describing the conduct of a prisoner brought before the Municipal Court of Boston, coupled with the later statement that the language, taken in connection with the publicly known circumstances under which it was written, showed at once that the article referred to A. P. H. Hanson, and that the name of H. P. Hanson was used by mistake. I have shown why it seems to me that these statements are misleading. I only will add on this point, that I do not know what the publicly known circumstances are. I think it is a mistake of fact to suppose that the public generally know who was before the Municipal Criminal Court on a given day. I think it is a mistake of law to say that, because a small part

of the public have that knowledge, the plaintiff cannot recover for the harm done him in the eyes of the greater part of the public, probably including all his acquaintance who are ignorant about the matter, and I also think it is no sufficient answer to say that they might consult the criminal records, and find out that probably there was some error. *Blake* v. *Stevens*, 4 F. & F. 232, 240. If the case should proceed further on the facts, it might appear that, in view of the plaintiff's character and circumstances, all who knew him would assume that there was a mistake, that the harm to him was merely nominal, and that he had been too hasty in resorting to an action to vindicate himself. But that question is not before us.

With reference to the suggestion that, if the article, in addition to what was true concerning A. P. H. Hanson, had contained matter which was false and libelous as to him, he might have maintained an action, it is unnecessary to express an opinion. I think the proposition less obvious than that the plaintiff can maintain one. If an article should describe the subject of its statements by two sets of marks, one of which identified one man and one of which identified another, and a part of the public naturally and reasonably were led by the one set to apply the statements to one plaintiff, and another part were led in the same way by the other set to apply them to another, I see no absurdity in allowing two actions to be maintained. But that is not this case.

Even if the plaintiff and A. P. H. Hanson had borne the same name, and the article identified its subject only by a proper name, very possibly that would not be enough to raise the question. For, as every one knows, a proper name always purports to designate one person and no other, and although, through the imperfection of our system of naming, the same combination of letters and sounds may be applied to two or more, the name of each, in theory of law, is distinct, although there is no way of finding out which person was named but by inquiring which was meant. *"Licet idem sit nomen, tamen diversum est propter diversitatem personae."*

Mr. Justice Morton and Mr. Justice Barker agree with this opinion.

JONES *v.* HULTON & CO.

Court of Appeals, 1909. *L. R.* 1909, 2 *K. B.* 444.

House of Lords, 1909. *L. R.* 1909, *A. C.* 20.

May 24. LORD ALVERSTONE C. J. read the following judgment: —This was an appeal in an action for libel tried before my brother Channell and a special jury at the Manchester Assizes. The action was brought by the plaintiff, a member of the Bar, in respect of a libel published in the Sunday Chronicle of July 12, 1908 (the passages complained of are set out in the statement of claim), which appeared in an article in the defendant's paper purporting to describe what the Paris correspondent of the paper had witnessed at Dieppe,

and the particular passage on which the question really turns was in these words: "Whist! there is Artemus Jones with a woman who is not his wife, who must be, you know—the other thing! whispers a fair neighbor of mine excitedly into her bosom friend's ear. Really, is it not surprising how certain of our fellow-countrymen behave when they come abroad?" It was alleged by the plaintiff that this passage was libel upon him.

The material facts which were proved in evidence at the trial were as follows: The plaintiff, whose real name is Thomas Jones, is thirty-seven years old, and since the year 1901 has been a member of the Bar, practising on the North Wales Circuit. His baptismal name was Thomas Jones, but ever since he was at school he had been known by the name of Artemus Jones or Thomas Artemus Jones. He was confirmed in the latter name in the year 1886, and it appears to have been given him by his father in order to distinguish him from other persons of the name of Jones. The defendants alleged that the name was used as a fictitious name adopted by the writer of the article without any knowledge of the existence of the plaintiff or of any person named Artemus Jones; and both the writer and the editor, who were called as witnesses by the defendants under circumstances to which I shall have to refer, stated that they had no knowledge whatever of the plaintiff, and had no intention to refer to him, and that so far as they were concerned the name was entirely an imaginary name. The counsel for the plaintiff accepted the explanation given by the writer, Mr. Dawbarn, and the editor, Mr. Woodbridge, and expressly stated that he did not, after their evidence, allege that they or either of them were in fact actuated by malice, or intended to refer to the plaintiff in their article. Some question was raised both at the trial and on the appeal before us as to the possibility of there being other individuals in the employment of the defendant company who were actuated by express malice towards the plaintiff, but for the purpose of my judgment, I assume that there was no proof of malice in fact on the part of any agent or servant of the defendants. The plaintiff called five witnesses who stated that upon reading the article they thought that it referred to the plaintiff, and the plaintiff was prepared to call further witnesses to give evidence to the same effect, but, at the suggestion of the learned judge, he abstained from calling them.

It was contended by the defendants that inasmuch that it must be taken that there was no intention to refer to the plaintiff, and that the only words which could connect the article with him were the name Artemus Jones, the action could not be maintained, inasmuch as the plaintiff failed to prove that the defendants falsely and maliciously published the libel of and concerning the plaintiff; but this contention, in my opinion, involves a fallacy. If an untrue and defamatory statement in writing is published without lawful excuse, and in the opinion of the jury upon the evidence it refers to the plaintiff, the cause of action is made out: see notes to *Bullen* v. *Leake,* 3rd ed., p. 304. No one doubts that the averment that the

libel was written of and concerning the plaintiff is a material averment. The authorities cited by my brother Fletcher Moulton establish that proposition, but in my opinion no authorities are necessary; it has been so held for generations; but here the averment was made, and the question is whether the averment was proved; and that, as well as the innuendo founded thereon, was for the jury upon the evidence. At the conclusion of the plaintiff's case, Mr. Langdon, who was then the leading counsel for the defendants, submitted that, as the name Artemus Jones was a fictitious name, coined by the writer of the article, and not intended to refer to any particular individual at all, it was not a libel on anybody, and a fortiori not on the plaintiff himself. The learned judge ruled that, if a person chooses to publish a thing of this description, the question is not whether the man really intended it, but whether it would be understood by readers to apply to a particular person, adding that, if sensible readers would see at once that it was only an imaginary thing, if any one reading it would see that it did not refer to a gentleman who happened to bear the name of Artemus Jones, it would not be a libel, but if he would think the contrary, that it did not refer to an imaginary person, but to a real individual, the action might be maintained.

It is in my opinion clearly established by authorities, to some of which I will refer, that the question, if it be disputed, whether the article is libel upon the plaintiff, is a question of fact for the jury; and in my judgment this question of fact involves not only whether the language used of a person in its fair and ordinary meaning is libelous or defamatory, but whether the person referred to in the libel would be understood by persons who knew him to refer to the plaintiff.

It seems to me that a very brief consideration will show that on principle this must be so. Take the case of a libel which uses a name; that name may or may not be conclusive as to the person to whom the libel is intended to refer. Just in the same way, if the libel speaks of a person by description without mentioning the name in order to establish a right of action the plaintiff must prove to the satisfaction of the jury that ordinary readers of the paper who knew him would have understood that it referred to him. There is abundant authority to shew that it is not necessary for every one to know to whom the article refers; this would in many cases be an impossibility; but if, in the opinion of a jury, a substantial number of persons who knew the plaintiff, reading the article, would believe that it refers to him, in my opinion an action, assuming the language to be defamatory, can be maintained; and it makes no difference whether the writer of the article inserted the name or description unintentionally, by accident, or believing that no person existed corresponding with the name or answering the description. If upon the evidence the jury are of opinion that ordinary sensible readers, knowing the plaintiff, would be of opinion that the article referred to him, the plaintiff's case is made out.

Dealing now with the authorities, it is, I think, beyond dispute

that, apart from the question of express malice, the intention or motive with which the words are used is immaterial, and that, if in fact the article does refer, or would be deemed by reasonable people to refer, to the plaintiff, the action can be maintained, and proof of express malice is wholly unnecessary.

FLETCHER MOULTON, L. J. The action for libel is a very ancient action for a tort at common law. The essentials of such a cause of action appear from the well-known form of the declaration, a form which itself must have been in use for centuries. It ran thus: "That the defendant falsely and maliciously wrote and published of and concerning the plaintiff the words following, that is to say, he (meaning the plaintiff) is," &c. To support such a declaration the plaintiff must prove that the words alleged were written and published of him by the defendant. Having satisfied this onus, he succeeds in the action if the words bear naturally a defamatory meaning or must be understood in a defamatory sense by reason of circumstances attending the writing and publication; for the law under such circumstances presumes malice and damage, unless the occasion was a privileged one or the defamatory matter true.

The important question is the issue which the jury has to decide by its aid, which is, Aye or No, did the defendant write and publish the words of the plaintiff?

It is therefore, to my mind, settled law that a defendant is not guilty of libel unless he wrote and published the defamatory words "of and concerning the plaintiff"—in other words, unless he intended them to refer to the plaintiff. The ruling of the learned judge in the present case is directly contrary to this.

To say that when the common law required it to be alleged and proved that the defendant wrote and published the words of and concerning the plaintiff it meant only that it must be shown that some people might think so, is, to my mind, to give up all pretense of interpreting language and arbitrarily to create new torts which the law never did and does not now recognize as such.

The limitation of the action of defamation to cases where the defendant has spoken or written the words "of and concerning the plaintiff," is not an example of the weakness of common-law remedies, but of their wisdom. It constitutes the protection of the innocent individual from being held guilty of defaming others of whom he has never intended to speak, and also from being himself defamed. On the one hand to hold a person responsible for every application that his words may bear in the minds of persons who either possess knowledge that he does not possess or are ignorant of that which he knows would be to put on him a burden too heavy to be borne. But on the other hand it constitutes the protection of the individual from being defamed, because it nullifies all attempts to libel by language which as a matter of construction cannot refer to the plaintiff, but which persons reading between the lines would understand to refer to him by reason of the surrounding circumstances. This is one of the most common forms of libel. No name is mentioned, or some name other than that of the person really

meant is substituted. The surrounding circumstances are intentionally misdescribed. The reader, in order to discover the person referred to, must reject or alter part of that which is written. But all these devices are in vain to shelter a libeller,[1] or because the issue is not whether the language is, as a matter of construction, applicable to the plaintiff, but whether the writer intended it to refer to the plaintiff, and if he did so he is responsible if any one can discover his intention, however much in words he may have striven to conceal it.[2] This great and beneficial amplitude of the remedy is, however, only possible because the law makes the intention to refer to the plaintiff the critical issue. If a man is to be liable for the interpretation put by any person on his words, he must be entitled to require that it should be an interpretation of his words as they stand. He cannot be held responsible for what people may think to be his meaning after rejecting such portion of his words as may not agree with their interpretation. If a man who, judged by the language actually used by him, has not referred to the plaintiff may have such portion of that language as they may think fit rejected as being a mere blind by each set of readers, and the rest alone used for the purpose of identification, and is to be held liable according to the result of this process, then we have actually attained in our system of legal procedure to the absurdity expressed in the well-known farce where the magistrate solemnly warns the prisoners "Any statement you may make will be taken down, altered, and used against you."

In the first place I wish to point out that the only connection of the words with the plaintiff here is the identity of the name of Artemus Jones. The learned judge has directed the jury that, if the persons who knew the plaintiff might suppose the plaintiff to be meant, they are to find for the plaintiff. It is obvious that this would make the defendant equally liable to any other person of the

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[1] *J'Anson* v. *Stewart*, 1 T. R. 748 (1787); *Fleetwood* v. *Curle*, Cro. Jac. 557 (1619); *Bourke* v. *Warren*, 2 C. & P. 307 (1826); *Le Fanu* v. *Malcomson*, 1 H. L. C. 637 (1847), a newspaper article imputing that "in some of the Irish factories cruelties were practiced on workpeople" held to be susceptible of the innuendo, "in the factory of the plaintiffs", the jury having found a verdict for the plaintiffs being satisfied that the paper was referring especially to their factory: *Hays* v. *Brierly*, 4 Watts 392 (Pa. 1835), per Gibson, C. J., p. 395; *Hart* v. *Coy*, 40 Ind. 553 (1872), *semble; Steele* v. *Southwick*, 9 Johns. 214 (N. Y. 1812); *Weir* v. *Hoss*, 6 Ala. 881 (1844); *Palmer* v. *Bennett*, 83 Hun 220 (N. Y. 1894); *Clark* v. *Creitzburgh*, 4 McCord 491 (S. Car. 1828).

[2] See Lord Cottenham in *Le Fanu* v. *Malcomson*, 1 H. L. C. 637 (1847), and *Dressel* v. *Shipman*, 57 Minn. 23 (1894); but see Lord Campbell in *Le Fanu* v. *Malcomson*, 1 H. L. C. 637 (1847).

Contra: Smith v. *Ashley*, 11 Metc. 367 (Mass. 1847), where it was held that the publisher of a story intended by the writer thereof to defame the plaintiff, could escape liability, by showing that he in good faith supposed it to be "a mere fancy sketch or fictitious story." This was put on the ground that the publisher, if he had no knowledge that "the article published was libelous, was guilty of no wrong", not on the ground that if libelous it was not published of the plaintiff.

See the learned article on the principal case by Professor Jeremiah Smith, 60 U. of Pa. Rev. (A. L. Reg.) 365-461 (1912).

name of Artemus Jones, for it is admitted that there is nothing else in the description which points to the plaintiff, and in fact that the remainder of the description is inapplicable to him. If this be the law, then a person who makes a statement about Mr. A. B. which is perfectly true, but which if not true would be libellous, can be made liable to every person of the name of A. B. except the person of and concerning whom the words were written. It is clear on the judge's ruling that it would be no defense to say that the writer intended another Mr. A. B. to whom the statement referred, but who knew of the existence of some other person of that name, would be able to come and give the same evidence as was held by the learned judge to be sufficient to support the plaintiff's case in the present instance.

The same consequence might be true in many cases where the words were not defamatory of the person of whom they were spoken. An erroneous application may render innocent words defamatory. That Mr. A. B. devotes himself in his private life to spreading the doctrines of the Protestant Church might constitute a serious charge of hypocrisy if erroneously applied to an eminent Roman Catholic of the same name; and even the harmless domestic announcement that Mrs. A. B. had just had a baby might make a man liable to a grave charge of having accused a person of want of chastity if readers are at liberty from the similarity of name to apply it to a lady who was at the time a widow. It would indeed be a calamity if our English law of defamation burdened ordinary speech or writing with such a chaos of responsibilities.

But the most serious aspect of the new doctrine is when we apply it to cases where the description is not by name. After all a name is only one means of identification, and, considering the millions of names that must exist in England and the improbability of any man's name being borne by him alone, is not a very strong one. There is no difference in the eye of the law with regard to an indication of identity by name and indication by other modes of description. Now suppose no name is mentioned, but that the description is purely circumstantial. Let us take the case of a preacher or speaker who in denouncing some practice may introduce into his discourse some hypothetical case in order to render his meaning clear. Some detail innocently introduced by him, or even the choice of that particular theme, may lead his hearers to imagine that he is referring to some particular person in the neighborhood of whose existence and circumstances he is wholly ignorant and to whom personally he is not in any way referring. The learned judge clearly indicates that in that case he would be liable for defamation, and in fact says that he has already ruled in another case tried before him. Nor do I see how a person could guard himself against such a liability or what defense he could raise. It is clear law that no omission of the name, or statement that it is a hypothetical case or declaration that he does not intend to refer to anybody in particular, can or ought to protect a person so speaking whose intention is to libel. It could not therefore protect an innocent man under this ruling that intent is immaterial.

FARWELL, L. J. The first step is to prove that the words published, whether by name, nickname or description, are such as reasonably to lead persons acquainted with the plaintiff to believe that he is the person to whom the libel refers, the next step is to prove that that is the true intent and meaning of the words used.

The rule is well settled that the true intention of the writer of any document, whether it be contract, will, or libel, is that which is apparent from the natural and ordinary interpretation of the written words by persons who know the plaintiff and the circumstances. Lord Blackburn's speech in *Capital and Counties Bank* v. *Henty,* L. R. 7 App. Ca. 787, has already been read. It has been held that a mistake in the statement is no defence. Thus in *Shepheard* v. *Whitaker,* L. R. 10 C. P. 502, the defendant's newspaper by mistake inserted the name of a trading firm under the heading of "First Meetings under the Bankruptcy Act" instead of "Dissolution of Partnership." The mistake was simply an error in setting up the type, but the defendants were held liable; and the same result might follow if the mistake had been in the name of the firm, for instance if they had intended to insert Smith & Co. and had in fact inserted Shepheard & Co., and this, too, whether the existence of that firm was or was not known to them. Before Lord Denman's Act in 1843 and Lord Brougham's Act in 1851 a defendant was not a competent witness, and the defendant could never have been called to state his intention. And in my opinion he cannot now be heard to say that he did not intend the true meaning of his own words as interpreted by relevant surrounding circumstances on the issue of publication of the plaintiff, although such evidence would be admissible in mitigation of damages as negativing express malice. It always was and is still open to him to prove the surrounding circumstances, so as to shew that, although the words appear to refer to the plaintiff, that is not their true intent and meaning. As Lord Blackburn says in *River Wear Commissioners* v. *Adamson:*

"In all cases the object is to see what is the intention expressed by the words used. But, from the imperfection of language, it is impossible to know what the intention is without inquiring farther, and seeing what the circumstances were with reference to which the words were used, and what was the object, appearing from those circumstances, which the person using them had in view; for the meaning of words varies according to the circumstances with respect to which they were used." In the present case the jury have found that the libellous article described an actual scene at Dieppe, and that "Artemus Jones" mentioned therein described an actual person and not a mere type. If the defendants had proved in the present case not only that the writer of the article did not know of the plaintiff's existence, but also that there was an Artemus Jones other than the plaintiff, who was at present in Dieppe in the company alleged, then the circumstances with reference to which the words "Artemus Jones" were used would shew that the plaintiff was not the person intended; but the writer of the libel has chosen to state as a fact that Artemus Jones was present in order (as he says) to avoid the

banality of using A. B. or a blank: he has, therefore, for his own purpose chosen to assert a fact of a person bearing the very unusual name of Artemus Jones, recklessly, and caring not whether there was such a person or not, or what the consequence might be to him.

An action for defamation differs from other actions, such for instance as trespass, in that it is of the essence of defamation that the plaintiff should be aimed at or intended by the defendant. The man who throws a squib into a crowd not intending to hit any one is liable for the consequence of his act, whatever his intentions may have been, because the two necessary constituents of tort, namely, a wrongful act by the defendant and actual damage to the plaintiff, are both present. But it is not enough for a plaintiff in libel to shew that the defendant has made a libellous statement and that the plaintiff's friends and acquaintances understand it to be written of him: he must also shew that the defendant printed and published it of him; for if the defendant can prove that it was written truly of another person the plaintiff would fail. To this extent I agree with Fletcher Moulton L. J., but we differ as to the meaning of the word "intended". In my opinion the defendant intended the natural meaning of his own words in describing the plaintiff as much as in the innuendo: the inquiry is not what did the defendant mean in his own breast, but what did the words mean having regard to the relevant surrounding circumstances. For example, fraud is proved in an action of deceit not only when a false representation is made knowingly, but also when it is made recklessly, careless whether it be true or false, and although there was no intention to cheat or injure the person to whom the statement was made—*Derry* v. *Peek,* 14 App. Ca. 337, and yet fraudulent intent is of the essence of the action. So the intention to libel the plaintiff may be proved not only when the defendant knows and intends to injure the individuals, but also when he has made a statement concerning a man by description by which the plaintiff is recognized by his associates, if the description is made recklessly, careless whether it hold up the plaintiff to contempt or ridicule or not. In such a case it is no answer for the defendant to say that he did not intend the plaintiff, because he had never heard of him: he intended to describe some living person: he can suggest no one else; and the plaintiff proves that he is believed by his acquaintances and friends to be the person aimed at, and has suffered damage thereby. The element of intention, which is as essential to an action of defamation as to an action of deceit, can be proved in the same way in both actions. The issue of fact is whether the plaintiff is intended by the libeller; but sufficient evidence to prove it may be given, although the defendant had no intention of injuring the plaintiff and had never heard of his existence. The squib thrower is liable for the injury done by his squib to the plaintiff, whether he aimed at or intended to hit him or not; the libeller is not liable to the plaintiff unless it is proved that the libel was aimed at or intended to hit him; the manner of proof being such as I have already stated. If the libel was true of another person and honestly aimed at and

intended for him, and not for the plaintiff, the latter has no cause of action, although all his friends and acquaintances may fit the cap on him. If this were not so, no newspaper could ever venture to publish a true statement of A., lest some other person answering the description should suffer thereby.

I am therefore of the opinion that the defendant cannot complain of Channel J.'s summing up. I do not think that he intended to rule anything more than that the alleged actual, as distinguished from the expressed, intention of the defendant was under the circumstances of this particular case immaterial. I do not understand him to have withdrawn from the jury the question whether the plaintiff was the person of whom the libel was published, which was, in my opinion, a question for them to decide, but to have ruled that the fact that any one of the plaintiff's names was unknown to the writer and to every one in the defendants' office through whose hands the libel passed was not a conclusive defence requiring him to stop the case; and in this way he was, in my opinion, right. The ignorance was of course a material fact, both in considering the question of the true intent of the defendants and also in considering the damages, but I think that these were before the jury. It was said that there was some misdirection on the point of negligence, but I do not think that this is so. Negligence is immaterial on the question of libel or no libel, but may be material on the question of damages. The recklessness to which I have referred, founding myself on *Derry* v. *Peek*, is quite different from mere negligence.

Appeal dismissed.

From this action of the Court of Appeals the defendant took an appeal to the House of Lords.

LORD LOREBURN L. C. My Lords, I think this appeal must be dismissed. A question in regard to the law of libel has been raised which does not seem to me to be entitled to the support of your Lordships. Libel is a tortious act. What does the tort consist in? It consists in using language which others knowing the circumstances would reasonably think to be defamatory of the person complaining of and injured by it. A person charged with libel cannot defend himself by shewing that he intended in his own breast not to defame the plaintiff, if in fact he did both. He has none the less imputed something disgraceful and has none the less injured the plaintiff. A man in good faith may publish a libel believing it to be true, and reasonably believing it to be true, but that in fact the statement was false. Under those circumstances he has no defence to the action, however excellent his intention. If the intention of the writer be immaterial in considering whether the matter written is defamatory I do not see why it need be relevant in considering whether it is defamatory of the plaintiff. The writing, according to the old form, must be malicious, and it must be of and concerning the plaintiff. Just as the defendant could not excuse himself from malice by proving that he wrote it in the most benevolent spirit, so he cannot show that the libel was not of and concerning the plaintiff by proving that he never heard of the plaintiff. His

intention in both respects equally is inferred from what he did. His remedy is to abstain from defamatory words.

It is suggested that there was a misdirection by the learned judge in this case. I see none. He lays down in his summing up the law as follows: "The real point upon which your verdict must turn is, ought or ought not sensible and reasonable people reading this article to think that it was a mere imaginary person such as I have said—Tom Jones, Mr. Pecksniff as a humbug, Mr. Stiggins, or any of that sort of names that one reads of in literature used as types? If you think any reasonable person would think that, it is not actionable at all. If, on the other hand, you do not think that, but think that people would suppose it to mean some real person—those who did not know the plaintiff of course would not know who the real person was, but those who did know of the existence of the plaintiff would think that it was the plaintiff—then the action is maintainable, subject to such damages as you think under all the circumstances are fair and right to give to the plaintiff." I see no objection in law to that passage.

LORD ATKINSON. My Lords, I concur with the judgment which has been delivered by my noble and learned friend on the woolsack, and I also concur substantially with the judgment delivered by Farwell L. J., in the Court of Appeal. I think he has put the case upon its true ground, and I should be quite willing to adopt in the main the conclusions at which he has arrived.

LORD GORELL. My Lords, I concur also with the judgment which has been pronounced by the Lord Chancellor. I also wish to express my concurrence with the observations which my noble and learned friend Lord Atkinson has made upon the judgment of Farwell L. J.

In the publication of matter of a libellous character, that is matter which would be libellous if applying to an actual person, the responsibility is as follows: In the first place there is responsibility for the words used being taken to signify that which readers would reasonably understand by them; in the second place there is responsibility also for the names used being taken to signify those whom the readers would reasonably understand by those names; and in the third place the same principle is applicable to persons unnamed but sufficiently indicated by designation or description.

My Lords, I demur to the observation so frequently made in the argument that these principles are novel. Sufficient expression is given to the same principles by Abbott C. J. in *Bourke* v. *Warren*, 3 C. & P. 307, in which the learned judge says: "The question for your consideration is whether you think the libel designates the plaintiff in such a way as to let those who knew him understand that he was the person meant. It is not necessary that all the world should understand the libel; it is sufficient if those who know the plaintiff can make out that he is the person meant." I think it is out of the question to suggest that that means "meant in the mind of the writer" or of the publisher; it must mean "meant by the words employed." The late Lord Chief Justice Coleridge dealt simi-

larly with the point in *Gibson* v. *Evans,* L. R. 23 Q. B. D. 384 when in the course of the argument he remarked; "It does not signify what the writer meant; the question is whether the alleged libel was so published by the defendant that the world would apply it to the plaintiff."

Appeal dismissed.

SECTION 5.

Plaintiff's Consent to be Defamed.

Defamation published at the plaintiff's instigation, by his procurement or with his consent.

RICHARDSON *v.* GUNBY.

Supreme Court of Kansas, 1912. 127 *Pacific Reporter* 533.

Action of libel. The defendant admitted writing the letter complained of, but as a defense he alleged, *inter alia,* that it was written in response to a letter of inquiry addressed to him which was written at the instance of the plaintiff as a decoy to induce the defendant to make some statement upon which to predicate an action. A demurrer filed to this defense was overruled. The verdict and judgment were for the defendant.

BENSON, J. Whatever may be the rule in criminal cases, where the object is punishment for a public offense, in a civil action a party cannot be allowed to recover damages for a libel which he procured or instigated to be published against himself for the purpose of laying the foundation of a lawsuit for his own pecuniary gain. It would be contrary to the principles declared in analogous cases to sustain such an action. It follows that the demurrer to the defense referred to was properly overruled.

Another feature of the case closely related to this remains to be considered. In the tenth instruction the court, referring to the defense last considered, said: "If this letter written by Mr. Neal was the result of a decoy letter sent to Mr. Gunby at the instance and request of Mr. Richardson, plaintiff cannot recover, for the reason that it would place the plaintiff in the situation of publishing a libel against himself—a thing which the law will not tolerate." This statement lacks an important qualification. The reason why a person cannot recover in such a case, where he instigates or invites the libel, is that he does it, as charged in the reply, for the purpose of predicating an action for damages upon it.[1] He may not thus

[1] *Accord: Melcher* v. *Beeler,* 48 Colo. 233 (1910); *Howland* v. *Blake Mfg. Co.,* 156 Mass. 543 (1892), defendants gave a copy of the printed report of an investigating committee to an agent of the plaintiff sent to procure it, there having been no previous publication by the defendant, both cited in the principal case; *Sutton* v. *Smith,* 13 Mo. 120 (1850); *Miller* v. *Donovan,* 16 Misc. 453 (N. Y. 1896), no right of action "unless there has been a previous

assist in building up a cause of action for the purpose of gathering the fruitage to himself. If, however, the plaintiff instigated or set on foot the inquiry for the purpose of ascertaining whether the defendant, or the bank of which he was president, was disseminating evil reports concerning the cement company or its officers, in order that such influences might be counteracted, or for any other proper purpose, and not for the purpose of predicating an action for damages in his own behalf, he was not estopped from maintaining an action.[2] In *King* v. *Waring et ux.*, 5 Esp. 13, Lord Alvanley said: "The question is, if in consequence of the letter so written by the defendant, and which letter was false and unfounded, the plaintiff was prevented from getting a place. It has been decided that giving a character to a servant, however injurious to them, yet if fairly given, would not sustain an action, but if the letter was procured by another letter not written with a fair view of inquiring a character, but to procure an answer upon which to ground an action for libel, such evidence, I think, ought not to be admitted."

Following the instructions last quoted, if the jury found from the evidence that the so called decoy letter was written at the instance and request of appellant, they were precluded from giving him a verdict, regardless of his purpose or motive in causing the inquiry.[3] This was an error affecting his substantial rights, and for this the judgment is reversed, with directions to grant a new trial.

All the justices concurring.

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publication by the defendant"; *Nott* v. *Stoddard*, 38 Vt. 25 (1865); *contra*, *Duke of Brunswick* v. *Harmer*, 14 A. & E. (N. S.) (Q. B.) 185 (1849), though here the defendant had previously published the libel, the plaintiff sent an agent to obtain a copy of a newspaper published seventeen years before. This was held a sufficient publication.

[2] *Accord: Thorn* v. *Moser*, 1 Denio 488 (N. Y. 1845); *Byam* v. *Collins*, 111 N. Y. 143 (1888), p. 159, *semble*, in this case the inquirer while representing himself as the plaintiff's agent, had in fact no authority to represent him. The English cases hold that where the defendant himself, or by an agent, calls upon the defendant for an explanation of his acts derogatory or offensive to the plaintiff, or vague words of condemnation, the defendant's explanation, though containing defamatory language, is privileged; *War* v. *Jolly*, 6 C. & P. 497 (1834); *Cowles* v. *Potts*, 34 L. J. Q. B. 247 (1865); see also *Beeler* v. *Jackson*, 64 Md. 589 (1886); and *Nott* v. *Stoddard*, 38 Vt. 25 (1865); *Whitely* v. *Adams*, 15 C. B. (N. S.) 392 (1863). The reason given by Odgers in "Libel and Slander", 3rd ed. 255, is, that the plaintiff has brought it on himself. But if the defamatory words are a mere repetition of the slander previously uttered by the defendant there is no privilege, though spoken upon the plaintiff's request for an explanation, *Griffiths* v. *Lewis*, 7 A. & E. N. S. 61 (Q. B. 1845), or for making defamatory statements in explanation of a rumor originating with the defendant, *Smith* v. *Mathews*, 1 Moo. & R. B. 151 (1831); but see *Schultz* v. *Guldenstein*, 144 Mich. 636 (1906); where the privilege was held to exist though the defendant was responsible for the rumors which led the plaintiff's husband to demand an explanation.

[3] In the following cases it was held that where the plaintiff who had induced the defendant to publish the slander or libel, could not recover irrespective of his motives in so doing: *Heller* v. *Howard*, 11 Ill. App. 554 (1882), the defendant repeated, at the plaintiff's instance, and in the presence of a friend brought by him, words previously spoken to him alone; *Haynes* v. *Leland*, 29 Maine 233 (1848), defendant, at the plaintiff's request, repeated words spoken to him by a third person; *Irish-American Bank* v. *Bader*, 59 Minn. 329, 61 N. W. 328 (Minn. 1894).

CHAPTER III.

Disparagement of Property.[1]

(a) Disparagement of title ("slander of title").

MALACHY *v.* SOPER.

Court of Common Pleas, 1836. 3 *Bingham's New Cases,* 371.

TINDAL, C. J. In this case a verdict having been found for the plaintiff at the trial of the cause, with £5 damages, a motion has been made to arrest the judgment on the ground that the declaration does not state any legal cause of action. And we are of opinion that this objection is well founded; and that the judgment must be arrested.

This is not an ordinary action for defamation of the person, by the publication of slander either oral or written; in which form of action, no special damage need either be alleged or proved; the law presuming that the uttering of the slanderous words, or the publishing of the libel, have of themselves a natural and necessary tendency to injure the plaintiff. But this is an action to recover damages by reason of a publication of a paragraph in a newspaper, which contains no other charge than that the "petition in a bill filed in the Court of Chancery against the plaintiff, and certain other persons as shareowners in a certain mine, for an account, and an injunction, had been granted by the Vice-Chancellor, and that persons duly authorized had arrived in the workings." The publication therefore is one which slanders not the person or character of the plaintiff, but his title as one of the shareholders to the undisputed possession and enjoyment of his shares of the mine.[2] And the ob-

[1] For a very valuable discussion of the whole subject, see Professor Jeremiah Smith, Disparagement of Property, 13 Columbia Law Review, p. 20 and 121 (January and February, 1913).

[2] "There is a branch of the law (generally known by the inappropriate but convenient name, Slander of Title) which permits an action to be brought against one who maliciously decries the plaintiff's goods or some other thing belonging to him, and thereby produces special damage to the plaintiff. This is obviously no part of the law of defamation, for the plaintiff's reputation remains uninjured; it is really an action on the case for maliciously acting in such a way as to inflict loss on the plaintiff."—Odger's Libel & Slander, 2nd ed., 139; 3rd ed., 145; 4th ed., 74. This passage which applies both to disparagement of title and quality of property, was cited with approval by Day, J., in *Hatchard* v. *Mège and others,* L. R. 18 Q. B. Div. 771 (1887), in which it was held that such actions being an injury to property and not a personal injury to reputation, fall within the modern liberal interpretation of the Act of 4 Edw. 3 ch. 7, and survive the death of him who was owner at the time the property was disparaged.

jection taken is, that the plaintiff in order to maintain this action, must shew a special damage to have happened from the publication, and that this declaration shews none.

The first question therefore is, does the law require in such an action an allegation of special damage? And looking at the authorities we think they all point the same way. The law is clearly laid down in Sir W. Jones 196 (*Lowe* v. *Harewood*): "of slander of title, the plaintiff shall not maintain an action, unless it was *re vera* a damage; *scil.*, that he was hindered in sale of his land; so there the particular damage ought to be alleged." And in addition to the cases cited at the bar, viz. *Sir John Tasborough* v. *Day*, Cro. Jac. 484, and *Manning* v. *Avery*, Keb. 153, the case of *Cane* v. *Goulding*, Style's Rep. 169, 176, furnishes a strong authority. That was an action on the case for slandering the plaintiff's title, by speaking these words, viz., "his right title thereunto is nought, and I have a better title than he." The words were alleged to be spoken *falso et malitiosè*, and that he was likely to sell, and was injured by the words, and that by reason of speaking the words, he could not recover his tithes. After verdict for the plaintiff, there was a motion in arrest of judgment; and Rolle, C. J., said, "there ought to be a scandal and a particular damage set forth, and there is not here:" and upon its being moved again and argued by the judges, Rolle, C. J., held that the action did not lie, although it was alleged that the words were spoken *falso et malitiosè*, for "the plaintiff ought to have a special cause; but that, the verdict might supply; but the plaintiff ought also to have shewed a special damage which he hath not done, and this the verdict cannot supply: the declaration here is too general, and upon which no good issue can be joined; and he ought to have alleged, that there was a communication had before the words spoken touching the sale of the lands whereof the title was slandered, and that by speaking of them the sale was hindered;" and cited several cases to that effect.

We hold, therefore, on the authority of these cases, that an action for slander of title is not properly an action for words spoken, or for libel written and published, but an action on the case for special damage sustained by reason of the speaking or publication of the slander of the plaintiff's title. This action is ranged under that division of actions in the Digests, and other writers on the text law, and such we feel bound to hold it to remain at the present day.

The next question is, has there been such a special damage alleged in this case as will satisfy the rule laid down by the authorities above referred to? The doctrine of the older cases is, that the plaintiff ought to aver that, by the speaking, he could not sell or lease (Cro. Eliz. 197., Cro. Car. 140.); and that it will not be sufficient to say only, that he had an intent to sell, without alleging a communication for sale (R. 1 Roll. 244.). Admitting, however, that these may be put as instances only, and that there may be many more cases in which a particular damage may be equally apparent without such allegation, they establish at least this, that in the action for slander of title, there must be an express allegation of some par-

ticular damage resulting to the plaintiff from such slander. Now the allegations upon this record is only this, "that the plaintiff is in his rights; and the shares so possessed by him, and in which he is interested, have been and are much depreciated and lessened in value; and divers persons have believed and do believe that he has little or no right to the shares, and that the mine cannot be lawfully worked or used for his benefit; and that he hath been hindered and prevented from selling or disposing of his said shares in the said mine, and from working and using the same in so ample and beneficial a manner as he otherwise would have done." And we are of opinion that this is not such an allegation of special damage as the authorities above referred to require, where the action is not founded on the words spoken or written, but upon the special damage sustained.[8]

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[8] In most of the earlier cases the damage alleged was the loss of a sale, in which case it was held that it was necessary to allege and prove that some negotiations for its sale then in progress were broken off or that some particular intending purchaser was hindered from buying, *Tasburgh* v. *Day*, Cro. Jac. 484 (1618); *Law* v. *Harwood*, Cro. Car. 140 (1629); *Manning* v. *Avery*, 3 Keb. 153 (1674); *Wilson* v. *Dubois*, 35 Minn. 471 (1886); *Stevenson* v. *Love*, 106 Fed. 466 (Circ. Ct. N. J. 1901); but where the plaintiff's title to property put up at auction is denied, it is enough to allege and prove that prospective bidders left the room, "it being impossible in the nature of things to specify names," *Ravenhill* v. *Upcott*, 20 L. T. 233 (1869); *Roche* v. *Meyer*, L. R. 2 Ir. 35 (1895). "The declaration must set out the names of the prospective purchasers, unless it alleges that, under the circumstances, it is not reasonably possible for the plaintiff to ascertain the names," Smith, Disparagement of Property, 13 Col. L. R. p. 123. But any other harm resulting as a natural consequence of the disparagement or denial of the plaintiff's title is sufficient, *Newman* v. *Zachary*, Aleyn 3 (1646), seizure of plaintiff's sheep as an estray; *Vaughan* v. *Ellis*, Cro. Jac. 213 (1608), withdrawal of an offer to pay the plaintiff a sum of money to release his remote interest in an estate; *Brook* v. *Rawl*, 4 Exch. 521 (1849), plaintiff's leasehold brought low price at an auction in consequence of certain statements made by his landlord; *Linden* v. *Graham*, 1 Duer 670 (N. Y. 1853), plaintiff prevented from raising money on mortgage, and see Richards, J. A., in *Nagy* v. *Manitoba Free Press*, 16 Manitoba R. 616 (1907), p. 630, to the effect that the damage done by crowds brought to the plaintiff's property by the publication of the story that it was haunted, was "special" damage.

It was held so early as 1646, that the injurious action of a third person induced by the defendant's disparagement of the plaintiff's property was none the less sufficient damage, because such action was itself a trespass, for which the plaintiff might have his action against such third person, *Newman* v. *Zachary*, Aleyn 3. So it is held in *Ashford* v. *Choate*, 20 Upper Canada C. P. 471 (1870), that the refusal of a purchaser to complete a contract to purchase, though such contract was valid and binding, and the plaintiff might have maintained his action against such purchaser for breach thereof, was sufficient special damages; and see Parke B., in *Green* v. *Button*, 2 C. M. & R. 707 (1835); Bower, Code of Actionable Defamation, 313-315 and 33, note d., and Smith, Disparagement of Property, 13 Col. L. R. 125-127; *contra*, *Burkett* v. *Griffith*, 90 Cal. 532 (1891); *Walkley* v. *Bostwick*, 49 Mich. 374 (1882); *Kendall* v. *Stone*, 5 N. Y. 14 (1851), where the purchaser being led by the defendant's statements to desire to relinquish the agreement, binding on both, the plaintiff assented and the agreement was rescinded; *Felt* v. *Germania Life Ins. Co.*, 133 N. Y. S. 519 (1912); *Paull* v. *Halferty*, 63 Pa. St. 46 (1869), *semble*, all based on Lord Ellenborough's opinion in *Vicars* v. *Wilcocks*, 8 East 1; but even in these jurisdictions the plaintiff may recover

It has been argued in support of the present action, that it is not so much of an action for slander of title as an action for a libel on the plaintiff in the course of his business, and in the way of gaining his livelihood, and that such an action is strictly and properly an action for defamation, and so classed and held by all the authorities. But we think it is sufficient to advert to the declaration, to be convinced that the publication complained of was really and strictly a slander of the plaintiff's title to his shares, and nothing else. The bill in Chancery, out of which the publication arose, is filed by Tollervy, who disputed the plaintiff's right to the whole of the shares, and claimed in himself a right to part of the same, and prayed that he might be entitled to some of them; and the only mention made as to the working of the mines was with reference to the appointment of a receiver to the profits thereof. And we think it would be doing violence to the natural meaning of the terms of the publication, if we were to hold it to be published of the plaintiff in the course of his business or occupation, or mode of acquiring his livelihood, and not as referring to the disputed title of the shares of the mine.

It has been urged, secondly, that however necessary it may be, according to the ancient authorities, to allege some particular damage in cases of unwritten slander of title, the case of written slander stands on different grounds; and that an action may be maintained without an allegation of damage actually sustained, if the plaintiff's right be impeached by a written publication, which of itself, it is contended affords presumption of injury to the plaintiff. No authority whatever has been cited in support of this distinction. And we are of opinion that the necessity for an allegation of actual damage in the case of slander of title, cannot depend upon the medium through which that slander is conveyed, that is, whether it be through words, or writing, or print; but that it rests on the nature of the action itself, namely, that it is an action for special dam-

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if a purchaser is induced to refuse performance of a contract unenforceable for any reason, as when not in writing as required by the Statute of Frauds, *Rice* v. *Manley*, 66 N. Y. 82 (1876).

The expense incurred in legal proceedings to defend, or remove the cloud on, the plaintiff's title caused by the defendant's disparagement was held sufficient damage in *Elborow* v. *Allen*, Cro. Jac. 642 (1623), and *Chesebro* v. *Powers*, 78 Mich. 472 (1889); *contra*, *Cohen* v. *Minzesheimer*, 118 N. Y. S. 385 (1909); *McGuinness* v. *Hargiss*, 56 Wash. 162 (1909); *Ashford* v. *Choate*, 20 Upper Canada C. P. 471 (1870).

The plaintiff must prove that his damage has been caused by the defendant's conduct, *Fleming* v. *McDonald*, 230 Pa. 75 (1911); *Barrett* v. *Associated Newspapers*, 23 Times L. R. 666 (1907), where the plaintiff's house had been untenanted, because of rumors of its being haunted, for some time before the defendants published a story based thereon. If the defendant's statements, though all disparaging, are in part true, the plaintiff must show that his damage was caused by that part which was false and so wrongful, *Brook* v. *Rawl*, 4 Exch. 521 (1849), per Parke B.

In *Ross* v. *Pines*, Wythe 69 (Va. 1789), it was held that the loss of a sale caused by the apparently unauthorized act of the addressee of the disparaging letter in showing it to an intending purchaser, was actionable damage. See Smith, Disparagement of Property, 13 Col. L. R. p. 125.

age actually sustained, and not an action for slander. The circumstance of the slander of title being conveyed in a letter or other publication, appears to us to make no other difference than that it is more widely and permanently disseminated, and the damages in consequence more likely to be serious than where the slander of title is by words only; but that it makes no difference whatever in the legal ground of action.

For these reasons we are of opinion, that the action is not maintainable, and that the judgment must be arrested; and, consequently, it becomes unnecessary to inquire whether the *innuendo* laid in the declaration is more large than it ought to have been.

We therefore make the rule for arresting the judgment

Absolute.

PENNYMAN *v.* RABANKS.

Court of Common Pleas, 1594. *Cro. Eliz.* 427.

Action upon the case for slandering his title. For that he said to F. S. who was in speech to buy the plaintiff's land, "I know one that hath two leases of his land, who will not part with them at any reasonable rate," *ubi revera nulla talis dimissio facia fuit.* The defendant justifies by reason of two several leases by *parol* made unto himself. The plaintiff replies *de injuria sua propria absque tali causa.* Issue was joined, and found for the plaintiff. It was now moved in arrest of judgment, that an action lay not for these words. * * * Because it appears by the defendant's justification, that he intended of leases made of himself; and if a man claims estates, although they be false he shall not be punished.[1] This was agreed by all the court, that no action lay against one for saying, that he himself had title or estate in lands, &c., although it were false. But here the words in the declaration, as they are spoken, being in the third person, be not intendable of himself, but of some other, and import a slander to the plaintiff's title; and then his justification afterwards shall not take away that action which before was given to the plaintiff for the slandering of his title. Wherefore rule was given that judgment should be entered for the plaintiff, unless other matter was shewn upon the third day of the next term. Afterwards *Pasch.* 38 Eliz. it was adjudged for the plaintiff, Fenner *contradicente.*[2]

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[1] See *Gerard* v. *Dickinson,* 4 Coke 18 (1577), *post.*

[2] *Accord: Newman* v. *Zachary,* Aleyn 3 (1697), the defendant who was the plaintiff's shepherd, stated that one of the latter's sheep was an estray, whereby it was seized as such by a bailiff, both malice and knowledge of the falsity of the statement were alleged; *Milmay's Case,* 1 Coke *175 (1571), defendant, a man unlearned in the law, in a certain will stated that third persons had a thousand-year term in land owned by the plaintiff; *Rowe* v. *Roach,* 1 M. & S. 304 (1813); *Bignell* v. *Buzzard,* 3 H. & N. 217 (1838); *Ross* v. *Pines,* Wythe 69 (Va. 1789), p. 71, defendant wrote a letter to a friend, in which he said there was some dispute as to the title to certain slaves which

ANDREW *v.* DESHLER.

Court of Errors and Appeals, 1883. 45 *New Jersey Law Rep.* 167.

GREEN, J., in *Andrew* v. *Deshler.* All the cases agree that in an action for slander of title, there must be evidence of malice, express or implied.[1] If the words are spoken by a stranger, the law presumes malice.[2] But if the party is himself interested in the matter and announces the defect of title, *bona fide,* either for the purpose of protecting his own interest or preventing the commission of a fraud, the legal presumption of malice is rebutted.[3] Malice is of the gist of the action, and the real point on the question of malice is whether the defendant made the statement *bona fide* and under an honest impression of its truth, or whether he made it maliciously, for the purpose of slandering the plaintiff's title.

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the plaintiff was offering for sale, the letter coming to the attention of an intending purchaser led him to decline to buy.

"The law makes no allowance for the slander of strangers, whatever it may do in behalf of those, who have a real title or a claim of it, '*Rei immiscat se alienae*' is the good sense which must have given this case"; Lord Ellenborough in *Rowe* v. *Roach,* 1 M. & S. 304 (1813).

[1] *Accord: Pitt* v. *Donovan,* 1 M. & S. 639 (1813); *Hargrave* v. *Le Breton,* 4 Burr. 2422 (1769); *Smith* v. *Spooner,* 3 Taunton 246 (1810); *Kendall* v. *Stone,* 5 N. Y. 14 (1851); *Pater* v. *Baker,* 3 C. B. 831 (1847), p. 868; *Hill* v. *Ward,* 13 Ala. 310 (1848); *McDaniel* v. *Baca,* 2 Cal. 326 (1852); *Walkley* v. *Bostwick,* 49 Mich. 374 (1882); *Bailey* v. *Dean,* 5 Barb. 297 (N. Y. 1848); Miller, J., in *Like* v. *McKinstry,* 41 Barb. 186 (N. Y. 1863); *Cardon* v. *McConnell,* 120 N. Car. 461 (1897); *Hopkins* v. *Browne,* 20 R. I. 20 (1898); *Halsey* v. *Brotherhood,* 15 Ch. Div. 514 (1880), L. R. 19 Ch. Div. 386 (1881); *Hatchard* v. *Mège,* L. R. 18 Q. B. D. 771 (1887), an action for disparagement of property in which it is said that there is no presumption of malice from the fact of publication, but that malice, falsity and damage must be proved. In all these cases, except perhaps *Kendall* v. *Stone,* where it was held that there was not sufficient proof of damage legally resulting from the slander, the defendant was claiming the title in himself, or, acting on behalf of some one who claimed the title, or, as in *Pater* v. *Baker,* was a public officer; in none was the defendant an officious intermeddler having no interest to protect and no duty to perform.

[2] *Accord:* Proudfoot, J., in *Ontario Industrial Loan Co.* v. *Lindsey,* 4 Ont. 473 (1883); Blake Odger's Slander & Libel, 4th ed. 76, "Whenever a man officiously intermeddles with the affairs of others with which he is wholly unconcerned, such officious interference will be deemed malicious and he will be liable, if damage will follow." As to this method of stating the fact that in such case malice need not be proved, see Professor Smith in 13 Col. L. R., pp. 23-25. In *Swan* v. *Tappan,* an action for disparagement of quality, *Western C. M. Co.* v. *Lawes Co.,* note 1, *post,* similar language is used by Fletcher, J.

[3] See the cases given in note 1, and *John W. Lovell Co.* v. *Houghton,* 116 N. Y. 520 (1889); *Stark* v. *Chitwood,* 5 Kans. 141 (1869), levy erroneously made by defendant on real property owned by plaintiff under a judgment against third persons.

(b) Disparagement of quality (trade libel).

WILSON *v.* DUBOIS.

Supreme Court of Minnesota, 1886. 35 *Minnesota Reports* 471.

BERRY, J. The complaint alleges that plaintiff, a horsedealer, owned, January 30, 1886, and still owns, a race-horse, which then was and still is for sale; that on that day defendant maliciously published in a newspaper (of large circulation), of which he was proprietor, a statement that the horse was 21 years old, when he was not more than 12 years old, as defendant well knew, thereby intending to hinder the sale of the horse by plaintiff, to his pecuniary loss and damage; that at said time plaintiff had "a chance to sell, and was negotiating a sale" of, said horse for $1,000, and but for said false publication would have sold him for that sum; and that, solely because of said false publication, "plaintiff lost the chance to sell said horse; the negotiations * * * were broken off by said parties who contemplated purchasing; no one will pay for it more than $500; and plaintiff cannot sell his said horse for more than $500;" and that plaintiff has accordingly suffered damages in the sum of $500.

False[1] and malicious statements, disparaging an article of property, when followed, as a natural, reasonable, and proximate result, by special damage to the owner, are actionable. *Paull* v. *Halferty,* 63 Pa. St. 46; *Gott* v. *Pulsifer,* 122 Mass. 235; Starkie, Sland. (Wood's Ed.), § 136; *Manning* v. *Avery,* 3 Keb. 153; Broom, Comm. (6th Ed.) 761, 762; *Swan* v. *Tappan,* 5 Cush. 104; *Western C. M. Co.* v. *Lawes C. M. Co.,* L. R. 9 Exch. 218; Odgers, Lib. and Sland. 145; Townsh. Sland., § 204.[2]

Does the complaint state a case under this rule? That the

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[1] *Hargrave* v. *Le Breton,* 4 Burr. 2422 (1769); *Pater* v. *Baker,* 3 C. B. 831 (1847), Maule, J., p. 869; *Hatchard* v. *Mège et al.,* L. R. 18 Q. B. 771 (1887), p. 775, "the falsehood of the statement complained of . . . must also be proved to entitle the plaintiff to recover"; *Like* v. *McKinstry,* 41 Barb. 186 (N. Y. 1863): *Hastings* v. *Giles Lithographic Co.,* 51 Hun 364 (1889); *Young* v. *Geiske,* 209 Pa. 515 (1904).

[2] In *Paull* v. *Halferty,* the defendant wrote to one who was in negotiation for the purchase of the plaintiff's land containing ore-banks, that one M., a well-known practical iron-master, considered it an isolated pocket that would soon run out; in *Gott* v. *Pulsifer,* the defendants' newspaper branded as a fraud, a statue belonging to the plaintiff, known as the Cardiff Giant, thus preventing its sale. In *Swan* v. *Tappan,* the defendant, a rival publisher, published a letter from members of the Worcester School Board expressing dissatisfaction with the plaintiff's school books. In *Manning* v. *Avery,* the statement was that the plaintiff had mortgaged his property and had no power to sell or lease it, a disparagement of title rather than quality.

See also, *Dooling* v. *Budget Publishing Co.,* 144 Mass. 258 (1887), where an article accusing the plaintiff, a caterer, with serving a wretched dinner and vile cigars and wine, was held not actionable without averment and proof

statement complained of was false and malicious, is distinctly averred. It was also *prima facie* disparaging, for *prima facie*, as a matter of common knowledge, a horse at 21 years of age is less valuable than he is at 12. The complaint also alleges, in effect, that the plaintiff's loss of sale of his horse was the result of the publication; and there is no difficulty in conceiving of a state of facts showing that the intending purchaser was influenced and led to decline or refuse to purchase by the publication complained of, and hence no difficulty in conceiving that the failure to sell him may have been a natural, reasonable, and proximate consequence of said publication. But the allegation of special damage is insufficient. The action is in the nature of one for slander of title (*Western C. M. Co.* v. *Lawes C. M. Co.*, L. R. 9 Exch. 218), and hence it is not the ordinary action for slander, properly so called, "but an action on the case, for special damages sustained by reason of the speaking" complained of. 1 Wms. Saund. 243*e*, note *n*; *Malachy* v. *Soper*, 3 Bing. N. C. 371; *Brook* v. *Rawl*, 4 Exch. 521. Special damages are therefore of the gist of the action. *Wetherell* v. *Clerkson*, 12 Mod. 597. Without them the action cannot be maintained, and therefore a complaint failing to allege them fails to allege a cause of action. Starkie, Sland. 212; *Wetherell* v. *Clerkson, supra; Cook* v. *Cook*, 100 Mass. 194.

Where loss of sale of a thing disparaged is claimed and relied on as special damages occasioned by the disparagement, it is indispensable to allege and show a loss of sale to some particular person, for a loss of the sale to some particular person is the special damage, and of the gist and substance of the action. 1 Rolle Abr. 58; *Manning* v. *Avery*, 3 Keb. 153; *Tasburgh* v. *Day*, Cro. Jac. 484; *Evans* v. *Harlow*, 5 Q. B. 624; *Tobias* v. *Harland*, 4 Wend. 537;

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of special damages; *Hygienic Co.* v. *Way*, 35 Pa. S. C. 229 (1908); and *Young* v. *Geiske*, 209 Pa. 515 (1904), where a statement that a dividend upon stock, which the plaintiff was offering at auction, had been illegally declared was held actionable when false, made for the purpose of depreciating its value and resulting in its sale at a price far below its actual value, and see cases cited in note 1 to *Western, etc., Co.* v. *Lawes, etc., Co.*, of these cases only *Evans* v. *Harlow, Swan* v. *Tappan, Tobias* v. *Harland* were actions for disparagement of quality; *Manning* v. *Avery, Tasburgh* v. *Day, Kendall* v. *Stone, Linden* v. *Duer*, and *Malachy* v. *Soper*, were actions for disparagement of title (Slander of Title), see notes to *Malachy* v. *Soper, supra; Bassell* v. *Elmore* and *Ashford* v. *Choate*, were actions of slander for words not actionable *per se*, in which general allegations of denial of hospitality by neighbors not named was held insufficient averment of actual damage; *Cook* v. *Cook*, and *Pollard* v. *Lyon*, state the necessity in such actions for specific averment of the precise nature of the actual loss alleged and how it was caused by the slander; *Hartley* v. *Harring* and *Bergman* v. *Jones*, were actions of slander for words actionable *per se*, in which general falling off of a preacher's congregation and of the receipts from the business of a small tradesman were allowed to be shown as special damage; *Stiebeling* v. *Lockhaus*, a similar action, holds an averment that a physician was injured in his earnings as such to be insufficient to allow proof of the loss of particular patients; *Cramer* v. *Cullinane* and *Hallock* v. *Miller*, a similar action, hold that the declaration should aver the names of persons denying the plaintiff employment or refusing to patronize his shop, and that no proof can be given of such denial or refusal by any one not so named.

Kendall v. *Stone,* 5 N. Y. 14; *Swan* v. *Tappan,* 5 Cush. 104; *Linden* v. *Graham,* 1 Duer 670; *Hartley* v. *Harring,* 8 Term R. 130; *Hallock* v. *Miller,* 2 Barb. 630; *Malachy* v. *Soper, supra; Ashford* v. *Choate,* 20 U. C. C. P. 471; 3 Suth. Dam. 674; *Stiebeling* v. *Lockhaus,* 21 Hun 457; *Cramer* v. *Cullinane,* 2 McArthur, 197; *Bergman* v. *Jones,* 94 N. Y. 51; *Bassell* v. *Elmore,* 48 N. Y. 561; *Cook* v. *Cook,* 100 Mass. 194; *Pollard* v. *Lyon,* 91 U. S. 225; Odgers, Libel and Sland. 313; Starkie, Sland. (Wood's Ed.), § 136; *Wetherell* v. *Clerkson, supra; Swan* v. *Tappan, supra; Paull* v. *Halferty, supra; Gott* v. *Pulsifer,*[3] *supra;* and see declarations or complaints in many of the foregoing cases, especially the two last cited.

The rule is not technical, but substantial. It imposes no hardship upon the plaintiff. If there is a person to whom a sale could have been made, in the absence of the disparagement, he can be named, so as to inform defendant of the particular charge of damage which he is required to meet. *Wetherell* v. *Clerkson, supra.* If there is no such person, there is no cause of action; and it follows that the failure to name the particular person or persons to whom a sale could have been effected, if it had not been prevented by the disparagement, does not present a case of mere indefiniteness, but of total absence of an allegation *essential* to the statement of a cause of action,—a lack of substance, not of form (*Cook* v. *Cook, supra; Pollard* v. *Lyon, supra*); and therefore a case for a demurrer, rather than for a motion to make more definite and certain. Pom. Rem., § 549.

Order affirmed, and case remanded for further proceedings.[4]

GEORGE *v.* BLOW.

Supreme Court of New South Wales, 1899. 20 *N. S. W. L. R.* 395.

DARLEY, C. J. This was an action in the nature of an action of slander of title, in other words, an action for a trade libel. The declaration contained three counts, all of which are demurred to. Although different words are complained of in each count, practically there is but one complaint, and that is stated in the first count. The words there complained of are—"We are the only photographers supplying the rococo, as it is our own production," the innuendo being that the process of preparing rococo photographs had been invented and was used only by the defendant; that such photographs could not be produced by the plaintiff, and that the photographs produced by the plaintiff were not rococo.

Now, these words, "We are the only photographers, etc.," obviously intimate to the public that the defendant is the only photographer who can supply genuine rococo photographs, and that all others which purport to be rococo must be spurious. The plaintiff, however, alleges by way of introductory averment, that he and the

[4] See Smith, Disparagement of Property, 13 Col. L. R. pp. 123, 124, quoted in note 1 to *Malachy* v. *Soper, ante.*

defendant are both photographers; that a certain process for the production of photographs, known amongst other names by the rococo process, was well known to and commonly used by photographers; and that the plaintiff was entitled to use and was using the same for the production of photographs in his business. The declaration then alleges that the defendant falsely and maliciously printed and published of and concerning the plaintiff in relation to his said business, and the said process, the words complained of. The declaration further alleges by way of special damage that the plaintiff was injured in his said credit and reputation as such photographer and otherwise, and in his said business, and many persons who would have otherwise have dealt with him were prevented from dealing with him, and he lost the profits he would have made thereby.

It will be observed that this is not the case of one trader stating that his goods are better than the goods of another trader, or stating that his goods are the best in the market, or otherwise lauding his goods at the expense of the goods of others. All this may be done without affording any cause of action: see *Hubbuck* v. *Wilkinson*, 1 Q. B. 86 (1899).[1] This is a case of a trader who informs the public, I, and I only, can supply you with this article, and no one else can, and if any person else purports to do so, then the article so supplied is spurious, and not that which it purports to be. The case then closely resembles the case of *Liebig's Extract of Meat Co.* v. *Anderson*, 55 L. T. 206. There the words complained of were published in relation to Liebig's extract of meat, and were: "This is the only genuine brand." The plaintiffs, and indeed all other persons, were entitled to sell, and the plaintiffs were selling Liebig's extract of meat. Mr. Justice Chitty, in granting an injunction to restrain the use of these words, stated that they amounted to a clear

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[1] *Accord: Young* v. *McCrea*, 3 B. & S. 264 (1862); *White* v. *Mellin*, 1895 A. C. 154; see also, Christiancy, J., in *Weiss* v. *Whittemore*, 28 Mich. 366 (1873), p. 375, and Marcy, J., in *Tobias* v. *Harland*, 4 Wend. 537 (N. Y. 1830), p. 541, where, however, no sufficient damage was alleged to have resulted. Various reasons have been given for regarding such "puffing" of a trader's goods as not being actionable. In *White* v. *Mellin*, 1895 A. C. 154, Lord Herschell says, p. 165, that by allowing such action "the courts of law would be turned into a machinery for advertising such productions by obtaining a judicial determination as to which was the better", see Salmond, Torts, 1st ed., 428. Professor Smith, Disparagement of Property, 13 Col. L. R. 134-5, is of the opinion that it is because such "puffing" deceives no one, as in the case of actions of deceit brought by purchasers against tradesmen who have indulged in extravagant praise of their wares.

In *Johnson* v. *Hitchcock*, 15 Johns. 185 (N. Y. 1818), it was held that no action lay against the defendant, who being unfriendly to the plaintiff's ferry, hindered persons from using it by representing it as not as good as another near to it belonging to a third person. Lord Herschell in *White* v. *Mellin*, 1895 A. C., p. 165, and Lindley, J., in *Hubbuck* v. *Wilkinson*, at p. 94, however, suggest the possibility that a stranger, not himself a competitor, might be liable for such disparaging comparisons.

An unfavorable comparison of specific qualities of the plaintiff's and defendant's goods is no more actionable than a comparison of them generally, Lord Herschell, *White* v. *Mellin*, 1895 A. C., p. 165.

statement that what the plaintiffs sold was not genuine, and so in this case the statement put forward to the public was a clear intimation that no photographer but the defendant can supply genuine rococo photographs, and that all others purporting to be rococo photographs are spurious. We have no hesitation, therefore, in coming to the conclusion that upon this demurrer it must be held that the words complained of do disparage the plaintiff's business,[2] and, it being alleged that the words complained of were falsely published, it must, for the purpose of this record, be taken that they are untrue. Two elements necessary to found an action for a trade libel are established. First. That the plaintiff's goods are disparaged. Secondly. That the disparagement is untrue. A third still remains to be considered.

In order to support such an action, special damage arising from the false disparagement must be alleged and proved. The defendant contends that special damage is not properly alleged; that the allegation in the declaration only amounts to a general statement, which is not sufficient. Now, in order to determine this question, it is necessary to consider the nature of the matter complained of, the trade which it affects, and the position of the parties. The plaintiff is a photographer, and the photographs which he states he is prepared to supply according to a certain process, are alleged to be spurious, inasmuch as the defendant only can supply photographs prepared according to this process. From the nature of the business it is not possible for the plaintiff to say: "I have lost the custom of A., of B., or of C." The plaintiff may not be able to do this, but in the words of Bowen, L. J., in *Ratcliffe* v. *Evans* (1892), 2 Q. B. 533, "Sound judgment itself dictates that in an action for falsehood producing damage to a man's trade, which in its very nature is intended or reasonably likely to produce, and which in the ordinary course of things does produce, a general loss of business, as distinct from the loss of this or that known customer, evidence of such general decline of business is admissible. In *Hargrave* v. *Le Breton,* 4 Burr. 2422, it was a falsehood openly promulgated at an auction. In the case before us to-day it is a falsehood openly disseminated through the press, probably read, and possibly acted on, by persons of whom the plaintiff never heard. To refuse with reference to such a subject-matter to admit such general evidence would be to misunderstand and warp the meaning of old expressions; to depart from, and not to follow, old rules, and, in addition to all this, would involve an absolute denial of justice and of redress for the very mischief which was intended to be committed."

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[2] In *Lyne* v. *Nicholls,* 23 Times L. R. 86 (1906), a statement that the circulation of the defendant's newspaper was 20 to 1 that of the plaintiff's paper, was held to go beyond mere "puffing" and to be definite statements of fact, though the injunction prayed for by the plaintiff was refused, he not having shown any resulting damage. In *Alcott* v. *Millar's Karri, etc., Forests,* 21 Times L. R. 30 (1904), a letter by a rival importer of paving blocks containing statements that roads paved with the plaintiff's blocks from six to eight months before "are now in rotten condition", made to prevent the plaintiff

Every word of that lucid exposition of the law is applicable to the case now under consideration.[8]

We are, accordingly, of opinion that special damage as required by law is sufficiently alleged, and, accordingly, judgment must on this record pass for the plaintiff.

Judgment for the plaintiff.

WESTERN COUNTIES MANURE CO *v.* LAWES CHEMICAL MANURE COMPANY.

Court of Exchequer, 1874. *Law Reports,* 9 *Exchequer,* 218.

DECLARATION, that at the time of the committing, &c., the plaintiffs carried on business as manufacturers and sellers of artificial manures, and had upon sale certain artificial manures, and the defendants also carried on business as manufacturers and sellers of artificial manures, and had on sale certain artificial manures; that the defendants well knowing that the plaintiffs were carrying on the aforesaid business and selling the said artificial manures, and contriving and intending to injure the plaintiffs in their business, falsely and maliciously printed and published, and caused to be printed and published of and concerning the plaintiffs, and of and concerning them as such manufacturers and sellers of artificial manures, the words following:—

"Chemical Laboratory, University of Glasgow, January 29, 1873. Dear Sir,—I enclose herewith analyses of your four samples of manure, which differ much in quality. They are all mixtures, and do not consist of bones and acid alone. No. 2 (meaning thereby the defendants' artificial manures) is much the best, and seems to contain some kind of phosphatic guano. No. 4 (meaning thereby the plaintiffs' said artificial manures) appears to contain a considerable quantity of coprolites, and is altogether an article of low

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from obtaining a contract and resulting in his having to accept it on unfavorable terms was held actionable, it did not however appear that the defendant was at the time attempting to obtain the contract nor did the letter contain any comparison of the defendant's blocks with those of the plaintiff's. In *Weiss* v. *Whittemore, supra,* note 1, it was held that it was actionable for the defendants, agents for the Knabe Piano, to say that the plaintiff, the agent of the Steinway Piano, had himself recommended the Knabe Piano as the better.

[8] *Accord:* Martin, J., in *Evans* v. *Harries,* 26 L. J. Ex. 31 (1856), "Suppose a biscuit baker in Regent Street is slandered by a man saying his biscuits are poisoned; and in consequence no one enters his shop. He cannot complain of the loss of any particular customer for he does not know them, and how hard and unjust it would be if he could not prove the fact of the loss under a general allegation of loss of custom", *Weiss* v. *Whittemore,* 28 Mich. 366 (1873), note 1, *Morasse* v. *Brochu,* 151 Mass. 567 (1889); *contra,* Patterson J. in *Evans* v. *Harlow, supra,* note 2; Marcy J. in *Tobias* v. *Harland,* 4 Wend. 537 (N. Y. 1830), p. 540, and as to such allegations and proofs in actions of slander for words not actionable *per se,* see note to *Terwilliger* v. *Wands, ante.*

quality, and ought to be the cheapest of the four. The other two are fair articles and may be usefully employed. It is not for me to put an exact value upon the samples, as the prices charged for manures in the different parts of the country differ to an extraordinary extent. I know places where No. 2 (meaning the defendants' said artificial manures) would be sold at about £8 per ton, others, where £7 would be its price. I may state, however, the relative values thus: Suppose the price charged for No. 2 (meaning the defendants' said artificial manures) to be £8 per ton; then No. 1 should be worth £7; No. 3, £5 10s; and No. 4 (meaning the plaintiffs' said artificial manures), £5. Of course these must be taken as approximation only, and may be modified by the nature of the bargain; but they should be in these proportions."

(Then following an analysis in detail, purporting to shew the proportion of phosphates and ammonia in the plaintiffs' and defendants' artificial manures respectively.)

Meaning thereby, that the said artificial manures so manufactured, sold, and traded in by the plaintiffs were artificial manures of an inferior quality to the said artificial manures, and especially were of an inferior quality to the said artificial manures of the defendants. Whereas, in truth and in fact, the said artificial manures so manufactured, sold, and traded in by the plaintiffs were not of an inferior quality, and especially were not inferior in quality to the said artificial manures of the defendants. And by reason of the premises (here followed an allegation of special damage.)

Demurrer and joinder.

BRAMWELL, B. In this case our judgment must be for the plaintiffs. The case may be shortly stated thus. The plaintiffs trade in a certain article of manure, and it is alleged that the defendants falsely and maliciously published of and concerning that manure, and of and concerning the plaintiffs' trade and manufacture, a certain statement which contains in it this,—that it was an article of low quality and ought to be the cheapest of four, of which this is one, the others being mentioned. So far an action would not be maintainable, because it is not libelling an article to say that it is an article of low quality and ought to be cheaper than others. That part is not specifically stated to be untrue, but having been published as it is said of and concerning the plaintiffs' manufactures and trade, the declaration goes on and says "meaning thereby that the artificial manures so manufactured and traded in by the plaintiffs were artificial manures of inferior quality to other artificial manures, and that they especially were of inferior quality to the artificial manures of the defendants." I think if it stopped there it would not be the subject-matter of an action, even with special damage resulting from it, because I do not see that it is injurious to an article to say that it is of inferior quality. It may attract certain customers, and it is a very good thing that people can be found who will sell things of an inferior quality in order that they may not be wasted. But what makes the action maintainable is the allegation that follows: "Whereas, in truth and in fact, the

said artificial manures so manufactured and traded in by the plaintiffs were not of inferior quality, and were not inferior in quality to the said articles of manure of the defendants;" and by reason of the premises, certain persons, who, if they had not been told that which was untrue, would have continued to deal with the plaintiffs, are alleged to have ceased to deal with them. So that there appears there was a statement published by the defendants of the plaintiffs' manufacture, which is comparatively disparaging of that manufacture, which is untrue so far as it disparages it, and which has been productive of special damage to the plaintiffs; and it is stated that the publication was made falsely and "maliciously," which possibly may mean nothing more than that it was made falsely and without reasonable cause, calling for a statement by the defendants on the subject. But if actual malice is necessary—which I do not think is the case—the allegation is sufficient. It seems to me, however, that where a plaintiff says, "You have without lawful cause made a false statement about my goods to their comparative disparagement, which false statement has caused me to lose customers," an action is maintainable.

I do not go through the cases, but undoubtedly there is nothing in any of them inconsistent with the judgment we now pronounce. The only case that I will refer to is *Young* v. *Macrae,* 3 B. & S. 264. When examined that case will be found to differ materially from this one. The disparaging statement there was not expressly said to be untrue; it was only said generally that the libel was untrue, which it might be if only so much of it was untrue as contained praise of the defendants' own goods. On the general principle, therefore, that an untrue statement disparaging a man's goods, published without lawful occasion, and causing him special damage, is actionable, we give our judgment for the plaintiffs.

POLLOCK, B. I agree that our judgment in this case should be in favor of the plaintiffs. This case, no doubt, involves first principles. On the one hand, the law is strongly against the invention or creation of any rights of action, but, on the other hand, where a wrong has actually been suffered by one person in consequence of the conduct of another, one is anxious to uphold as far as possible the maxim "ubi jus ibi remedium." It seems to me the present case comes within the rule. Now, in the first place, this is not an action of libel. I think it is entirely distinguishable from that class of cases. It is alleged in the declaration that the matter complained of here was written. I think that makes no distinction. I will not say more upon that than that the difference between a written or verbal statement of the kind now complained of and an ordinary defamatory statement is very clearly pointed out by Tindal, C. J., in his judgment in *Malachy* v. *Soper,* 3 Bing. N. C. at p. 386. This action is, I think, in the nature of an action of slander of title, and comes within the general rule laid down as to such actions in Comyn's Digest, where it is said that an action lies when special damage is shewn. (Com. Dig. tit. Action on case for Defamation, G 11.)

The only question, therefore, that seems to arise is, what is the

fair intention of the words? It is alleged that the defendants were contriving and intending to injure the plaintiffs in their business, and that they falsely and maliciously printed and published the words in question. Now I do not attach any special meaning to the word "maliciously," except so far as it must be taken with the words "contriving and intending to injure the plaintiffs." I think that deprives the defendants of what I may call any legal occasion or opportunity on which they might use words of this kind. Therefore we have it stated that without legal occasion, without any necessity, the defendants have used language of and concerning the plaintiffs' goods which not only are false, but are such as to injure the plaintiffs in their business, and special damage is alleged. When all these things concur it seems to me a good cause of action is disclosed. With reference to the cases that have been cited, *Malachy* v. *Soper,* 3 Bing. N. C. 371; *Evans* v. *Harlow,* 5 Q. B. 624; and *Young* v. *Macrae,* 3 B. & S. 264, I would only observe that, in the two first mentioned cases, there is no allegation of special damage, whilst the last is distinguishable on the grounds mentioned by my Brother Bramwell. Moreover, there the Chief Justice in his judgment, 3 B. & S. at p. 271, supposes a case very like the present one, and states that, in his opinion, an action would lie in such circumstances.

Judgment for the plaintiffs.[1]

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[1] In *Bruce* v. *Smith, Ltd.,* 1 Sessions Cases, 5th Series, 327 (1898), an action against the publisher of a newspaper for an article, stating that buildings built and owned by the plaintiff were not unlikely to collapse, the courts sustained Lord Kilcairney who refused to amend the issue which required the plaintiff to prove that the defendants had falsely and calumniously published statements in regard to the pursuer's buildings to his loss, so as to require the pursuer to prove in addition that it was published maliciously and without probable cause, Lord Kilcairney saying, "That the question as to the insertion of malice has always been held to depend solely upon the position of the defenders and here it has been said that the defenders have no privilege." See also, *Nagy* v. *Manitoba Free Press Co.,* 16 Manitoba 616 (1907), particularly the opinion of Phippen J. A., affirmed 39 Supreme Court of Canada, 340 (1907), in which Davies J. A. said, "The reckless publication by a defendant of an untruth concerning the complainant's property the natural result is to produce and where it does produce actual damage, is sufficient evidence of the absence of *bona fide* and of the malice required by law." "Actual malice in the sense of a predetermined intention to injure the plaintiff or his property cannot be necessary to be proved." The defendant in this case had published a sensational article alleging that the plaintiff's house was haunted. In a similar case, *Barrett* v. *Associated Newspapers,* 23 Times L. R. 666 (1907), in which the plaintiff failed because no damage was shown to have been caused by the publication, Cozzens-Hardy M. R. intimated his impression that malice must be proved. See, however, Fell C. J. in *Young* v. *Geiske,* 209 Pa. 515 (1904), "An action for words spoken concerning a thing is in some respects like an action of malicious prosecution . . . as in malicious prosecution the action cannot be sustained without showing malice as a probable cause."

In the early cases little mention is made of malice where the defendant claimed no title in himself or in some one for whom he was acting, *Pennyman* v. *Rabank,* Cro. Eliz. 427 (1594); *Marvin* v. *Maynard,* Cro. Eliz. 419 (1596). In *Milmay's Case,* 1 Coke *175 (1581), the defendant, who was misled by his ignorance of law, honestly believed his statement to be true but it was held that "forasmuch as he has taken on himself the knowledge of the

CHAPTER IV.

Harm Intentionally Caused by the Publication of Statements Not In Themselves Defamatory.

RATCLIFFE *v.* EVANS.

Court of Appeal, 1892. *L. R.* (1892) 2 *Q. B.* 524.

Motion to enter judgment for the defendant, or for a new trial, by way of appeal from the judgment entered by Mr. Commissioner Bompas, Q. C., in an action tried with a jury at the Chester Summer Assizes, 1891.

The statement of claim in the action alleged that the plaintiff had for many years carried on business, at Hawarden in the county of Flint, of an engineer and boiler-maker under the name of "Ratcliffe & Sons," having become entitled to the good will of the business upon the death of his father, who, with others, had formerly carried on the business as "Ratcliffe & Sons"; that the defendant was the registered proprietor, publisher, and printer of a weekly newspaper called the County Herald, circulated in Flintshire and some of the adjoining counties, and that the plaintiff had suffered damage by the defendant falsely and maliciously publishing and printing of the plaintiff in relation to his business, in the County Herald, certain words set forth which imported that the plaintiff had ceased to carry on his business of engineer and boiler-maker, and that the firm of Ratcliffe & Sons did not then exist.

At the trial the learned commissioner allowed the statement of claim to be amended by adding that "by reason of the premises the plaintiff was injured in his credit and reputation, and in his said business of an engineer and boiler-maker, and he thereby lost profits which he otherwise would have made in his said business." The

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law, and meddling with a matter which did not concern him", judgment against him was affirmed, and in *Ross* v. *Pines*, Wythe 69 (Va. 1789), it was said, p. 71, that the defendant "although he is believed not to have designed any injury, ought to make reparation" for the loss of a sale occasioned by statements in a letter written by him.

See Fletcher J., *Swan* v. *Tappan*, 5 Cush. 104 (Mass. 1849), p. 111: "If the plaintiff can show that the publication was false in any material respect, and can also show special damage, done to himself by means of it, that will make a *prima facie* case for the plaintiff, and as standing thus malice would be presumed. But if the defendant can show that the publication was honestly made by him believing it to be true, and that there was a reasonable occasion or exigency in the conduct of his own affairs, in matters where his interest was concerned, which fairly warranted the publication, such proof would rebut the presumption of malice, and bring the publication within the class of privileged publication, and form a good defence to the action, unless the plaintiff can show express malice, or malice in fact, which will of course be a question for the jury.

plaintiff proved the publication of the statements complained of, and that they were untrue. He also proved a general loss of business since the publication; but he gave no specific evidence of the loss of any particular customers or orders by reason of such publication. In answer to questions left to them by the commissioner, the jury found that the words did not reflect upon the plaintiff's character, and were not libelous; that the statement that the firm of Ratcliffe & Sons was extinct was not published bona fide; and that the plaintiff's business suffered injury to the extent of 120 *l.* from the publication of that statement. The commissioner, upon those findings, gave judgment for the plaintiff for 120 *l.*, with costs.

The defendant appealed.

BOWEN, L. J. This was a case in which an action for a false and malicious publication about the trade and manufactures of the plaintiff was tried at the Chester assizes, with a result of a verdict for the plaintiff for £120. Judgment having been entered for the plaintiff for the sum and costs, the defendant appealed to this Court for a new trial, or to enter a verdict for the defendant, on the ground, amongst others, that no special damage, such as was necessary to support the action, was proved at the trial. The injurious statement complained of was a publication in the County Herald, a Welsh newspaper. It was treated in the pleading as a defamatory statement of libel;[1] but this suggestion was negatived, and the verdict of the jury proceeded upon the view that the writing was a false statement purposely made about the manufactures of the plaintiff, which was intended to, and did in fact, cause him damage. The only proof at the trial of such damage consisted, however, of evidence of general loss of business without specific proof of the loss of any particular customers or orders, and the question we have to determine is, whether in such an action such general evidence of damage was admissible and sufficient.[2] That an action will lie for written or oral falsehoods, not actionable per se nor even defamatory, where they are maliciously published, where they are calculated in the ordinary course of things to produce,[3] and where they do produce, actual damage, is established law. Such an action is not one of libel and slander but an action on the case for damage wilfully and intentionally done without just occasion or excuse, analogous to an action for slander of title. To support it, actual damage must be

[1] In *Reid* v. *Providence Journal*, 20 R. I. 120 (1897), it was held that an action of libel would not lie for words not in their nature defamatory, though they in fact caused actual harm to the plaintiff.

[2] A large part of the opinion deciding that such evidence was admissible and sufficient is omitted, see *George* v. *Blow, post.*

[3] *Accord: Riding* v. *Smith*, L. R. 1 Ex. Div. 91 (1876), defendant orally publicly accused the plaintiff's wife, who was his assistant in his draper's shop, of adultery; so if the statement had been that one of his shopmen was suffering from a contagious disease, ibid, per Kelly, C. B., p. 94; "It is the natural consequence of such a statement that persons would cease to resort to his shop." Tillinghast, J., in *Reid* v. *Providence Journal, supra*, note 1, "words which are not in their nature defamatory . . . perhaps if false and malicious and if used by a person, who knows, or ought to know, that

shown, for it is an occasion which only lies in respect of such damage as has actually occurred.

Appeal dismissed.[4]

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special damage will follow, and such damage does in fact follow, an action on the case may be maintained whatever the nature of the words."

[4] *Accord: American Ins. Co.* v. *France,* 111 Ill. App. 382 (1903), defendant stated that plaintiff had gone out of the farm insurance business; *Benton* v. *Pratt,* 2 Wend. 385 (N. Y. 1829), defendant, stated that plaintiff did not intend to perform his agreement to deliver hogs, thereby inducing the purchaser to buy the defendant's hogs and to refuse the plaintiff's when they arrived later; *Morasse* v. *Brochu,* 151 Mass. 567 (1889), defendant, a priest, urged his parishioners not to employ the plaintiff as a physician, refusing to attend them if the plaintiff was present, the plaintiff by an uncanonical marriage having become excommunicated; see *Hollenbeck* v. *Ristine,* 105 Iowa 488 (1898). See also, the case put by Littledale J. in *Kelley* v. *Partington,* 5 B. & A. 645 (1833), p. 648; "Suppose a man having a relative of a penurious disposition and a third person knowing him would injure him in the opinion of that relative, tells the latter of a generous action which the first has done, by which he induces the relative to leave him money, would that be actionable"; to which Lord Campbell, then Solicitor General, answered, "If the words were spoken falsely with intent to injure, they would be actionable"; and see Odger's Slander & Libel, 2nd ed., p. 91. and the supposed case given by him of a false report that a tradesman is "a radical or a dissenter" disseminated in a small country when political or religious feeling ran high.

In *Haney Mfg. Co.* v. *Perkins,* 78 Mich. 1 (1889), the defendants falsely stated that they had served an injunction against the plaintiffs, trade rivals, and had about closed up their factory. There was some proof of actual damage but Long J. said, "that the action was not strictly one for slander of title and that words spoken or written injurious to a person in his business, and false and malicious, are actionable *per se,* and special damage need not be proved."

In *Dudley* v. *Briggs,* 141 Mass. 582 (1886), the plaintiff's declaration set out that he had for many years published a biennial local directory and had secured a valuable list of advertisers and subscribers, and that he intended to publish such a directory in 1885, and that the defendant in order to injure him and prevent him from publishing such directory in order that he might secure the same for himself, falsely and fraudulently represented to such advertisers and subscribers that the plaintiff had gone out of the business and had sold it to the defendant, thereby inducing the plaintiff's subscribers and advertisers to give their subscriptions and advertisements to the defendant and preventing the plaintiff from gaining profit by the publication of such directory. On demurrer the declaration was held to disclose no cause of action on the ground that "it is entirely problematical whether the plaintiff would have actually published a directory if the defendant had not made the fraudulent statements alleged"; see *Hutchins* v. *Hutchins,* 7 Hill 104 (N. Y. 1845), the defendant, knowing that the plaintiff's father had by will devised to him a farm, falsely represented to the father that the plaintiff intended to set up a large claim against his estate after his death, and so prevailed upon the father to revoke the will and execute another by which the plaintiff was given nothing, Nelson C. J. regarding "the deprivation of any substantial advantage, such as the loss of customers, of a permanent home at a friend's or advancement in life" as "peculiar" to actions of slander for words in their nature defamatory but not actionable *per se.*

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